

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 *See* the unpublished *In re Huntsman*, No. C9-02-85 (Minn.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 reasoning¹ 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-*¹ *E.g.*, the trial judge failed to determine whether the summary judgment motion *affected* the pending appeal and the order appealed from. Instead, the trial judge misread Minn. R. Civ. App. P. 108.01 and held that the summary judgment motion was independent of, supplemental to, or collateral to the order appealed from because, the trial judge reasoned, proceeding to hear the summary judgment motion *was not affected by* the order from which appeal was taken. What Rule 108.01 provides in pertinent part bears repeating:

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. (Emphasis added.)

In other words, whether A affects B is not the same as whether B affects A.

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 previously filed appeal moot, the trial court was without jurisdiction to take such action).

CONCLUSION

All of this goes to show how ignorant it is for the Park Board to baldly state that Huxmann is attempting “to circumvent all rules of civil appellate procedure and come in the back door through motion practice to get a ruling on a case that he has lost” and “has consistently misconstrued the applicable rules pertaining to stays.” Huxmann has neither “circumvented” nor “misconstrued” anything, and, because it cannot, the Park Board has not shown otherwise. For all of the foregoing and previously-stated 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,

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Dated: December 31, 2007.

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