

No. A07-1431

**STATE OF MINNESOTA
IN COURT OF APPEALS**

PETER HUXMANN, individually and
on behalf of all those similarly situated,

Appellant,

v.

MINNEAPOLIS PARK AND RECREATION BOARD,

Respondent.

APPELLANT'S REPLY BRIEF AND APPENDIX

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REPLY ARGUMENT

No temporary injunction motion would ever succeed if the trial court in every instance were to ignore the movant's facts and arguments in their entirety as the trial judge did in this case, and the Park Board has not shown or even attempted to show otherwise. To challenge the sufficiency of Huxmann's verified complaint, *e.g.*, the Park Board resorts to misrepresenting *Gorgen Company v. Brecht*, 2002 WL 977467 (Minn. Ct. App.), as standing for the proposition that allegations referring to irreparable harm in a complaint, any complaint, are conclusory if not supported by specific facts showing that immediate or irreparable harm would occur. Respondent's Br. at 12-13. In truth, what the Minnesota Court of Appeals held in that regard was this:

Because Gorgen applied for a TRO **without notice to appellants**, the application could be granted only if it clearly appeared from specific facts shown by affidavit or by the verified complaint that Gorgen would suffer immediate and irreparable injury, loss, or damage before appellants or their attorney could be heard in opposition to the application.

RA-166 (emphasis added).

Gorgen is inapposite. Huxmann provided notice.

In July 2006, Huxmann made a DVD which shows why a sidepath crossing intersections will most likely result in bicyclist-vehicle accidents. Copies of that DVD were distributed to the Park Board commissioners and became part of the record of this case when filed with his complaint for injunctive relief. Appellants' Reply Appendix at AR-1. (hereinafter "AR. __"). Clearly, however, neither the Park Board commissioners, the Park Board's staff, the trial judge, nor the Park Board's attorneys bothered to view it. Logistical difficulties prevented its inclusion in Huxmann's initial appendix, but now that it is before this appellate court, it most certainly deserves to be viewed if only for

the first time on appeal.

In response to Huxmann's (well-founded) allegation that the May 25, 2007 order denying the temporary injunction was rushed out in a day so the trial judge and his staff could take a vacation over the Memorial Day week, the trial judge claimed on June 22d that the order was issued quickly because time was of the essence, *i.e.*, the Park Board's attorney had told the court and counsel on April 25th that the Park Board would advertise for bids on June 1, 2007. A.2-3.

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.

The Park Board approved the low bid on October 17th *without discussion and without notifying the public in advance that such approval would be sought at that meeting*. Previously, I have shown that time was not of the essence when Your Honor denied plaintiff's temporary injunction motion, and the Park Board's attorney remained silent for *four* months before disclosing to Your Honor that the Park Board had not advertised for bids until August 28th and not on June 1st as she told Your Honor on April 25th (Attachment 1). At that August 30th hearing and by way of the August 29, 2007 affidavit of Project Manager Eloff, Your Honor was told that "[b]ids are scheduled to be opened on September 27, 2007" and "ltthe Contract shall be awarded subject to approval of the Board of Commissioners of the Park Board on October 3, 2007," and '[c]onstruction will be scheduled to begin by October 5, 2007,'

and 'the concrete portion of the bike/pedestrian path . . . between Ulysses Street, NE and Stinson Boulevard **must be completed by the end of November 2007.**' Attachment 3 (emphasis added). However, the bid specs which were authored by Eoloff some three weeks before, told a different story:

S-21 (1806) DETERMINATION AND EXTENSION OF CONTRACT TIME

The Contract Time will be determined in accordance with the provisions of MnDOT 1806 and the following:

S-21.1 Construction operations **shall be started within eight (8) Calendar Days after the date of Notice of Contract Approval.** Construction operations shall not commence prior to Contract Approval.

S-21.2 All work required under the Contract except maintenance work and Final Clean Up **shall be completed within 45 Working Days.**

S-21.3 In addition to the requirements indicated above, all work required to construct the Residential Segment **shall be substantially completed by November 15** or the Contractor will be assessed a monetary deduction as shown in MnDot 1807.

Attachment 2 (emphasis added),

Bids were indeed opened on September 27, 2007, and Eoloff put the low bid of about \$733,000 before the Park Board for approval at its October 3d meeting and stated in his October 3d Request for Park Board Action that 'SCHEDULE: Construction *started W* of 2007 and complete spring of **2008.**' Attachment 4 (emphasis added). At the beginning of that meeting, however, the matter was struck from the meeting agenda because, reportedly, it was 'incomplete.' Then the published agenda for the next regular meeting (on October 17th) contained no indication that approval of the bid would be sought (Attachment 5), and thus the public was not notified that approval of the low bid would again be sought, as it in fact was. At some undisclosed time on October 17th, Eoloff submitted a Request for Park Board Action accompanied by, *inter alia*, a Memorandum dated October 17, 2007, in which he claimed in pertinent part that '[w]e have *just received* the required, approval from the Minnesota Department of Transportation's (MnDOT) Civil Rights office that the contractor has met the Disadvantage(*sic*) Business Enterprise goals.' Attachment 6 (emphasis added). In truth, that 'just received' approval was communicated to Eoloff *five* days earlier in a letter dated October

12, 2007. *Id.* An agenda amendment sheet containing the addition of Eoloff's approval request appears to have been distributed to the commissioners and only to the commissioners at or around the the 5:00 P.M. start of the October 17th regular meeting, and Eoloff stated in the Request for Park Board Action that 'SCHEDULE: Construction is anticipated to start this fall of 2007 **and be completed in the spring of 2008.**' Attachment 6 (emphasis added).

By approving the bid as presented and described to it on October 17th, the Park Board by implication approved the fact that it is too late in the season to think that the project can be completed in 2007. That fact and the fact that the winning bid is some \$414,000 less than the \$1,147,000 which Your Honor was told it would probably cost means that, as plaintiff has argued, there is no basis for denying plaintiff's motion for a stay of proceedings and imposing a bond. In other words, action to protect the Park Board from incurring additional costs as the result of postponing construction is unnecessary because the amount to be paid to the contractor upon completion is not dependent on completion in 2007. Additionally, the willful failure of the Park Board to apprise Your Honor of the changed circumstances I have enumerated is sufficient reason alone to grant plaintiff's motion for a stay of proceedings during the pendency of his interlocutory appeal.

Sincerely,

AR.3.

As of October 29, 2007, the trial judge has not responded to that letter.

The Park Board's argument in support of the trial judge's ruling concerning the **Dahlberg relationship of the parties factor** merits a brief reply at most, *to wit*: Merely listing some of the trial judge's findings does show that the trial judge did not abuse his discretion in ruling that this *Dahlberg* factor favored the Park Board.

The Park Board's argument in support of the trial judge's ruling concerning the **Dahlberg balance of harms factor** merits a brief reply at most, *to wit*: Where the Park Board knows that it has never even *argued* that it will be harmed, financially or otherwise, by a postponement of the construction of the bike path at issue, it is disingenuous to say the least for the Park Board to imply that it did simply because the trial judge, without any basis for doing so, held that the Park Board would suffer harm if the project were delayed.

In ostensible response to Huxmann's argument concerning the *Dahlberg* **likelihood of success on the merits factor**, the Park Board begins by contending that Huxmann's "initial brief" completely ignored the fact that Huxmann had the burden to prove he was entitled to an *injunction*. to the district court was a memorandum in support of a motion for a temporary restraining order. See A.21. Huxmann's initial filings did not include a memorandum of law in support of his motion for a temporary injunction because in practice it is not one of the documents a party submits to the court when seeking a temporary restraining order. D. McFarland & W. Keppell, MINNESOTA CIVIL PRACTICE § 1073 (3d ed. 1999). His memorandum of law in support of his motion for a temporary restraining order was just that, a memorandum of law which supported a motion for a temporary restraining order; it was not intended to support the motion for a temporary injunction, nor was it necessary for it to do so. It thus is meaningless for the Park Board to argue, *inter alia*, that Huxmann "completely ignored the fact that he had the burden of proving he was entitled to the injunction." Minn. Stat. § 561.01 provides:

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

In an obvious attempt to distract from the fact that the Park Board had the burden to prove its immunity claim and was not required to do so by the trial judge, the Park Board makes much of Huxmann's purported failure to present no argument in support of his position that he was likely to win on the merits of his nuisance claim. It must be understood, however, that it was the trial judge who required the Park Board to submit its memorandum in opposition to the issuance of a temporary injunction *before* Huxmann was to submit his memorandum of law in support of his motion for a temporary injunction. Huxmann's memorandum, as a result, was in part a reply memorandum, and the Park Board argued only that it was more likely to prevail on the

merits *as a matter of law*, *i.e.*, because it was entitled to discretionary immunity. It was to that argument and that argument alone that Huxmann was obligated to respond. He had already alleged that the intended bike path would be a nuisance if or when constructed, and the Park Board did not attempt to show otherwise. It nevertheless is wrong for the Park Board to state that Huxmann failed to demonstrate any likelihood of success on the merits of his nuisance claim. He argued, *e.g.*, that “[w]here the doctrine of discretionary immunity will never serve as a basis for dismissing this action, the issue at trial will be whether the proposed path would be an inherently dangerous nuisance, and, as to that, it is highly likely that plaintiff will prevail over a defendant who, *inter alia*, will be unable to produce expert testimony to support the decision to locate the 3000-foot path on the northerly side of St. Anthony Parkway rather than on St. Anthony Parkway itself or some other street.” A.11.

The Park Board has not responded to Huxmann’s arguments concerning the ***Dahlberg* public policy factor** beyond arguing that the doctrine of discretionary immunity relieves it of any need to be concerned in the least about the inherently dangerous bike path it intends to construct. Huxmann’s public policy argument is unsupported by the evidence in the record, of course, because the trial judge, in his haste to start his Memorial Day week vacation, opted to class **all** of Huxmann’s nineteen exhibits as inadmissible hearsay and conclusory after saying the following at the May 25th hearing: “I have read the papers, the motion papers, and I have not looked in detail at the affidavits but I’ve perused some of the documents so I’m somewhat familiar with the issues.” A.176. To that must be added the fact that the trial judge never viewed the intersection DVD and revealed an inexcusably erroneous belief that Huxmann had not submitted any affidavits. Appellant’s Br. at 9 (“At the hearing, Plaintiffs counsel stated that approximately 40 homeowners lived along the proposed bike path. No affidavits from a homeowner (except perhaps Mr. Stanbury) have been presented to the Court that express opposition to the bike path.”) and 10 n. 4

("Opposition to the bike path was expressed in the *verified* complaint, and, as a result, such opposition did not have to be expressed in an affidavit, *see* Minn. R. Civ. P. 65.01, but even so, opposition was also expressed in Huxmann's two affidavits, the intersection DVD, and exhibits like the *Northeaster* editorial, the *Northeaster* article, and the work and emails of Parkway resident Dew which the trial judge, obviously, neither read nor viewed.").

Huxmann's **requested recusal of the trial judge** was not based on a dissatisfaction with the denial of his motion for a temporary injunction, and Huxmann has not objected to the trial judge's holding that discretionary immunity "will" apply in this case because it "caused the Park Board to schedule a motion for summary judgment" Respondent's Br. at 23-24. That should be clear to anyone who reads Huxmann's attorney's July 15, 2007 letter to the trial judge. AR.219. The trial judge revealed a predispositional bias that required him to disqualify himself.

CONCLUSION

For the foregoing reasons, appellant Peter Huxmann respectfully asks the court (1) to reverse the trial court's May 25, 2007 order and require the issuance upon remand of a temporary injunction enjoining the Park Board from constructing a bike path on St. Anthony Parkway between Ulysses Street NE and Stinson Parkway during the pendency of a trial on the merits and (2) to require the assignment of this case to another judge upon remand.

Dated: October 29, 2007.

Respectfully submitted,


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CERTIFICATE PURSUANT TO MINN. R. CIV. APP. P. 132.01, SUBD. 3

The undersigned certifies that this Reply Brief complies with the word count requirements of Minn. R. Civ. App. P. 132.01. This Reply Brief was prepared using AppleWorks Version 6.2.9 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. All text is 13-point Times, and this Reply Brief contains 2,726 words.



Alfred Stanbury

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DVD made by appellant on July 27 and 28, 2006, and titled *A Hazardous Intersection--Or why a sidepath bike lane will be very dangerous along St. Anthony Parkway*

1

Huxmann attorney's October 22, 2007 letter to Judge Connolly (without attachments)

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