03-CV-249225CM3

Hotz v. City of Toronto et al.

Dewey, N. for Gazzola, the moving party
Levin, R. for Hotz in this action, only
Hotz, G. on his own behalf in the three other actions
Agopian, T. for the City and for the Toronto Police service in the action in which they are named as a defendant

REASONS

Master Haberman: Mr. Hotz is currently embroiled in four pieces of litigation, as plaintiff in each. Gazzola Paving Ltd., one of the defendants in this action, moves to have all four actions tried together. While Hotz agrees that the other three matters should proceed in tandem, he resists joining this action to the group. No other parties involved in any of the four actions oppose the relief sought.

Hotz raises a preliminary objection to the motion based on the contents of the motion record. He suggests that it was as a breach of the implied undertaking rule (Rule 30.1.01) for Gazzola to have included excerpts of the transcripts from his examination for discovery in this action in the motion record, as this evidence has now been disclosed to strangers to this action.

The motion raises the following issues:

1) If a party uses discovery evidence in the context of a motion within a proceeding that involves disclosures to those beyond the action, has he breached Rule 30.1.01(1)?
2) Can and should actions be ordered tried together when they arise from very different events and are at different stages?

Factual context

The first action – personal injury claim for slip and fall in February 2003
On February 24, 2003, Hotz slipped and fell on City property and fractured the radial head of one of his elbows (the claim does not disclose which of the two was affected). A statement of claim was issued, naming only the City as defendant, in May 2003.

Though case managed, the action moved slowly. The deadline for completing mandatory mediation was extended by court order at least twice, counsel was late in filing a proposed timetable for the action and trial scheduling court was adjourned, as well. The claim was amended in August 2005 to add Gazzola. A review of the case history indicates that I, as managing master, expressed concern on more than one occasion about the delays and the failure of plaintiff's counsel to move this matter along.

Hotz was first examined for discovery in this action in August 2004. At that time, he was asked whether he would be pursuing a claim for loss of income, though the statement of claim does not appear to advance a claim under that head of damages. Hotz indicated he would be. His counsel explained that the claim related to employment that he obtained after the accident, so that it was a "forward looking" claim.

As counsel put it:

> *Our loss of income claim, as you are going to hear from Glyn, is based on the jobs that he subsequently obtained after his loss, after the accident, and that he lost* ***because he's not able to function in the workplace.***
>
> *…he lost two jobs where he was making significant amounts of money* ***because of the accident.*** (emphasis added)

Hotz, a qualified lawyer, was questioned at some length about this assertion. He explained that he had secured employment with the law firm of Regan, Desjardins in May 2003. The primary focus of his work was going to be defending personal injury claims on behalf of insurers, while developing a plaintiff's practice. He indicated that he had an annual billing target of 1,700 hours and a daily target of 7.2 hours and that he was earning a salary of $100,000 per year, all of which he said was set out in his contract of employment.

Hotz explained that the contract provided for a 9-month probationary period and that he was asked to leave in January 2004, before the period had expired. He stated under oath that his employment was terminated because of his performance and that he was given a letter to that effect. He expanded on the subject, making it clear that he was on track for hours and that this was not the issue. The problem, as Hotz perceived it, was his level of efficiency, accuracy and consistency. He stated that he was "sore and groggy" from his medication, in pain and still going to physiotherapy and that it was "hard to be accurate" when he was in pain.

It was also clear from Hotz's evidence that the termination was not sudden but that he had been aware of concerns regarding his performance earlier on, as the partners had talked to him about getting his work done more quickly. Hotz seemed to sympathize with the law firm's position. As he put it, "they're running a business." He was given a week's notice, in accordance with the terms of the contract. In his view, there was nothing wrong with how he was treated. He stated in response to question 981:

> *Q: And that's the reason they gave you. Do you have your own belief as to the reason?*
> *A: No. I think there were ongoing performance issues.* ***I think they were fair. I haven't gripes (sic) with what they did.*** (emphasis added)

The inescapable conclusion from reading this evidence is that Hotz was told and that he firmly believed that Regan, Desjardins was justified in terminating his employment as he

displayed real performance problems. His evidence also made it clear that it was his belief that these problems stemmed directly from the injuries he sustained in the accident and the fall-out from those injuries. There is not a hint of a suggestion that there was or could have been any other basis for Hotz's dismissal or that he believed there may have been another reason for his employment to have ended when it did.

In terms of the status of the action, Gazzola's evidence is that examinations for discovery of the plaintiff were completed in September 2007 and undertakings from that discovery have not yet been fulfilled. The defendants have been examined but there has been some difficulty getting Mrs. Hotz to discovery in view of her ongoing psychological problems. Thus, though the action is almost ready for trial, the examination of Mrs. Hotz appears to be holding matters up for the time being. A motion to deal with the issue has recently been adjourned, to be heard next month.

Pursuant to my order of July 31, 2007, made at a status hearing, the plaintiff is required to set the mater down for trial by June 11, 2008. Depending on Mrs. Hotz's situation, this may or may not be possible. This date can, of course, be extended if circumstances warrant it.

The second action – claim for damages for wrongful dismissal from Regan, Desjardins LLP in January 2004

Notwithstanding what Hotz said about the basis for his dismissal from the law firm and his belief that they had treated him fairly when he was examined in the personal injury action, he commenced suit against the firm by notice of action, issued in September 2005, only 13 months after this evidence was taken. Hotz and his brother, also a lawyer, represent his interests in this matter.

In his statement of claim in this action, Hotz relates a very difference version of events. Here, Hotz claims that his termination was the result of events that took place in a shopping mall on January 19, 2004, when he was arrested for criminal harassment. The charges stem from a complaint by a young girl, also a mall patron. Hotz alleges that a security guard tried to remove him from the mall and that the police were called, resulting in his arrest and detention. All of this, he says, was witnessed by a firm associate and legal assistant.

When he returned to the firm later in the day, Hotz says he was met by Desjardins and told to go home. The following day, he was contacted and advised to take a few days off. On January 23, 2004, Hotz says he was fired by Desjardins.

A large part of this claim is based on Hotz's assertion that the firm had an obligation to assist him with the criminal investigation by providing him with the information he needed to establish his alibi for the time periods he was accused of having stalked the complainant. He states that the charges against him were ultimately withdrawn in mid-November 2004 without their assistance.

Hotz's claim is therefore three-fold, as he states in paragraph 33 of his pleading:

> *The Plaintiff pleads that the continued wrongful prosecution to which he was subjected and* ***the loss of his employment were caused by the acts and omissions of the Defendants,*** *who had it in their sole power and control the exculpatory evidence which would have brought to an end the Plaintiff's ten month ordeal, and which they wrongfully, wilfully and maliciously withheld.* (emphasis added)

The third prong of attack is in the form of an action for defamation, based on allegations that the firm told others about the charges. What is important here is that Hotz now claims he was wrongfully dismissed.

The timing of events is curious. Hotz was examined for discovery in the personal injury action on August 4, 2004, after his dismissal. It seems that through August and September 2004, he was engaged in efforts to obtain information from the firm to help him with his defence in the criminal matter. It is difficult to understand how these events could have been far from his mind at the time of his examination, as he was actively pursuing his alibi evidence from the firm at the time. He makes no mention of these events at his discovery, however, and attributes all of his economic problems to the injuries sustained in the accident.

While Hotz's problems enlisting the firm's aid and the alleged defamation may have arisen after the discoveries, it is difficult to understand how he could say the termination was justified based on his performance in August 2004, the turn around a year later and say something quite different. This pleading therefore appears to be entirely inconsistent with the evidence given by Hotz when he was examined for discovery in his personal injury action as regards the basis for his dismissal from the firm. He pleads here:

> *39… The Plaintiff pleads that* ***the Plaintiff was dismissed as a result of an incident for which he was not responsible****, and then cut off from his colleagues and any help he might have obtained, all the while the Firm obstructed justice by failing to provide evidence that was exculpatory and in their exclusive control.*
> (emphasis added)

In that respect, the discovery evidence in the earlier action could well impact on liability considerations in the wrongful dismissal case.

The intersection between the two proceedings extends beyond liability and also appears to encompass the issue of damages. In the first action, Hotz claimed at discoveries that his loss of income claim, based on having been terminated from two law firms, arose from the impact of his injuries on his ability to function in the work place.

In the wrongful dismissal action, he makes the following allegations in the pleading regarding the interplay between the accident and the dismissal:

> *37. The Plaintiff was unable to focus or concentrate and work properly, and was required to attend criminal court during work hours. One contract position at another law firm, beginning on March 1, 2004 was terminated. He has not been able to find a position with a Firm since that time. The Plaintiff has suffered and continues to suffer from a significant economic loss. ……He has suffered from and continues to suffer from extreme mental and emotional distress including anxiety and depression and loss of confidence.* ***The effect of this mental distress has exacerbated a pre-existing physical injury.*** (emphasis added)

Thus, not only does he attribute his loss of income claim to the dismissal, he goes further and suggests that the dismissal exacerbated the problems he was having as a result of his previous injuries.

<u>The third action- claim for damages for malicious prosecution against the complainant and her parents arising from events that took place between September 2003 – November 2004</u>

As was the case with the wrongful dismissal action, Hotz and his brother issued a notice of action in this matter in September 2005.

This pleading is similar to the one issued for wrongful dismissal, in terms of how it describes the events leading to Hotz's arrest and the aftermath.

Paragraph 50 of that pleading is essentially identical to paragraph 37 of the claim for wrongful dismissal, such that Hotz attributes his inability to work and the ensuing loss of income to what he claims was a wrongful arrest and malicious prosecution, claiming that these events exacerbated his mental distress flowing from his pre-existing physical injuries. Here, however, he looks to the complainant and her parents to make him whole.

<u>The fourth action – claim for damages for malicious prosecution against Toronto Police Service and various police officers from events that took place between September 2003 and November 2004</u>

The notice of action in this proceeding was not issued until January 18, 2006, though it is based on the same events as those raised in the third action. Hotz and his brother appear to be propelling this matter through the court, as well.

It is interesting to note that this is an action based on a multitude of torts, including malicious prosecution, yet there is no indication in the pleading as to how the criminal proceedings were concluded. Resolution in an accused's favour is a requisite component of the malicious prosecution, yet it is not pleaded here that this occurred in this case. In the wrongful dismissal action, Hotz did allege that the criminal charges were withdrawn. However, Regan, Desjardins pleaded in response that this was the result of a plea bargain, with Hotz agreeing to sign a peace bond. The issue is not raised here and there is no evidence filed on point.

Hotz again ties the actions together in this pleading. At paragraph 66, he asserts that the defendant's actions resulted in his wrongful dismissal from the law firm. Paragraph 71 is a repetition of what Hotz has already pleaded regarding his damages at paragraphs 37 and 50 of the second and third actions, respectively. Hotz states:

> *An injury for which he underwent surgery in March 2003 was exacerbated.*

Preliminary objection – use of the transcript on this motion

There is no cross-motion brought by Hotz to purge the motion record of evidence he says was in breach of Rule 30.1.01, the codified version of what was once referred to as the deemed undertaking rule. Instead, his counsel says I must make it clear that the use of this material cannot be condoned and I should consider striking statements of defence as a result of the parties' attempt to rely on it. This is something I would not consider absent the proper notice of motion, even if there was some basis for the complaint. No such motion is properly before me at this time.

The alleged cause for concern is Gazzola's use of excerpts of the transcript from Hotz's examinations for discovery in the first action for the purpose of this motion. Gazzola's notice of motion was served on the parties in all four actions on January 7, 2008, as appears from the affidavit of service of Patricia Cinnirella, legal assistant to Gazzola's counsel. The excerpt from the transcript was contained within the record.

According to Mr. Sutherland's affidavit filed in support of the motion for trial together, the purpose of including the discovery evidence was to demonstrate the position that Hotz was taking in that action regarding his loss of income claim. In the context of the personal injury action, Hotz claimed that his positions with two law firms were terminated because the injuries from the accident interfered with his ability to work effectively. He effectively supports and agrees with Regan, Desjardins, suggesting that the injuries he sustained in the slip and fall are the culprit for his current financial predicament. He makes no mention of the arrest or criminal charges and suggests that the law firm that fired him did what they had to do as they were running a business and he clearly was not able to keep up. As a result, he claims damages for loss of income in this action on the basis of what he would have earned had his employment continued.

This evidence is important as it conflicts with what Hotz pleads in the three later actions, where, in each case, he attributes his financial problems to the arrest and criminal charges. There is no suggestion that his injuries interfered with his level of efficiency at work. Without clarification, the positions taken in the first and later three actions are inconsistent.

Following service of the motion record, counsel for the law firm wrote to Hotz by e-mail, and made some unfortunate comments about the strength of Hotz's case against the firm in view of the discovery evidence from the personal injury case.

I want to be clear that I, in no way, condone the acts of counsel for the law firm. It is unseemly for counsel to write to a party who acts for himself, even one who is a qualified lawyer, to suggest that he will "get absolutely hammered" in this case" if he carries on, and to accuse him of being "less than frank and honest." It displays poor judgment on the part of an over-zealous counsel when he refers to the party's "untruths" and when he suggests that he do himself "a big service and drop the case." It was reckless on the part of that counsel when he wrote again the following day to tell Hotz that he was "being silly" if he couldn't see how this transcript "finishes him off.", when aware that Hotz was being treated at CAMH for serious stress-related problems and was dealing with other serious issues at home. It is one thing to posture when dealing with counsel, but quite another when dealing directly with a party acting for himself, particularly when the record suggests the party suffers from stress-related problems. Both the tone and the content of these e-mails are callous in the extreme.

The question remains, however, as to whether the use of the transcript for the purpose of a motion in this proceeding is a breach of the Rule, when the nature of the motion necessarily involves certain aspects of the evidence being disclosed to parties in the other proceedings. This is where the focus must be, rather than on these e-mails.

It is important to note that the firm's counsel begins the first of the series of e-mails as follows:

> *I have received and looked at the motion record received from Mr. Dewey's office in respect to an Order for Trial Together. Of particular note is (sic) the portions of the transcript of the discovery of August 2004 attached to the Motion Record.*

It therefore appears that the individuals who have come into possession of the transcript are all counsel for parties in one or more of the four actions currently before the court in the context of this motion for trial together. There is no evidence or even a suggestion that the transcript, or any other evidence from this action for that matter, was disseminated to anyone else or in any other manner, for any other purpose. More to the point, there is nothing to support Darrel Hotz's blanket allegation when he says in his affidavit that the parties have "disseminated among themselves" portions of the transcripts, apart from what appears to have been served within the context of the motion record. He has provided no detail to back up this claim.

Darrel suggests that Hotz and his wife are now unable to receive a fair trial with these counsel who have had an opportunity to review the evidence from the personal injury action.

Darrel also raises concerns that the City's counsel in the personal injury action now also acts for the police in the malicious prosecution action, such that he will have access to evidence in both proceedings. That is a matter for another day, but only if the motion for trial together is dismissed.

Hotz's position must be assessed in the context of the letter and spirit of Rule 30.1.01.

The relevant parts of the Rule read as follows:

> *30.1.01(1) This Rule applies to,*
> *(a) evidence obtained under,*
> *(ii) examination for discovery.*
>
> *30.1.01(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purpose* ***other than those of the proceeding in which the evidence was obtained.***
>
> *30.1.01(5) Subrule (3) does not prohibit the use,* ***for any purpose****, of,*
> *(a) evidence that is filed with the court.*
>
> *30.1.01(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.* (emphasis added)

On a straightforward reading of the Rule, it appears that what has been done here is perfectly permissible. Gazzola is bringing a motion **in this proceeding** to have this action tried with others. Thus, while the ambit of the order sought extends beyond this action, the evidence is still being used in the context of the proceeding in which it was obtained. That, in my view, should be sufficient to end the debate.

Further, the evidence in issue was served on parties to the other actions as a pre-condition to being permitted to file it with the court. Thus, even if this scenario did not fall beyond the scope of the Rule, it would fall squarely within one of the exceptions to it, as the use of the evidence is not prohibited **for any purpose** if it is filed with the court, as long as the purpose for which it is filed is a legitimate one. This does not appear to me to be a case where the parties used the motion as a subterfuge to permit them to get around the Rule by filing the evidence with the court when it was not relevant to the proceeding. While the motion could have been argued strictly on the basis of the pleadings in the four actions, the evidence given by Hotz in this action makes Gazzola's position considerably more compelling. It is helpful to the court.

Finally, the Rule provides a further exception, permitting the use of evidence from one proceeding to impeach credibility in another. This is a critical point, as it indicates that drafters of the Rule wanted to ensure that the deemed undertaking in no way interfered with the process of ferreting out the truth. Thus, if a party commits himself to a particular set of facts in one action, he should be bound by that rendition of the facts in any other proceeding where the same issues arise. Anything short of that makes a mockery of our system of justice as it would permit parties to craft their evidence on a case by case basis, to fit the needs of each particular proceeding without regard for the truth.

It seems to me that one of the objectives of this motion is to pin Hotz down to one set of facts. Having sworn in the personal injury action that he believed his employment was terminated due to his less than stellar performance, should he be permitted to say something very different in the three later actions, hiding behind the shield of the deemed undertaking? Another way to phrase the question would be to ask if each trial judge should hear the particular version of events Hotz chooses to put forward in each case without knowing that he may have testified differently elsewhere. I think not.

The only way of getting this issue before the court for the purpose of this motion was to serve and file the transcript. The case law relied on by Hotz is distinguishable, as it deals with the use of evidence to initiate a new proceeding, which is really the mischief the Rule was aimed at preventing. Here, the evidence was used to support a claim for relief within the action in which it was obtained. There is a world of difference between the two.

Darrel Hotz maintains in his evidence that his brother will not be able to get a fair trial if lawyers from one action are made privy to evidence adduced in the others. For a trial to be fair, it must be fair to all parties. It would be unfair to all defendants if Hotz was permitted to say what he likes in each action, free from worry that he was bound to repeat his story in the next.

The preliminary objection is wholly unfounded and dismissed.

Merits of the motion for trial together

Contrary to the position refuted in Hotz's factum, the motion before the court is for an order for trial together, not consolidation. The two are very different beasts. In the former, separate actions are permitted to proceed in tandem (subject to a further order for common discoveries, mediation, etc.) until they reach trial. At that time, the two are joined for the purpose of ensuring that evidence common to both is tendered once, only. This is usually done in the interests of expedience, to save time and costs, and to eliminate the possibility of inconsistent findings regarding the same evidence.

Consolidation effectively collapses two or more proceedings into one, under one court file number. Generally, new pleadings are delivered to cover the allegations in all of the actions subject to the order, so that all issues proceed in tandem from the time of the order. Each individual action loses its distinctive identity. That is not what the parties seek here.

The relevant law is found at Rule 6.01, which refers to both trial together and consolidation, providing a similar approach for ordering each:

6.01(1) Where two or more proceedings are pending in the court and it appears to the court that:

(a) they have a common question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceeding be consolidated, or heard at the same time or one immediately after the other….

6.01(2) In any order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a listing for trial and abridge the time for placing an action on the trial list.

I will take each subrule in turn.

Common question of law or fact

All four actions deal with the issue of whether or not Hotz has lost and will continue to lose income as a result of the actions of others. In the personal injury action, Hotz points the finger at the City and Gazzola, claiming that the injuries he sustained in the slip and fall, caused by their alleged negligence, impeded his efficiency in the workplace. This, he claims, led to his being terminated from two positions and resulted in his inability to find further employment. In the other three actions, Hotz claims his earning potential has been interfered with as a result of the criminal harassment charges. He blames each defendant in turn for his past and future loss of income flowing from that event and its aftermath.

All four actions raise the following common questions of fact:

- Is/has Hotz been unable to work or to locate a position?
- If so, why?
- Who is responsible for this situation?

In all four actions, the claim for loss of income is a significant aspect of the damages sought. Although Hotz has not specifically advanced a claim for loss of income in the personal injury action, he made it clear at discoveries that he was pursuing one. Presumably, this is what the claim of $750,000 for special damages in his pleading represents. In each of the other three actions, he claims $1 million for special and pecuniary damages. In all four actions, the claim for loss of income or pecuniary or special damages represents the lion's share of the damages sought.

This case is therefore quite different from *Drabinsky v. KPMG* 1999 WL 33193332, where the court decided against making an order for trial together. Swinton J's rationale was that while there was a possible overlap with respect to determining the cause of Drabinksy's claim for mental distress damages, the court would be able to quantify the extent to which each set of defendants was liable. It was also clear that the link in those actions, mental distress damages, was not a significant aspect of any of the three actions in which Drabinsky was involved, as those actions focused on allegations of breach of fiduciary duty and issues surrounding the decrease of the valuation of shares in Livent.

For the most part, these actions were about commercial losses. The mental distress claims were a small part of the picture.

There is also a claim for psychological or stress-related damages in all four Hotz actions. Again, the claim is advanced in each case on the basis that the incident that gave rise to each action was the catalyst of the problem. Thus, in the personal injury action, Hotz claims for "severe and profound shock" sustained as a result of his accident and by what flowed from it. In each of the other three actions, he claims that he:

> *has suffered and continues to suffer from extreme mental and emotional distress including anxiety and depression and loss of confidence. The effect of his mental distress has exacerbated a pre-existing physical injury.*

Thus, Hotz claims that his termination and the criminal charges have caused him mental distress, which, in turn, have made his injuries from the slip and fall worse.

In pleading in this way, Hotz has made a circular argument, as he has already claimed that it was his injuries that impeded his ability to perform at work. Now, he claims his termination for employment exacerbated his injuries. We are left to assess which event led to what result. This assertion binds the four actions together and sets up the framework for a global assessment of Hotz's general damages. The trial judge will have to assess the total quantum of damages, then parcel out the degree to which each set of defendants is accountable.

Once again, the fact that mental distress is a significant aspect of each of the claims distinguishes these matters from the *Drabinsky case.*

<u>The relief claimed arises out of the same or series of transactions</u>

When examined for discovery in the personal injury action, Hotz claimed that his injuries affected his ability to work and that his employment was terminated as a result. In the wrongful termination and malicious prosecution actions, however, Hotz claims that the events he describes in the three later actions exacerbated the issues he was already dealing with from the slip and fall.

Thus, although the slip and fall, termination and prosecution all arose at different times and were triggered by different and independent events, the damages sustained appear to flow along a continuum. The cumulative relief claimed therefore arises from a series of transactions and the trial judge will have to determine who bears responsibility for which, for which part, or for any of the damage claims.

<u>Any other cause</u>

Rule 6.01 provides general guidelines in subrules (1) (a) and (b) but also gives the court broad discretion by allowing any other considerations to come into play if the court is of the view that they merit inclusion in the deliberations.

I have already alluded to my concerns that subject to clarification, Hotz appears to be approaching each action differently in terms of the facts he relies on. As a result, there is a considerable risk of inconsistent decisions, in terms of possible findings of fact, if these matters do not proceed in tandem. How can Hotz be permitted to attribute his loss of income to his injuries in one trial, to his termination in another and to malicious prosecution in a third and fourth?

It is ironic that Hotz seeks to have the actions tried separately for this very reason - he does not want the personal injury trial "tainted" by what he alleges elsewhere and vice versa. The question must be asked: how can pinning Hotz down to one version of events and ensuring that he sticks to that version be considered "tainting"?

Reasons not to join actions

Hotz takes the position that these actions are very different in nature and he maintains that the first action is far ahead of the others so that its progress should not be held up by the other three actions, issued later in time. Thus, while he is prepared to have the three later actions tried together, he wants the personal injury to go forward alone.

There are a number of problems with this position. First, although discoveries are largely completed from the first action, there are still undertakings outstanding and there remains the issue of how and when Carol Hotz will be examined in view of her ongoing psychological issues. Carol is also a plaintiff in the wrongful termination action, but not in either of the malicious prosecution actions. Unless and until there is some certainty with respect to her situation, the first and second actions will necessarily be held up. As Hotz agrees that the second action should be tried together with the third and fourth, there will be time for them all to catch up to the first action while Carol's fate is determined.

I also feel compelled to say that this "hurry up and move the first action on to trial" submission appears somewhat ingenuous at this late date. The action was initiated in 2003. The main physical injury, a fractured radius, likely reached its healing plateau some time ago. Neither the action nor the injury appears to be complex - I was taken to no evidence by Hotz to suggest otherwise. Yet, here we are, five years later, still waiting for the plaintiff to comply with undertakings as a result of a series of delays. It is therefore difficult to accept delay as a serious impediment to the order sought.

This slow pace appears to plague all of Hotz's litigation. How is it that actions two and three, commenced in September 2005 have not yet moved to the discovery stage? None of the four actions has progressed with speed.

On the basis of all of the foregoing, the relief sought is granted. These actions shall be tried one after the other, or as the trial judge shall direct. They shall proceed to examinations for discovery together and the evidence already elicited from Hotz shall be used as a base for his examinations for discovery in the remaining three actions. This should expedite matters.

The three non-personal injury actions (05-CV-296318PD3; 05-CV-296320PD2; and 06-CV-304367PD1) are all transferred to case management, to be governed by a common timetable. As the timetable created for this action at the recent status hearing is no longer viable, the parties in all four actions shall file a proposed timetable that will apply to all four of them by **the end of February 2008**. If that is not possible, Mr Levin shall so advise me by fax, copied to all parties in all actions, and I will convene a case conference to work out the terms. I trust this will not be necessary.

If the parties are unable to agree as to the costs of this motion, I can be spoken to within 30 days.

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Master Joan M. Haberman

Heard: January 24, 2008
Released: February 5, 2008