



temporary injunction. Exhibit 1 to *previously-filed* Affidavit of Alfred Stanbury dated April 8, 2008 (hereinafter “Stanbury 040808 Aff. ¶ \_\_ and/or Ex. \_\_”). The Park Board immediately noticed a motion for summary judgment for hearing in late August 2007. On June 22, 2007, Huxmann’s request for leave to move for reconsideration of the denial of his motion for a temporary injunction was denied, and Huxmann’s request for leave to move for reconsideration of the denial of his request to remove Judge Connolly was denied on July 20, 2007. Stanbury 040808 Aff. Ex. 2 and 3. On July 24, 2007, Huxmann commenced an interlocutory appeal as a matter of right from the district court’s May 25, 2007 order denying his motion for a temporary injunction.

On August 16, 2007, Huxmann served and filed a motion in the district court for an order enjoining the construction of the bike path at issue and otherwise staying proceedings in the district court during the pendency of his appeal, arguing in pertinent part as follows:

Defendant’s summary judgment motion is one part of the proceedings which plaintiff has sought to stay inasmuch as Judge Connolly has decided that motion in advance by holding that discretionary immunity “will” apply in this case. It would be unfair to say the least for Judge Connolly to hear that motion before plaintiff’s attempt to obtain a stay of proceedings has been allowed to run its course, and that attempt will not have run its course until plaintiff, if necessary, has the opportunity to obtain a review of this court’s determination as to plaintiff’s instant motion. Accordingly, plaintiff moves the court for an indefinite continuance of the hearing of defendant’s summary judgment motion while plaintiff’s attempt to obtain a stay of proceedings is underway in this court and, if necessary, in the court of appeals.

A stay of proceedings during the pendency of plaintiff’s appeal is warranted because plaintiff will be irreparable harmed if the present traditional sidewalk is torn up and replaced with a 10’ bicycle-only path, whereas there is no evidence before the court that shows that defendant will be harmed, financially or otherwise, by a postponement of the construction of such a path from Ulysses Street to Stinson Boulevard.

Stanbury 040808 Ex. 4 (emphasis added).

On August 16, 2007, Huxmann served and filed his opposition to the Park Board’s

motion for summary judgment and, *inter alia*, objected in pertinent part as follows to the hearing of that motion during the pendency of his appeal of the denial of his motion for a temporary injunction:

Plaintiff objects to the instant motion [for summary judgment] and the hearing of it in the following ways and on the following grounds:

1. Plaintiff objects to the hearing of the instant motion on August 30, 2007, for the reasons set out in the memorandum of law in support of his contemporaneous motion for a stay of proceedings during the pendency of his appeal from the denial of his motion for a temporary injunction.

2. Plaintiff objects to the hearing of the instant motion by the presently assigned judge for the reasons set out in the memorandum of law in support of his contemporaneous motion for a stay of proceedings during the pendency of his appeal from the denial of his motion for a temporary injunction and in his attorney's letters to the court dated June 13, 2007, and July 15, 2007, copies of which are attached as Exhibits 2 and 3 to Affidavit of Alfred Stanbury dated August 21, 2007 (hereinafter "Stanbury Aff. ¶ \_\_ and Ex. \_\_").

Exhibit 1 to Affidavit of Alfred Stanbury dated April 11, 2008 (hereinafter "Stanbury Aff. ¶ \_\_ and/or Ex. \_\_"). On August 27, 2007, Huxmann also served and filed his reply in support of his motion for a stay of proceedings in which it was argued in pertinent part as follows:

Stating baldly that defendant's motion for summary judgment 'is a matter not affected by the court's order denying plaintiff's motion for a temporary injunction' does not make it so--just as the mere labeling of a government function as either operational or planning is not dispositive as to immunity. *See, e.g., Nusbaum v. County of Blue Earth and State of Minnesota*, 422 N.W.2d 713, 719 (Minn. 1988). Defendant's summary judgment motion is affected most certainly by the order denying plaintiff's motion for a temporary injunction because the order contains a holding that discretionary immunity will apply to this case. The motion has been pre-judged. Moreover, this court lacks jurisdiction to hear and decide the summary judgment because that motion is premised on the same facts and a parallel theory to defendant's argument on plaintiff's appeal.

Stanbury 040808 Aff. Ex. 6.

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

Stanbury 040808 Aff. Ex. 8 (emphasis added).

Briefing of Huxmann's appeal was completed on October 29, 2007, and, in an order filed on October 31, 2007--*i.e.*, sixty-two days after hearing Huxmann's non-dispositive motion to stay of proceedings--the trial judge denied Huxmann's request for a stay and granted the Park Board's motion for summary judgment, holding in pertinent part as follows:

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.

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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.

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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.

Stanbury 040808 Aff. Ex. 9. On December 24, 2007, Huxmann moved in the court of appeals to stay proceedings during the pendency of his appeal and to vacate the order granting summary judgment for lack of jurisdiction, arguing in pertinent part as follows:

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.**'

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**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.

Stanbury Aff. Ex. 2 (emphasis added). The Park Board responded in opposition on December 26, 2007, Stanbury Aff. Ex. 3, and, on December 31, 2007, Huxmann served and filed a reply in which it was argued in pertinent part as follows:

By its own admission, the Park Board's response memorandum is no more than an edited resubmission of its memorandum in opposition to Huxmann's motion in district court for a stay of proceedings during the pendency of his present appeal. That memorandum, unedited, is attached to Huxmann's motion memorandum as Exhibit 3, and Huxmann's reply to it is attached as Exhibit 4. The response argument now put before this court by the Park Board is conclusory and thus not argument at all. The Park Board, *e.g.*, states that '[t]he Park Board's motion for summary judgment was a matter not affected by the court's order denying Huxmann's motion for a temporary injunction.' That is unmistakably conclusory, and, as Huxmann argued in response in his reply memorandum, '[s]tating baldly that defendant's motion for summary judgment 'is a matter not affected by the court's order denying plaintiff's motion for a temporary injunction' does not make it so--just as the mere labeling of a government function as either operational or planning is not dispositive as to immunity. *See, e.g., Nusbaum v. County of Blue Earth and State of Minnesota*, 422 N.W.2d 713, 719 (Minn. 1988). The Park Board's summary judgment motion was affected most certainly by the order denying Huxmann's motion for a temporary injunction because that motion was premised on the same facts and a parallel theory to the Park Board's argument on the pending appeal. *See* the unpublished *In re Huntsman*, No. C9-02-85 (Minn. Ct. App. 2002), wherein the Minnesota Court of Appeals held in pertinent part as follows:

First, the district court did not have jurisdiction to hear James Huntsman's motion during the pendency of his previous appeal. *See* Minn. R. Civ. App. P. 108.01, subd. 1 (stating that **the district court has no authority to issue orders necessarily affecting the appealed order unless issues involve enforcement or are collateral, supplemental, or independent**). James Huntsman's motion, premised on the same facts and a parallel theory to his argument in his pending appeal, **necessarily affected the judgment on appeal**. The district court properly determined that it did not have jurisdiction to hear and decide the repackaged motion. (Emphasis added.)

A copy of that case--which was ignored by the trial judge despite being attached as Exhibit 1 to Affidavit of Alfred Stanbury dated August 27, 2007--is attached hereto as Exhibit 10 for this appellate court's convenience and consideration (yellow highlighting supplied). As to whether its motion for summary judgment was independent of, supplemental to, or collateral to the order denying Huxmann's motion for a temporary injunction, the Park Board says nothing. In other words, the Park Board says nothing as to whether

the order granting summary judgment affects the appealed order denying Huxmann's motion for a temporary injunction. *E.g.*, no attempt is made to support the trial judge's faulty reasoning or rebut or refute what Huxmann argued in his initial memorandum at 8, *to wit*:

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 [solely] 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.

*See* Minn. R. Civ. App. P. 108.01 and *Hasan v. MacDonald's Corp.*, 377 N.W.2d 472, 473-74 (Minn. Ct. App. 1985) (when depositions were not timely filed as part of the supplemental record, an order based on parties' stipulation that the depositions were part of the supplemental record, after filing of appeal, would not be given effect. "The contents of record on appeal from the summary judgment are **intertwined** with the summary judgment appealed, [therefore] the trial court had no jurisdiction to order filing of the deposition transcripts.") (emphasis added).

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. *See Bio-line Inc. v. Wilfly*, 365 N.W.2d 338, 341 (Minn. Ct. App. 1985) (since dismissal of a counterclaim and entry of default judgment would render filed appeal moot, the trial court was without jurisdiction to take such action).

Stanbury Aff. Ex. 4 (footnote omitted). In an order filed on January 9, 2008, the court of appeals held in pertinent part as follows in denying the motion for a stay:

By motion filed on December 24, 2007, appellant seeks (a) a stay pending appeal and (b) vacation of the order for summary judgment, based on the district court's alleged lack of jurisdiction to consider the motion while the appeal was pending. Respondent opposes the motion.

Judgment was entered on the October 31 order on November 2, 2007. Neither the October 31 order nor the November 2 judgment is within this court's scope of review in this appeal, which is limited

to the May 25 order denying a temporary injunction. To the extent that appellant challenges the October 31 order and resulting judgment, the proper remedy is a separate appeal from the judgment.

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Because a timely appeal from the November 2 judgment may have been mailed, but not yet received by the Clerk of the Appellate Courts, it is premature for us to consider whether dismissal of the underlying action renders the appeal from the denial of temporary injunctive relief moot.

**IT IS HEREBY ORDERED:**

1. Appellant's motion for a stay pending appeal and to vacate the October 31 order for summary judgment is denied.

2. This order shall not preclude a timely appeal from the November 2 judgment and shall not be construed as an expression of opinion on the merits of any such appeal. . . .

Stanbury 040808 Aff. Ex. 10. The Park Board then immediately moved to dismiss the appeal as moot and argued as follows:

Pursuant to [Minn. R. Civ. App. P. 127](#), Respondent City of Minneapolis, acting by and through its Park and Recreation Board (Park Board) hereby moves the Minnesota Court of Appeals for an order dismissing Appellant's appeal as moot.

Appellant Peter Huxmann (Huxmann) appealed from an order of the district court denying [Huxmann's](#) motion for a temporary injunction. After Huxmann had filed his appeal, the district court granted summary judgment to the Park Board. The district court's order for entry of judgment was filed on October 31, 2007. Judgment was entered in the case on November 2, 2007. Pursuant to [Minn. R. Civ. App. P. 104.01](#), Huxmann had 60 days to appeal. [Huxmann's](#) time to appeal from the district court's entry of summary judgment has passed rendering his appeal moot. It is well settled that the court of appeals may not extend the time for filing the notice of appeal. *See* Comment 1983 to [Minn. R. Civ. App. P. 126](#); *see also* [Minn. R. Civ. App. P. 127](#). [Huxmann's](#) failure to file a timely appeal from the entry of summary judgment in the underlying is fatal; he cannot cure it. Therefore, the Park Board respectfully requests that the court of appeals dismiss [Huxmann's](#) appeal with prejudice.

Stanbury 040808 Aff. Ex. 11. Huxmann responded as follows on January 22, 2008:

Respondent has moved to dismiss this appeal but has not provided this court with any reason to do so. Respondent says only that the passage of Huxmann's time to appeal from the district court's entry of summary judgment rendered his appeal moot. It did not. If it were otherwise, the rule allowing an appeal *as a matter of right* from the denial of a motion for a temporary injunction could be eviscerated by a district court with impunity.

Huxmann never intended to appeal from the district court's entry of summary judgment. While such an appeal is a proper way to challenge that entry of summary judgment, as opined by this court in its January 8, 2008 order denying Huxmann's motion for a stay pending appeal and to vacate that order for summary judgment, it is not the only proper remedy. Huxmann, e.g., can exercise his rights under Minn. R. Civ. P. 60.02(d) either by motion or independent action. Either way, the initial outlay would be considerably less than the \$1,500 outlay required by another appeal while affording the opportunity to add defendants like the United States Department of Transportation, the Minnesota Department of Transportation, and the Metropolitan Council.

This court may know of some authority for holding that this appeal has been rendered moot by the fact that Huxmann did not appeal from the entry of summary judgment, but Huxmann cannot find any, and respondent has not supplied any. This [appellate] court has had jurisdiction over this case since July 24, 2007. The fact that the district court issued an order affecting this appeal is undeniable. That October 31, 2007 order is most certainly within this court's scope of review where Minn. R. Civ. App. P. 103.04 ('Scope of Review') provides in pertinent part:

The appellate courts may reverse, affirm or modify the judgment or order appealed from **or take any other action as the interests of justice require.**

On appeal from or review of an order **the appellate courts may review any order affecting the order from which the appeal is taken . . . .** (Emphasis added.)

Stanbury 040808 Aff. Ex. 12 (emphasis added.). In an order filed on January 31, 2008, the court of appeals held in pertinent part as follows in granting the Park Board's motion to dismiss the appeal as moot:

This appeal challenges the district court's May 2007 denial of a temporary injunction. Appellant's principal brief and reply brief seek injunctive relief to stop construction of a bike path until the completion of 'a trial on the merits' on appellant's claim that the

path will constitute a public nuisance. On October 31, 2007, the district court granted summary judgment to respondent on the basis of immunity. Judgment was entered on November 2, the appeal time has passed, and no appeal was taken, making that judgment final. Respondent now moves to dismiss the appeal from the denial of temporary injunctive relief as moot. Appellant opposes the motion.

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The underlying action has been determined adversely to appellant and that judgment is now final. Because there will be no 'trial on the merits,' appellant's request for a temporary injunction until the completion of that trial is now moot. Similarly, appellant's request for assignment to another judge is moot, because the original judge has left the district court and there will be no further proceedings in this matter. . . . And appellant's assertion that the summary judgment entered in November 2007 is within this court's scope of review in this appeal, filed more than three months earlier, is unfounded.

**IT IS HEREBY ORDERED:**

1. Respondent's motion is granted.
2. This appeal is dismissed as moot.

Stanbury 040808 Aff. Ex. 13.

**ARGUMENT**

A reading of every case opinion cited by the Park Board reveals the following:

- None mentions Minn. R. Civ. App. P. 108.01 or 108.03 or their Oregon, California, Montana, or Eighth Circuit equivalents;
- None involves an appeal of a denial (or a grant) of an injunction;
- None involves a motion to vacate a judgment entered while an appeal was pending;
- None involves the grant of summary judgment on the grounds that a trial court's decision was independent of, supplemental to, or collateral to an order appealed from; and
- None involves an appellant's attempt to move for a review of the trial court's jurisdiction to proceed during the pendency of an appeal of any kind.

In short, **all** of the Park Board's cited cases are inapposite, and thus none of the Park Board's arguments has an authoritative basis, *to wit*:

The case was already on appeal when the trial court heard and decided the Park Board's motion for summary judgment. Huxmann challenged the trial court's jurisdiction to do that. Stanbury 040808 Aff. Ex. 4 and 5. After the trial court issued its decision granting summary judgment, Huxmann moved in the court of appeals to vacate the trial court's judgment of dismissal for lack of subject matter jurisdiction. Stanbury Aff. Ex. 2 and 4. That motion was wholly consistent with the the Advisory Committee Comment to Minn. R. Civ. App. R. 108.01, wherein 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.'** (Emphasis added.) Huxmann's motion was consistent as well with the appellate policy disfavoring piecemeal appeals. Conversely, the ruling by the court of appeals that "appellant's assertion that the summary judgment entered in November 2007 is within this court's scope of review in this appeal . . . is unfounded" was wholly inconsistent with Minn. R. Civ. App. R. 103.04 ("Scope of Review"), which provides in pertinent part that "[o]n appeal from or review of an order the appellate courts may review any order affecting the order from which the appeal is taken . . . ." Stanbury 040808 Aff. Ex. 10, 12, and 13. Obviously, the court of appeals' concluded that the trial court's order granting summary judgment seriously affected the order from which the appeal was taken because the court of appeals ruled that the trial court's summary judgment order mooted the appeal.

In its memorandum of law at 6, the Park Board relies on *Zions First Nat'l Bank v. World of Fitness, Inc.*, 280 N.W.2d 22 (Minn. 1979) for the proposition that "a defendant who foregoes an opportunity to assert a jurisdictional argument in the initial proceeding **or** to appeal an adverse jurisdictional finding cannot bring a rule 60.02(d) motion arguing voidness after the proceedings have been concluded." (Emphasis added.) As shown, *supra*, Huxmann did assert a jurisdictional argument in the initial

proceeding **and** moved within a pending appeal for an appellate review of the trial court's ongoing jurisdiction to decide the Park Board's summary judgment motion. Consequently, under *Zions* and where the court of appeals in this case did not reach a decision as to the trial court's ongoing jurisdiction during the pendency of Huxmann's appeal, Huxmann is not foreclosed from directly attacking the trial court's judgment of dismissal as void by way of his Rule 60.02(d) motion. The fact that the summary judgment is final is irrelevant. Rule 60.02(d) motions are not limited to direct attacks on non-final judgments.


### CONCLUSION

For the foregoing reasons, defendant's motion to dismiss plaintiff's Rule 60.02(d) motion to vacate the November 2, 2007 judgment of dismissal as void should be denied.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: April 11, 2008.

  
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