

STATE OF MINNESOTA  
IN COURT OF APPEALS

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PETER HUXMANN, individually	)	
and on behalf of all those similarly	)	
situated,	)	
	)	<b>APPELLANT’S MOTION TO ENJOIN</b>
Appellant,	)	<b>CONSTRUCTION OF BIKE PATH AND</b>
	)	<b>OTHERWISE STAY PROCEEDINGS</b>
v.	)	<b>DURING PENDENCY OF APPEAL AND</b>
	)	<b>TO VACATE ORDER GRANTING</b>
MINNEAPOLIS PARK AND	)	<b>SUMMARY JUDGMENT FOR LACK OF</b>
RECREATION BOARD,	)	<b>JURISDICTION</b>
	)	
Respondent.	)	Court of Appeals Case No. A07-1431
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Pursuant to Minn. R. Civ. App. P. 108.01, subd. 1, 108.03, and 127, appellant Peter Huxmann moves for an order (1) enjoining the construction of a bike path on St. Anthony Parkway between Ulysses Street NE and Stinson Boulevard and otherwise staying proceedings in the district court during the pendency of his appeal from the denial of his motion for a temporary injunction and (2) vacating the district court’s order granting summary judgment for lack of jurisdiction.

**FACTS**

1. On May 25, 2007, the district court denied Huxmann’s motion for a temporary injunction.
2. On June 13, 2007, Huxmann sought leave to move for reconsideration of that order denying his motion for a temporary injunction and the voluntary disqualification of the trial judge.
3. On June 22, 2007, the district court denied Huxmann’s request for leave to move for reconsideration of his motion for a temporary injunction and his request for the trial judge’s voluntary disqualification.

4. On July 14, 2007, Huxmann sought leave to move for reconsideration of the trial judge's denial of Huxmann's request for the trial judge's voluntary disqualification.
5. In a letter dated July 20, 2007, the trial judge summarily denied Huxmann's request for leave to move for reconsideration of the denial of Huxmann's request for the trial judge's voluntary disqualification.
6. On July 24, 2007 (*not* on July 25, 2007), Huxmann commenced this appeal from the district court's May 25, 2007 order denying his motion for a temporary injunction.
7. In response to Huxmann's application by letter for a stay of proceedings during the pendency of his appeal, the trial judge wrote in pertinent part as follows in an August 2, 2007 letter to counsel:

Mr. Stanbury must bring a formal motion for such a stay and the court will hear that motion on [August 30, 2007]. This will be considered a nondispositive motion and plaintiff and defendant must file and serve their papers in accordance with the timelines set forth in the General Rules of Practice. **All parties should be prepared to discuss whether a bond or other conditions as provided by the Rules should be imposed if the court grants such a stay.**

Entire letter attached hereto as Exhibit 1 (emphasis added).

8. On August 16, 2007, appellant moved in the district court for an order enjoining the construction of a bike path on St. Anthony Parkway between Ulysses Street NE and Stinson Boulevard and otherwise staying proceedings in the district court during the pendency of this appeal. *See* Exhibit 2 attached hereto.
9. It was the trial judge's decision to hear the motion for a stay of proceedings and the Park Board's motion for summary judgment at the same time on August 30, 2007.
10. The Park Board's memorandum of law in opposition to Huxmann's motion for a stay did not contain one word as to what sort of bond or other conditions should be imposed and why. *See* Exhibit 3 attached hereto. Huxmann thus argued in pertinent part as follows in his reply memorandum of law:

The trial court thus continues to have no evidence before it on

which to base an imposition of a bond or other conditions, and defendant's attorney cannot be properly allowed to 'testify' at the hearing on August 30th on a subject about which *nothing* has been said in defendant's response memorandum. Defendant has never even *argued* that it will be harmed, financially or otherwise, by a postponement of the construction of what we now know will be a 10' bicycle-only path and not the falsely-described 'bike/pedestrian' path. The absence of any such argument coupled with the absence of any evidence that a bid concerning the Ulysses-to-Stinson project has been accepted or even advertised should require this court to presume that a bid for the Ulysses-to-Stinson project has never been solicited, let alone accepted. **The court should reject any attempt to proffer any such evidence at the hearing on August 30th and should refuse to hear any eleventh-hour attorney 'testimony' about such evidence or the way and extent to which defendant stands to be harmed by a postponement of a Ulysses-to-Stinson path.**

See Exhibit 4 attached hereto (emphasis added).

11. In an obvious reaction to that criticism, the Park Board's attorney proffered an August 29, 2007 Affidavit of Nicholas P. Eoloff at the hearing, and the trial judge accepted it and gave Huxmann an opportunity to serve and file a response to that 11th-hour submission, which Huxmann did on September 6, 2007. See Exhibit 5 attached hereto.

12. On October 22, 2007, Huxmann's attorney wrote in pertinent part as follows in a letter to the trial judge:

Dear Judge Connolly:

I write (1) to learn why Your Honor has not issued a decision as to plaintiff's motion for a stay of proceedings **even though fifty-three days have elapsed since the motion was heard on August 30, 2007**, and (2) to inform Your Honor of some developments that the Park Board's attorney should have brought to Your Honor's attention but has not. Please make this part of the record. Delaying the issuance of a decision as to plaintiff's motion for a stay of proceedings, in my opinion, is another objective basis for believing that Your Honor is biased in favor of the Park Board, and, obviously, my contention cannot be kissed off as dissatisfaction with a (non-existent) decision. **Declining to decide that motion promptly or at all has prejudiced plaintiff by preventing him from seeking, if necessary, the same relief in the court of appeals**

**before the bid process reached, as it now has, the Park Board's approval and awarding of the contract to construct the bike path on the northerly side of St. Anthony Parkway between Ulysses Street NE and Stinson Boulevard. To date at least, Your Honor's failure to issue a decision one way or the other amounts, of course, to a *de facto* denial of the motion.**

See Exhibit 6 attached hereto (emphasis added).

13. The Park Board's attorney responded to that letter in an October 24, 2007 letter to the trial judge in which she said "[a]s you know, Ms. Peterson is out of the country until October 31, 2007" (see Exhibit 7 attached hereto), and Huxmann's attorney replied in pertinent part as follows in an October 25, 2007 to the trial judge:

Ms. Walther states, *e.g.*, that '[i]f the court stays the proceedings, then **as a matter of law**, plaintiffs(*sic*) **must** post an appropriate bond.' (Italics in original and emphasis added.) That should come as news to Your Honor inasmuch as you wrote in pertinent part as follows in your August 2d letter to counsel prior to the August 30th hearing: 'All parties should be prepared to discuss **whether** a bond or other condition as provided by the Rules should be imposed **if** the court grants such a stay.' (Emphasis added.)

Ms. Walther also states that '[t]he Park Board has not failed to provide this court with any relevant information.' She cannot be serious. Waiting four months to tell the court that time had not been of the essence when the temporary injunction was denied was a failure to provide the court with relevant information until August 30th. And despite knowing that plaintiff's motion for a stay of proceedings was still under advisement, never informing the court that the construction would be completed and probably started in 2008 without penalty was a failure to provide the court with relevant information.

See Exhibit 8 attached hereto.

14. On October 4, 2007, Governor Pawlenty announced the appointment of Judge Connolly to the Minnesota Court of Appeals effective January 1, 2008.

15. In an Order Denying Plaintiff's Request for a Stay Pending Appeal of Denial of Temporary Injunction and Granting Defendant's Motion for Summary Judgment and Memorandum of Law filed on October 31, 2007--*i.e.*, sixty-two days after hearing Huxmann's motion for stay of proceedings--the trial judge held in pertinent part as

follows in denying Huxmann's motion:

[U]nder [Minn. R. Civ. App. P. 108.01], 'the trial court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from, and to enforce its order or judgment.' Id. Rule 108.03 goes so far as to say 'the trial court may proceed upon any other matter not affected by the judgment or order from which the appeal is taken.' Minn. R. Civ. App. P. 108.03. In essence, the trial court is only suspended from making decisions regarding matters directly involved in the appeal. It is not prohibited from deciding issues supplemental to or independent thereof. See Phillips-Klein Companies, Inc. v. Tiffany Partnership, 474 N.W.2d 370 (Minn. Ct. App. 1991); Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984); In re Thulin, 660 N.W.2d 140 (Minn. Ct. App. 2003).

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This Court will not stay the proceedings because it retains jurisdiction over the rest of the case even if the Court's ruling on the temporary injunction is being appealed. Minnesota Rules of Civil Appellate Procedure 103.03b and 108.03 govern. Plaintiffs appealed to the Court of Appeals under Rule 103.03b, which allows for an appeal 'from an order which grants, refuses, dissolves or refuses to dissolve, an injunction.' Minn. R. Civ. App. P. 103.03b. However, under Rule 108.03, the Defendant's motion for summary judgment is not affected by the appeal of the denial of the motion for a temporary injunction. Rule 108.03 states:

When a bond is filed as provided by Rule 108.01, it shall stay all further proceedings in the trial court upon the judgment or order appealed from or the matter embraced in it; but the trial court may proceed upon any other matter not affected by the judgment or order from which the appeal is taken.

Minn. R. Civ. App. P. 108.03 (Emphasis added).

Plaintiffs have not posted a bond and argue that one is not needed. Defendant disagrees.

Defendant's summary judgment motion deals with governmental immunity, which is a question of law, 'distinct from a defense to the merits of a plaintiff's claims.' Unzen v. City of Duluth, 683 N.W.2d 875, 878 (Minn. Ct. App. 2004). The order denying the motion for a temporary injunction dealt with the far more narrow issue of whether Plaintiffs had met their burden of proof under all the

*Dahlberg* factors. Therefore, while the two motions necessarily deal with the same set of facts, the burden of proof, the appropriate legal standard and application of that standard to the facts are all quite different. For example, it is possible for a Court to grant a motion for a temporary injunction but later deny a motion for summary judgment, and also to deny a motion for temporary injunction but later grant a motion for summary judgment, or grant both motions. Finally, it is possible for a Court to deny a motion for a temporary injunction and later deny a motion for summary judgment. In this instance, the Court's decision to proceed to hear the motion for a summary judgment is not affected by the order from which the appeal is taken. This Court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order denying the motion for a temporary injunction. Therefore, the Court will not grant the stay. As the Court is not granting a stay in the first instance, it need not address the issue of whether a bond is required and if so, in what amount.

See Exhibit 9 attached hereto.

## ARGUMENT

### I Pertinent Rules.

Minn. R. Civ. P. 62.02 provides:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Minn. R. Civ. P. 62.05 provides:

The provisions of Rule 62 do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Minn. R. Civ. App. P. 108.01 provides in pertinent part:

Except in appeals under Rule 103.03(b), or as otherwise provided by law, the filing of a proper and timely appeal suspends the authority of the trial court to make any order necessarily affecting the order or judgment appealed from. The trial court retains jurisdiction as to matters independent of, supplemental to, or

collateral to the order or judgment appealed from, and to enforce its order or judgment.

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An application to approve a supersedeas bond, or for a stay on other terms, shall be made in the first instance to the trial court. Upon motion, the appellate court may review the trial court's determination as to whether a stay is appropriate and the terms of any stay.

In the Advisory Committee Comment to Rule 108.01, it is said that “[i]f there is uncertainty about the scope of the trial court’s ongoing jurisdiction, a motion to resolve the question may be directed to the appellate court.”

Minn. R. Civ. App. P. 108.03 provides:

When a bond is filed as provided by Rule 108.01, it shall stay all further proceedings in the trial court upon the judgment or order appealed from or the matter embraced in it; but the trial court may proceed upon any other matter not affected by the judgment or order from which the appeal is taken.

**II. The District Court Was Without Jurisdiction To Hear And Decide Defendant’s Motion For Summary Judgment.**

The order at issue and its timing shows why Huxmann had sought the trial judge’s disqualification since last June when the trial judge’s predispositional bias was revealed. Taking 62 days to issue a decision on a non-dispositive motion to stay proceedings pending appeal is inexcusable. In denying Huxmann’s motion for a temporary injunction, the trial judge stated that “the doctrine of discretionary immunity *will* apply in this case,” whereupon the Park Board immediately calendared a motion for summary judgment based solely on an asserted entitlement to discretionary immunity. The trial judge’s objective evidence of bias caused Huxmann to request the trial judge’s recusal and is one of the issues before this appellate court on Huxmann’s pending appeal from the order denying his motion for a temporary injunction.

That objective evidence of bias was by itself a reason the trial judge should have declined to hear and decide the Park Board’s motion for summary judgment, but it is not

the only reason. The trial judge's conclusory denial of Huxmann's motion to stay proceedings was based solely on the trial judge's erroneous conclusion that the question of discretionary immunity was not affected by the judgment or order from which the appeal is taken. None of the three cases cited by the trial judge supports that erroneous conclusion. In two of those cases, a claim for attorneys' fees was held to raise a matter independent of the merits of the action. See *Phillips-Klein Companies, Inc. v. Tiffany Partnership*, 474 N.W.2d 370 (Minn. Ct. App. 1991), and *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984). In the inapposite *In re Thulin*, 660 N.W.2d 140 (Minn. Ct. App. 2003), a determination of continued commitment was held to be independent of and supplemental to an initial order of commitment.

The rule divesting a trial court of jurisdiction is designed to avoid the confusion and waste of time potentially arising from having the same issues before two courts at the same time. *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980). In denying Huxmann's motion for a temporary injunction, the trial judge held that the likelihood of success on the merits weighed in the Park Board's favor because it was entitled to discretionary immunity. Thus the Park Board's summary judgment motion, which was based solely on the contention that its discretionary immunity mandated a dismissal of the action, was inextricably intertwined with Huxmann's pending appeal and thus not independent of, supplemental to, or collateral to the order Huxmann has appealed from. The Park Board had the burden of proof in each instance, *i.e.*, "the burden of proof, the appropriate legal standard and application of that standard to the facts" were *not* "all quite different." Consequently, the trial court lacked jurisdiction to hear and decide the Park Board's summary judgment motion, and, in the absence of such jurisdiction, the putative basis for denying Huxmann's motion to stay proceedings does not and never did exist. Where appealing from the denial of a temporary injunction is a matter of right under Minn. R. Civ. App. P. 103.03(b), allowing the order granting summary judgment to stand will render Huxmann's appeal and the rule permitting it meaningless.

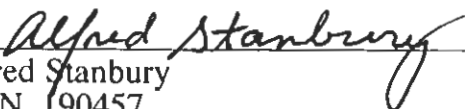
## CONCLUSION

For the foregoing reasons, the district's court's order granting summary judgment should be vacated for lack of jurisdiction, and plaintiff Peter Huxmann's motion for an order enjoining the construction of a bike path on St. Anthony Parkway between Ulysses Street NE and Stinson Boulevard and otherwise staying proceedings in the district court during the pendency of his appeal from the denial of his motion for a temporary injunction should be granted.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: December 21, 2007.

  
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