

NO. A07-0165

State of Minnesota
In Court of Appeals

Catherine F. Peterka,

Appellant,

vs.

Stephen G. Dennis, Certified Public Accountant
and Baune, Dosen & Co.,*Respondents.*

APPELLANT'S REPLY BRIEF

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LEGAL ISSUES

- I. Are the Respondents-accountants chosen under court approved stipulation to make an appraisal of the valuation of the business of the parties entitled to immunity as quasi-judicial officers?

The trial court found in the affirmative.

Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955)

STATEMENT OF CASE

The Appellant Catherine F. Peterka brought this cause of action for accounting malpractice against the Respondents Stephen G. Dennis, CPA, and Baune, Dosen & Co. The Appellant also brought an action for legal malpractice against Defendant Todd R. Haugan, Attorney at Law. The causes of action arose out of Defendant Todd R. Haugan's representation of the Appellant in her divorce proceeding from her former husband, Mark J. Peterka. The cause of action against Respondents Stephen G. Dennis, CPA, and his firm, Baune, Dosen & Co., arose out of the same dissolution proceeding wherein Mr. Dennis and his firm were stipulated between the parties as an appraiser for the businesses owned by the Appellant and her former husband, Mark J. Peterka. The claim against Respondents Stephen G. Dennis, CPA, and his firm were dismissed by the trial court by summary judgment on April 8, 2005 on the basis of qualified immunity.

This action was commenced in the Fourth Judicial District Court in the County of Hennepin and was heard before the Honorable Tony N. Leung. The action was brought on a Complaint on February 5, 2004 (A-1). The Respondents answered the Complaint (A-10). Following discovery, several motions for summary judgment were filed by both sides.

By Order of April 8, 2005 the trial court granted the Respondents' motion for summary judgment. The Order on Motion to Dismiss by Virtue of Quasi-Judicial Immunity dismissed the Appellant's claims against the Respondents. Presently before the court is the Appellant's appeal of this Order granting the Respondents' Motion for Summary Judgment by the trial court's Order on Motion to Dismiss by Virtue of Quasi-

Judicial Immunity. The trial court extended quasi-judicial immunity to the Respondents. The Appellant subsequently settled by Perring Agreement with the Defendant Todd R. Haugan and a Final Judgment was entered in this cause on November 28, 2006.

STATEMENT OF FACTS

The facts have been exhaustively briefed heretofore and the Appellant sees no need to add to those facts. Any difference in the facts as set forth in Respondents' Brief will be noted hereinafter.

ARGUMENT

I. STANDARD OF REVIEW.

The Appellant relies upon the Standard of Review as enunciated in her main brief.

II. THE RESPONDENTS-ACCOUNTANTS CHOSEN UNDER COURT APPROVED STIPULATION TO MAKE AN APPRAISAL OF THE VALUATION OF THE BUSINESS OF THE PARTIES ARE NOT ENTITLED TO IMMUNITY AS QUASI-JUDICIAL OFFICERS.

The law in this State is crystal clear as enunciated by the Supreme Court in *Gammel v. Ernst & Ernst*, 245 Minn. 249, 255, 72 N.W.2d 364 (1955). Accountants requested to make independent determination binding upon the parties as to appraisals and valuations are not performing judicial functions and are not entitled to immunity, whether court appointed or not. This ruling has not been overturned nor eroded by the Supreme Court. In fact, it has been the leading decision for the majority of the decisions in other states which have addressed this question and have determined the same law.

The Respondents, in an attempt to skirt this well founded principle, argue that recent case law has carved out an exception to the *Gammel* decision, that "Dennis is

entitled to immunity based upon his court appointment as an independent neutral evaluator – a different quasi-judicial function.” See page 23 of the Respondents’ Brief. (Emphasis supplied.) They continue by relying upon their quotation from *Kipp v. Saetre*, 454 N.W.2d 639, 634 (Minn. App. 1990):

Judicial officers are absolutely immune from civil liability for acts done while acting in their judicial capacity, regardless of motive. It would be logically inconsistent for case law to subject to liability those individuals acting pursuant to explicit court directives.

The Respondents conveniently omit the next sentence in this decision which is:

To deny the protection of immunity under such circumstances might prompt officers of the court to refuse to obey a judge’s directives for fear of personal liability.

The issue at hand was the absolute immunity of prosecutors as was established by the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 487 L. Ed.2d 128 (1976).

This court noted at page 643 of *Kipp* that “This immunity is contingent not on the status but on the particular function of the prosecutor; ...”

Imbler’s focus on function rather than status as the factor determining absolute immunity was quoted in *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed.2d 58 (1987), a case arising in Minnesota:

[I]mmunity depends not upon [appellant’s] status as a prosecutor but upon the “functional nature of the activities” of which [respondent] complains.

(Quoting *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995).

The Respondents argue that the status of court appointment of Dennis, if such appointment exists, renders the *Gammel* decision inapposite. But the *Gammel* decision has rested its opinion not on status but on function. Accountants performing appraisals are not acting as hearing officers or umpires with an obligation to hear, consider and produce a result in relation to the contention of the parties but rather are only making sound accountancy appraisals – not as an arbiter but as an accountant-evaluator.

The Supreme Court in *Gammel* reviewed and addressed several instances involving quasi-judicial officers who were court appointed – grand and petty juries, and prosecuting attorneys and did not make its determination based upon such factor of court appointment. It rested its decision solely on the function of the party as to whether the party “was called to exercise judicial authority,” *id.* at page 255 with an obligation to hear, consider and produce results not just “...the making of a sound accountancy appraisal...” *id.* at page 256 – “not as an arbiter but as an accountant-evaluator.”

The progeny of *Gammel* have also been decided on such factor of function.¹ The federal decisions cited on page 18 and 19 of Appellant’s Brief based their decisions on such distinction, that an appraisal is not an arbitration – it “does not call for the exercise of judicial authority ...” *Gammel, id.* at 255 and *Levine v. Wiss & Co, id.* at 252.

It is the function, not the status of court appointment which is determinative.

¹ In *Comins v. Sharkansky*, 38 Mass. App. Ct. 37, 41, 644 N.E.2d 646 (1995) an accountant was chosen by the parties under court approved settlement agreement to appraise the value of a company; *Levine v. Wiss & Co.*, 97 N.J. 242, 252, 478 A.2d 397 (1984) the court had appointed an accountant to appraise a husband’s business in a divorce proceeding; *Arthur Andersen & Co. v. Wilson*, 256 Ga. 849, 353 S.E.2d 466 (Ga. 1987) the court had appointed an accountant to perform an examination of the books, records and accounts for determining the value of the plaintiff’s stock in the business.

The Respondents rely heavily upon *Kipp v. Saetre*, 454 N.W.2d 639 (Minn. Ct. App. 1990) for the extension of quasi-judicial immunity to provide them safe harbor. In *Kipp* the question presented was the extension of absolute immunity to prosecutors. The question was not decided on **status** but **function** that the prosecutors activities are intimately associated with the judicial phase of the criminal process and are **functions** to which reason of absolute immunity apply with full force, *id.* at page 643. Such functions are not inherent in the Respondents' services.

The Minnesota Supreme Court extended immunity to public defenders in *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993). In declining such immunity for **private defense counsel**, the court found strong policy reasons for such immunity for public defenders: (1) public defenders may not reject their clients; (2) public defenders are limited to their representations by the resources available to their office; (3) it is doubtful that a client could prevail on strategy decisions, citing *Ouellette v. Subak*, 391 N.W.2d 810, 815 (Minn. 1986) and (4) the time to defend the malpractice suit would diminish the limited resources available to serve the indigent constituency. None of these policy considerations exist for the Respondents.

The Respondents also rely heavily on this Court's decision in *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. Ct. App. 1997) and *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490 (Jan. 2, 2007). Both cases involved custody evaluators in dissolution of marriage proceedings. In *Zagaros*, this Court found that trial courts have statutory authority to order custody evaluations and reports (Minn. Stat. § 518.167, subd. 1 which provides "In contested custody proceedings the court may order an investigation and report concerning

custodial arrangements for the child.”) This Court declined to extend such immunity, based upon a lack of court appointment in lieu of an agreement of the parties. The Respondents have no such statutory authority. This Court in *Kuberka* stated that it would extend such immunity based upon a court appointment under the statute. But the Respondents, try as desperately as they must, do not enjoy such court appointment, only a court approval of a stipulation between the parties to utilize their services.

In *Myers Through Myers v. Price*, 463 N.W.2d 773, 776 (Minn. App. 1990), a case relied upon by the Respondents, this Court made the same distinction, that had there been no court appointment, there would be no immunity.

The Respondents have only been able to find two (2) cases in other jurisdictions involving accountants performing appraisal services which they insist support their immunity. In the unpublished Michigan decision of *Shatzman v. Cunningham*, (R. App. 69) the Court of Appeals of Michigan extended immunity to accountants performing appraisal services. The court, though, found that the accountants had been **appointed** by the court to serve as “binding independent master” and were referenced by the same court in another order as **arbitrators**. The Respondents do not enjoy such appointment. The court extended **arbitral immunity** to the accountants. Such is the identical function that our own Supreme Court discusses in *Gammel*. This Michigan decision relies upon the reasoning of the *Gammel* decision by our Supreme Court (though not cited) and strongly supports the Appellant’s arguments.

The Respondents also rely heavily on *Riemers v. O’Halloran*, 678 N.W.2d 547 (N.D. 2004). In this decision the trial court **appointed** under Evidence Rule 706 an

accounting firm to determine a number of issues involving a husband's earning from his business and accounting irregularities. The North Dakota Supreme Court extended immunity based upon the **appointment** by the court. The court distinguished *Levine, supra*, because it "...involved an expert selected by the parties to the action." In *Levine*, though, the accountant was selected by the parties and **approved** by the court. The identical situation to the case at bar.²

We have come full circle, back to *Gammel*. Try as desperately as they may, the Respondents have not been court appointed.³ Without such specific appointment, they are not entitled to such immunity. But more importantly, they do not perform the function of an arbitrator as determined by *Gammel* for such immunity and as determined by the Michigan court in *Shatzman* (relied upon by the Respondents).⁴ For the Court to rule in favor of the Respondents, it will have to overrule *Gammel* and the determination that such quasi-judicial immunity is not based upon the function (judicial) of the appraiser.

² The Respondents state at page 16 that in conformance with Rule 706 (permitting parties to call their own experts) that the Appellant retained Howard Kaminsky as a "shadow" expert. But such is not the case. Mr. Haugan, Peterka's counsel, did not believe under the Stipulation that he had the power or right to call his own expert. More importantly, Mr. Kaminsky had been retained to determine income stream and was requested to review Dennis' report. Mr. Kaminsky could not perform such review, because Dennis refused to deliver records to Haugan (and subsequently Kaminsky) the records which had been submitted to him by Peterka's husband.

³ See pages 14 and 15 of the Appellant's Brief where the court approved of the Stipulation of Stephen Dennis and does not make an appointment.

⁴ Even the determination to be made by the accountants in *Riemers* i.e. determining gross income, specifically identifying accounting and financial irregularities, empowering the accountant to obtain all relevant documents from **any person**, business and government agency are arbitral.

As the Fifth Circuit of Appeals stated in *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977) in discussing this distinction between an appraiser and arbitrator:

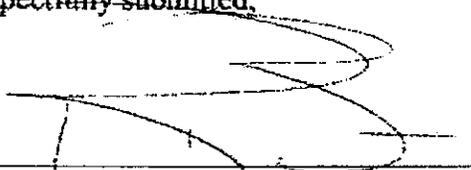
When in discharging his **function** the arbitrator resembles a judge, we protect the integrity of his decision-making by guarding against his fear of actual mulcted in damages. Cf. *Broom v. Douglass*, 175 Ala. 268, 57 So. 860 (1912). But he should be immune from liability only to the extent that his action is **functionally** judge-like. **Otherwise we become mesmerized by words.** (Emphasis supplied.)

CONCLUSION

The trial court erred in granting summary judgment on behalf of the Respondents and dismissing the Complaint by extending quasi-judicial immunity to the Respondents. The Respondents-accountants, chosen under court-approved stipulation to make an appraisal of the valuation of the business of the parties are not entitled to immunity as quasi-judicial officers.

~~Respectfully submitted,~~

Dated: 4/1/78

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CERTIFICATE OF BRIEF LENGTH

Stephen G. Dennis, Certified Public
Accountant and Baune, Dosen & Co.,

Respondents.

I hereby certify that this Appellant's Reply Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,256 words. This Brief was prepared using Word 2000.

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