

CASE 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,

Todd R. Haugan, Attorney at Law.

RESPONDENTS' BRIEF

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STATEMENT OF ISSUES

1. Was Dennis a court-appointed independent neutral evaluator pursuant to the September 30, 1997 Order and all attendant circumstances? Yes. The district court held that Dennis was court-appointed. The district court should be affirmed.

Most Apposite Authorities:

Minn. R. Evid. 706

Mike v. Perfetti, No. C3-95-1650, 1996 WL 33102 (Minn. Ct. App. Jan. 30, 1996)

2. Was Dennis, as a court-appointed independent neutral evaluator, entitled to quasi-judicial immunity from Peterka's professional malpractice suit? Yes. The district court granted summary judgment for Dennis on the grounds that Dennis was court-appointed and therefore entitled to quasi-judicial immunity. The district court should be affirmed.

Most Apposite Authorities:

Zagaros v. Erickson, 558 N.W.2d 516 (Minn. Ct. App. 1997)

Minn. R. Evid. 706

3. Is Dennis entitled to quasi-judicial immunity as an independent neutral evaluator even if he was not court appointed? Yes. The district court held that Dennis was entitled to quasi-judicial immunity even if he was not court appointed. The district court should be affirmed.

Most Apposite Authorities:

Zagaros v. Erickson, 558 N.W.2d 516 (Minn. Ct. App. 1997)

Minn. R. Evid. 706

Kipp v. Saetre, 454 N.W.2d 639 (Minn. Ct. App. 1990)

STATEMENT OF THE CASE

This is an appeal from an entry of final partial judgment in Hennepin County District Court, the Honorable Tony N. Leung presiding, for Defendant Stephen G. Dennis and Baune, Dosen & Co. (collectively, "Dennis") in an accounting malpractice action. The malpractice action was brought against Dennis by Catherine Peterka ("Peterka"), one of the parties to a marital dissolution proceeding in which Dennis was court-appointed, by stipulation, to act as an independent neutral evaluator in determining the value of certain business assets subject to the dissolution proceeding.

Peterka began this malpractice suit against Dennis on February 5, 2004. Peterka also sued her former attorney, Todd Haugan. Peterka's claims against Dennis related to Dennis' independent neutral evaluation of two businesses in the marital estate.

On December 14, 2004, Dennis moved for summary judgment on all claims Peterka asserted against him. Dennis moved on the grounds that he was entitled to quasi-judicial immunity from suit due to his court appointment and his role as independent neutral evaluator. Haugan also moved for summary judgment.

On April 8, 2005, the district court granted Dennis' motion. (Haugan's motion was denied.) The court held that Dennis was court-appointed and therefore was entitled to quasi-judicial immunity. The court also held that, even in the absence of court appointment, Dennis would be entitled to quasi-judicial immunity as an independent neutral evaluator under the circumstances of this case. At Peterka's request, the district

court entered final partial judgment on May 19, 2005.¹ After Haugan settled with Peterka, final judgment on the remaining claims was entered on November 28, 2006.

¹ As explained in Dennis' March 20, 2007 informal memoranda, filed pursuant to this Court's March 9, 2007 Order, Peterka's appeal is untimely given that final partial judgment was entered on May 19, 2005.

STATEMENT OF FACTS

A. Underlying Dissolution Proceedings

Peterka commenced a marital dissolution action against her former husband, Mark J. Peterka, in 1996. A. 2. When the action was commenced, Plaintiff was represented by Roselyn Nordaune and Plaintiff's former husband, Mark Peterka, was represented by Douglas Nill. R. App. 63, 65. One of the contested issues in the trial of the dissolution proceedings was the value of Peterka's interest in certain business assets owned by Mark Peterka – Mark Charles, Inc. and Deerbrooke Construction, Inc. A. 2.

B. Parties Stipulated to Retain an Independent Neutral Evaluator

The parties and counsel reached an agreement to have the Peterkas' business assets evaluated by a neutral evaluator. R. App. 63, 65. The court issued an order consistent with this agreement in an Order for Temporary Relief dated March 17, 1997, and specifically identified a list of appropriate neutrals to be used. R. App. 50 ("The parties business will be valued by an independent evaluator from Judge Davidson's list of neutrals.").

After the parties' initial selection of evaluators withdrew, the parties' attorneys approached Dennis² to act as a neutral business evaluator. R. App. 64-65. Dennis has performed hundreds of evaluations in the marriage dissolution context and, as a precondition to performing this valuation, Dennis specifically requested a court appointment. R. App. 37-38, 44, 64-65. Dennis' request is reflected in a

² Dennis is a partner in and employed by Baune, Dosen. R. App. 14.

contemporaneous letter from Nill which states "Mr. Steve Dennis requests an order specifically appointing him as the independent neutral" R. App. 40, 42. It is undisputed that Dennis specifically requested that he be court-appointed to avoid the very kind of claim Plaintiff asserts in this litigation. R. App. 37-38, 44.

C. September 30, 1997 Stipulation and Order Appointing Dennis

Accordingly, Nordaune and Nill both stipulated to Dennis' appointment, prepared an order for the court, and submitted that order. R. App. 64-65; A. 69-71. On September 30, 1997, Hennepin County District Court Judge James T. Swenson approved the parties' stipulation and entered an order appointing Dennis to conduct an "independent neutral evaluation of the value of the parties' business assets." A. 69-71.

The Court then sent a copy of that Order directly to Dennis. R. App. 38-39. Consistent with Rule 706, the Order required each party to cooperate with Dennis, and also to pay Dennis' fees. A. 69-71. Failure to cooperate with the Court's Order was specifically made subject to "court enforcement of this Order" or "sanctions" imposed by the Court. A. 69-71.

D. Dennis Understood That He Was Court Appointed

Dennis understood his appointment to be pursuant to Rule 706 of the Minnesota Rules of Evidence. R. App. 14. Dennis' understanding of his appointment and role as a Court witness was consistent with Nordaune and Nill, and was confirmed several times during his deposition testimony, as follows:

Q [Mr. Bosse] Here's where I'm having a problem, Mr. Dennis: You have been putting forth the position that you are sitting in the role of the

judge because of your appointment; correct?
Am I wrong about that?

A [Mr. Dennis] I'm Court appointed.

Q You're Court appointed.

A Yes.

Q Okay. Is it your opinion that you're performing a judicial function, a role that the judge would normally perform?

A A quasi judicial function, yes.

Q What is that quasi judicial function that you're performing?

A To determine the value of the closely-held business involved in this case.

Q In your opinion so the judge doesn't have to perform that evaluation; is that correct?

A So the judge can hear unbiased independent, neutral testimony on the issue and make whatever findings the judge feels is appropriate in light of that testimony.

Q Unbiased and neutral; correct?

A Yes.

Q And sitting in this quasi judicial role, it is your feeling and/or opinion that you can receive documents from one side and not make sure that the other side has the benefit of the documents that you have utilized for your opinion?

A I have no objection, had no objection to Mr. Haugan getting any document contained in my file. And Rule 706 permits him to take my deposition if he feels that is necessary in order for him to do his job.

Q Do you have some document that says you were

appointed pursuant to Rule 706?

A I think under the Court order it was an appointment under Rule 706.

Q The Court doesn't specify that?

A Not specifically, but it falls within that rule.

Q Rule 706 specifies also that the Court is to direct you in writing as to what your duties and responsibilities are; does it not?

A And I think it did.

Q Okay. And what was that?

A It was an independent, neutral evaluation of the parties' business assets.

Q And what page are you looking at?

A That is BD&C 0024.

Q You're reading from the Paragraph 2 where it says, "The purpose of this Order and Stipulation for Order is to direct that the parties shall cooperate with an independent neutral evaluation"?

A Yes.

Q Okay. And you believe that that independent, neutral evaluation was an appointment of you understand [sic] Rule 706; is that correct?

A Yes.

* * *

Q I think we started this discussion by my asking you: When did you first become involved with the Peterka litigation and you advised that it was sometime in September based upon your time records; is that correct?

A Yes.

Q Okay. And would you tell us what your understanding of your engagement and services were to be?

A I was to provide to the Court pursuant to the Court Order a valuation of Mark Charles and Deerbrooke.

* * *

Q I'm sorry. Did you have a certain practice or custom in regards to divorces, dissolutions of marriage, in regards to the documents that were being produced to you as to whether or not they were transmitted to the other party or adverse parties?

[objections omitted]

A When I'm a neutral, I anticipate that either party has the right to take my deposition as Rule 706 indicates. And the way I look at it is my file is an open book and if they want to come look at my file, they have every right to do so.

Q (By Mr. Bosse) It was noted yesterday that Mr. Nill had made a request that there be no conversations between you and Mr. Haugan without him being present. Were you familiar with that?

A Yes.

Q Is that a normal procedure?

A It is more common than not that the attorneys essentially treat me as though I was the Court so that there be no ex parte communications with me without the other party or the other attorney being on the line. That's the norm. There are some attorneys that are agreeable to waiving that norm. But obviously in this case Mr. Nill felt that that was the most appropriate manner in

which to proceed.

R. App. 49, 45, 47 (objections omitted).

E. Attorneys Understood Dennis Was Court Appointed

Both Nill and Nordaune considered Dennis to be court appointed and that the work done by Dennis was performed on behalf of the Court. R. App. 64-65. Todd Haugan succeeded Nordaune as Peterka's counsel in the underlying matter, and handled the dissolution proceedings through trial. Haugan was counsel of record when Dennis performed his independent neutral evaluation. Haugan also understood that Dennis was court appointed, and confirmed the same in his deposition:

Q [Mr. Degnan] And you had I assume seen the papers that included a stipulation by the parties but an Order of the Court appointing him as a neutral?

A [Mr. Haugan] Correct.

Q Did you understand he was appointed by the Court under Rule 706 of the Rules of Evidence?

A I didn't see a reference to that rule in the Order, but that was my understanding as the basis pursuant to which he was authorized to do the valuation.

* * *

Q Yeah, and that was exactly my question. You said that was your understanding and I wanted to make sure that that wasn't something hearsay that you had heard from somebody.

A No, that was my understanding as to what his role was as a neutral.

Q And that's what you assumed when you took over the case?

A Well, when I took over the case. I mean I'm not sure when I knew that he was involved as a neutral. But at some point I learned that. That was my assumption is that he was a neutral.

Q And when you say that you understand it was under Rule 706, what do you mean by "understand"?

A Well, it's my general understanding under Rule 706 his report comes in. And as an aside, there's a specific trial order or pretrial order on this that says his report is automatically in and there's no foundation and people can cross-examine, parties can cross examine him.

It's also my understanding as a neutral that I'm not in a position to call him and say: Here is all of this information and, you know, I think Peterka's hiding money. He's kind of like the judge.

R. App. 58-59 (emphasis added).

F. Dennis Conducts Evaluation

Pursuant to the Court's Order, Dennis conducted an independent and neutral evaluation of the specified business assets and provided a valuation opinion. R. App. 15.

Dennis then provided testimony before the Court related to his opinions and valuations.

R. App. 16.

G. Attorneys Treatment of Dennis Consistent with Court Appointment

Further support for Dennis' role as a neutral, court-appointed evaluator comes from how Haugan treated Dennis' work. Haugan did not completely rely on Dennis. In his deposition, Haugan testified that Dennis was not Plaintiff's advocate. Instead, Haugan considered Dennis to be a neutral appraiser and was "kind of like the judge." R. App. 59.

Consistent with Dennis' neutral role, Haugan and Nill agreed not to have ex parte contact with Dennis. *Id.* Dennis testified in his own deposition that he was a neutral and also expected there to be no ex parte contact with the attorneys. R. App. 45, 47, 59.

And because Dennis was not Haugan's own expert, Haugan retained Howard Kaminsky as a so-called "shadow expert" to check over Dennis' report. R. App. 55, 57. Although Kaminsky's main role was with respect to the maintenance calculation, and not the business valuation, Haugan did have Kaminsky review Dennis' report for potential weaknesses or cross-examination. *Id.* Kaminsky found no such weaknesses and advised Haugan of the same. *Id.* Kaminsky eventually testified at trial regarding the maintenance issue, and was available to testify as needed regarding Dennis' report. Kaminsky also has now addressed the allegations in the subsequent malpractice case.³

H. Subsequent Malpractice Lawsuit

Unhappy with the ultimate outcome of the underlying dissolution proceedings, Peterka commenced malpractice actions against Dennis, his accounting firm, and Haugan. Dennis then moved for summary judgment which was granted by the district court on April 8, 2005, finding quasi-judicial immunity applied.

³ Although not relevant to the issues before the Court, Appellant's brief describes in detail the substance of the allegations that Dennis negligently performed his duties. To avoid lending credibility by allowing the submission of the affidavit to go unanswered, Dennis submitted a letter from Howard Kaminsky, Todd Haugan's expert in the underlying case. R. App. 60-62. The letter summarizes significant errors Kaminsky found in Stiegel's report and methodology. In sum, Kaminsky's opinion is that Stiegel did not perform his analysis in line with Minnesota law. In any event, the allegations regarding the alleged negligence are irrelevant to the issues on appeal. The court would be well served to disregard pages 4 through 12 of Peterka's brief.

ARGUMENT

I. STANDARD OF REVIEW

Rule 56 of the Minnesota Rules of Civil Procedure authorizes the district court to grant summary judgment when "there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); Minn. R. Civ. P. 56.03. Summary judgment may be reversed on appeal only if there is a genuine issue of material fact or if the district court misapplied the law. *Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). There are no genuine issues of material fact warranting reversal, and the district court properly applied the law.

II. SUMMARY JUDGMENT MUST BE AFFIRMED UNDER THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY BECAUSE DENNIS WAS A COURT-APPOINTED INDEPENDENT NEUTRAL EVALUATOR

Because Dennis was appointed by the Court to act as an independent neutral evaluator in Peterka's dissolution proceedings, Dennis is immune from liability under the doctrine of quasi-judicial immunity.⁴ (See Section III, below). Whether Dennis was court appointed is therefore a threshold issue on appeal. Regardless, Dennis is entitled to

⁴ Baune, Dosen is vicariously entitled to immunity because it is Mr. Dennis' employer. Under the doctrine of vicarious quasi-judicial immunity, an employer "which employs an officer also enjoys the quasi-judicial immunity of that officer for the acts of that officer." *Lutheran Day Care v. Snohomish County*, 829 P.2d 746, 750 (Wash. 1992); *In re Scott County Master Docket*, 618 F. Supp. 1534, 1575 (D. Minn. 1985), *aff'd in part and rev'd in part*, *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987); *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. Ct. App. 1990). It is undisputed that Baune, Dosen employs Mr. Dennis, and is therefore entitled to vicarious immunity. That issue is not challenged by Peterka on appeal.

immunity under the circumstances even if there had been no court appointment. (See Section V below).

A. **Dennis Was Court Appointed Pursuant to the Plain Language of the Order and All Relevant Circumstances**

Peterka disputes that Dennis was court-appointed. As the district court concluded, however, Peterka "does not point to a single fact which would tend to show the Accountant was not court appointed." A-78. Instead, Peterka relies solely on the argument that Judge Swenson's September 30, 1997 Order does not explicitly state that Dennis was court-appointed. That analysis is too simplistic, elevates form over substance, and is contrary to the understanding of all relevant parties.

Dennis' court appointment is embodied in Judge Swenson's September 30, 1997 Order, and while it may not use the exact words "Dennis is court-appointed," Dennis' court appointment is apparent from the Order taken as a whole. Significantly, the Order characterizes Dennis as an "independent neutral" evaluator, specifically requires each of the parties to cooperate with Dennis, advance one-half of his retainer, and be responsible for one-half of his total fee and costs. Furthermore, the Order provides that the parties' failure to cooperate with Dennis' independent neutral evaluation pursuant to the Order will subject them to attorney fees and other sanctions. Judge Swenson's Order placed the full power of the court behind Dennis' appointment. A mere witness would not have received such a blessing.

Dennis' court appointment is also confirmed by the undisputed testimony from each of the attorneys who represented the parties during the underlying dissolution

proceeding. Each attorney has testified either by deposition or affidavit that they considered Dennis to be an independent, court-appointed neutral. More importantly, the attorneys all considered the work that Dennis performed to be performed on behalf of the court. Peterka does not challenge these facts and presents nothing to the contrary.

Perhaps the best evidence that Dennis was court-appointed comes from a letter from Mr. Peterka's attorney, Douglas Nill, in which he confirms that Dennis specifically requested a court appointment as a condition to agreeing to take on the work.

Concluding that Dennis was not court-appointed would be contrary to the understanding of Dennis himself, both of the Peterkas' former attorneys, and Todd Haugan, who represented Ms. Peterka at the time the evaluation was actually performed.

B. Dennis Was Appointed Pursuant to Rule 706

The parties' understanding that Dennis was court-appointed also fits clearly within Minnesota Rule of Evidence 706, which specifically provides for party-approved and court-appointed witnesses. Minn. R. Evid. 706 ("The court may appoint any expert witnesses agreed upon by the parties . . ."). Dennis' duties were spelled out in the Order, which Judge Swenson mailed directly to Dennis.

Rule 706 does not require any "magic language" that must be invoked for a Rule 706 appointment. Instead, the Rule explains the power of a court to appoint a court witness and then gives some guidelines. Dennis meets those guidelines. For example, Rule 706 requires that the witness advise the parties of the witness' findings in writing. Minn. R. Evid. 706(a). Dennis provided two written reports to the parties – an initial report on October 25, 1997 and a final report on February 10, 1998. R. App. 46. Rule

706 also requires that the witness' compensation be paid by the parties as directed by the court. Minn. R. Evid. 706(b). Here, the Order specifically requires each party to pay for half of Dennis' costs. A. 69-71.

Finally, Rule 706 allows the parties to retain and call their own experts, and not rely solely on the court-appointed expert. Minn. R. Evid. 706(d). Plaintiff did exactly that by retaining her own "shadow" expert (Howard Kaminsky), which would have been unnecessary if Dennis was anything other than court-appointed and neutral.

C. **The Parties' Stipulation for the Court to Appoint Dennis Does Not Change the Fact that he Was Court-Appointed and is Therefore Entitled to Immunity.**

Peterka also argues that Dennis is not entitled to immunity because the parties stipulated to his appointment, as if the mere fact that the parties agreed to a court order negates the order. This Court has already rejected that argument. *E.g., Mike v. Perfetti*, No. C3-95-1650, 1996 WL 33102 at *2 (Minn. Ct. App., Jan. 30, 1996) (R. App. 67). Dennis is entitled to immunity despite the fact that the parties stipulated to his appointment by the court as an independent neutral evaluator. The *Mike* case explicitly rejects the argument that quasi-judicial immunity does not extend to persons appointed by agreement of the parties. In the *Mike* case, this Court explained that, when a person serves as a receiver pursuant to court order,

The fact that Mike, her attorney, and Stremski's attorney agreed to Perfetti's role as custodian and receiver of Stremski's funds does not negate the court's order officially appointing Perfetti.

Id. (emphasis added).

And the fact that the Peterkas' stipulated to the appointment of an independent evaluator does not make the Court's order approving that stipulation any less binding. If anything, the parties' stipulation makes the subsequent court order more powerful as neither party can object to enforcement. Indeed, compliance with that order, like any court order, could be enforced by the court's contempt powers. *E.g.*, Minn. Stat. § 588.01, subd. 3(3) (2006) (defining constructive contempt as "disobedience of any lawful judgment, order, or process of the court"); Minn. Stat. § 588.02 (providing the court with the power to punish contempt). Thus the parties' stipulation does not negate the court order, rather it reinforces it since the parties were in agreement with it.

Furthermore, the stipulation is also consistent with Rule 706 as discussed above. Minn. R. Evid. 706(a) ("court may appoint any expert witnesses agreed upon by the parties.") The Advisory Committee Comments explain that judges can use court-appointed experts in appropriate cases where "necessary to a fair, expeditious, and inexpensive proceeding." Minn. R. Evid. 706, Advisory Committee Comment. Because the parties' stipulation was consistent with Rule 706 – which explicitly contemplates stipulated appointment – it does not jeopardize Dennis' quasi-judicial immunity.

III. IN MINNESOTA COURT-APPOINTED PROFESSIONALS, INCLUDING ACCOUNTANTS, ARE ENTITLED TO QUASI-JUDICIAL IMMUNITY

A. Judicial Immunity Has Been Extended to Court-Appointed Professionals In Minnesota Judicial Proceedings for More than 100 Years

"The concept of quasi-judicial immunity is not new to Minnesota. 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." *Kipp v. Saetre*, 454 N.W.2d 639, 643 (Minn. Ct. App. 1990) (internal citations omitted).

Judicial immunity is designed to protect the judicial process and extends to judges or judicial officers, as well as to other persons who are integral parts of the judicial process. *Myers through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. Ct. App. 1990). Minnesota courts have extended "quasi-judicial immunity" to court-appointed receivers, court-appointed therapists, public defenders, arbitrators, guardians ad litem, city council members, prosecutors, probation officers, and assessors. *Dziubak v. Mott*, 503 N.W.2d 771, 775-76 (Minn. 1993) (extending immunity from malpractice suits to public defenders, though not to privately-retained defense counsel); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376-77 (Minn. 1989) (granting immunity to arbitrator even where arbitrator had a conflict of interest); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (extending immunity to guardian ad litem, who acted as officer of court and must be free to present vigorous and autonomous representation of child's best interests); *DePalma v. Rosen*, 294 Minn. 11, 15-16, 199 N.W.2d 517, 519-20 (1972) (finding city council members immune); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 254-55, 72 N.W.2d 364, 368 (1955) (recognizing quasi-judicial immunity for arbitrators); *Schmidt v. Gayner*, 59 Minn. 303, 308, 62 N.W. 265, 265 (1895) (receivers); *Stewart v. Case*, 54 N.W. 938 (Minn. 1893) (assessors); *Kipp*, 454 N.W.2d at 642-44 (extending immunity to prosecutor and probation officer who acted in accordance with judge's determination that no probation revocation hearing was necessary); *Myers through*

Myers, 463 N.W.2d at 776 (court-appointed therapist and his clinic found immune under quasi-judicial immunity doctrine).

B. Court Appointment is Key Factor in Establishing Quasi-Judicial Immunity

Minnesota courts have not directly addressed quasi-judicial immunity with respect to an accountant acting pursuant to appointment as a court-appointed independent neutral evaluator. But Minnesota courts also have had little difficulty extending such immunity to new kinds of court appointments. One of the key factors in determining whether quasi-judicial immunity applies is whether there was a court appointment.

The *Zagaros v. Erickson* case from this Court clearly articulates this principle. 558 N.W.2d 516 (Minn. Ct. App. 1997). In *Zagaros*, the plaintiff asserted professional malpractice claims against a psychologist that performed a custody evaluation in connection with the plaintiff's divorce proceedings. *Id.* Like Dennis, the psychologist in *Zagaros* was chosen and paid by the parties to perform an "independent" evaluation to be used by the court in making its decision. *Id.* at 519. But the critical difference between the psychologist and Dennis is the fact that Dennis was appointed by the court pursuant to a court order, while the psychologist was not. *Id.* at 523-24. The lack of court appointment was the lynchpin in the *Zagaros* court's decision to deny immunity to the psychologist:

We decline to formally extend judicial immunity to custody evaluators without court appointment. . . . We do understand the logic of [the psychologist's] argument. For now, the doctrine of judicial immunity protects those who are appointed by the court to perform judicial or quasi-judicial functions The

district court in this case apparently did not
exercise its authority to appoint [the psychologist].

Id. (emphasis added).⁵ It is apparent from the decision in *Zagaros* that had the psychologist been appointed by the court – either by stipulation or otherwise – she would have been entitled to immunity. Because Dennis was appointed by the court, he is entitled to quasi-judicial immunity under the *Zagaros* decision.

The Court continues to follow the *Zagaros* decision and apply its rationale. Earlier this year, this Court this court confirmed that a court appointed custody evaluator was entitled to immunity, citing *Zagaros*. *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490, 2007 WL 3525 at * 3 (Minn. Ct. App. Jan. 2, 2007) (unpublished, R. App. 73) ("Although this court has declined to extend immunity to a custody evaluator who was not court-appointed, we agree that the rationales underlying immunity would extend to a court-appointed custody evaluator."). Ultimately, the only reason the defendant in *Kuberka* was not entitled to quasi-judicial immunity was because the alleged negligence took place prior to the court appointment and/or was alleged to have been performed outside the scope of the appointment. *Id.* There is no dispute that Dennis' allegedly negligent conduct took place after Dennis' court appointment and was within the scope of his court-appointed duties as an independent neutral evaluator.

⁵ And at least one member of the Court of Appeals considers the parties' agreement to be the dispositive issue, regardless of the appointment. *See Zagaros*, 558 N.W.2d at 524 (Davies, J., concurring specially) ("In this fact situation, [the psychologist] comes to the court with the same judicial immunity that he would enjoy had the district court appointed him directly.").

As the district court in this case recognized, important policy considerations also must inform this Court's decision regarding liability versus quasi-judicial immunity for court-appointed evaluators such as Dennis. In family law in particular, independent neutral evaluators such as Dennis "serve to reduce the costs to litigants and to increase the efficiency of family court in general." A-81. As the court explained, involving neutrals early "provide[s] swifter relief to all parties involved, children in particular." *Id.*

Dennis was appointed to provide an independent and neutral valuation of certain assets to allow the court to make an informed award. Such evaluations are necessary in contested cases such as Peterka's because judges often have neither the time nor expertise to evaluate the parties' assets and must be able to rely on a trusted and experienced evaluator such as Dennis. Independent, neutral, court-appointed evaluators are an integral part of dissolution proceedings.

The practical consequences of denying immunity to court-appointed evaluators also cannot be ignored. If accountants such as Dennis can be sued in connection with their court-appointed evaluation, a large pool of capable and experienced evaluators will no longer take the risk and serve as independent evaluators. And the risk is not insignificant in contested and fiercely-litigated dissolution proceedings, where one side or the other is bound to be unhappy with any evaluation. The Minnesota Supreme Court recognized this kind of risk over 100 years ago, and has explained the practical considerations for extending immunity to quasi-judicial officials charged with making a property valuation as follows:

If [the appraisers] were liable to have the

considerations upon which they make the valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it.

Stewart v. Case, 54 N.W. at 938-39 (emphasis added). This analysis is as valid today as it was then and should be heeded.

IV. PETERKA RELIES SOLELY ON OUT-OF-STATE CASE LAW THAT FAILS TO REFLECT MINNESOTA PUBLIC POLICY REGARDING QUASI-JUDICIAL IMMUNITY

Plaintiff relies heavily on out-of-state case law to support her contention that Dennis is not entitled to immunity. These out-of-state decisions are not binding on this Court and should not be relied upon as they fail to present similar facts and, more important, fail to reflect the policy underlying Minnesota decisions on the subject of quasi-judicial immunity. The cases also focus on whether an individual was entitled to immunity as an arbitrator which does not address the real issue before this court.

A. The Arbitrator/Appraisal Distinction is not Relevant

The foreign cases that Peterka cites rely heavily on an analysis inapplicable to the issue before this court. Specifically, Peterka argues that Dennis should not be entitled to quasi-judicial immunity because he did not act as an "arbitrator" and did not exercise judicial authority. Peterka cites several cases where the defendant accountant argued that it was entitled to immunity because it performed the specific functions of an arbitrator.

Peterka's argument misses the point. It is true under Minnesota law, and law in most other jurisdictions, that arbitrators are entitled to immunity. *See, e.g., L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376-77 (Minn. 1989). But Dennis does not seek

immunity based on functioning as an arbitrator. Dennis is entitled to immunity based on his court appointment as an independent neutral evaluator – a different quasi-judicial function. As the *Kipp* case confirms, judges are entitled to immunity, but so too are those "acting pursuant to explicit court directives." 454 N.W.2d at 643.

The test under Minnesota law for a professional to be entitled to quasi-judicial immunity does not hinge upon whether the professional acted as an "arbitrator." Instead, as the *Zagaros* court explained "For now, the doctrine of judicial immunity protects those who are appointed by the court to perform judicial or quasi-judicial functions." *Zagaros*, 558 N.W.2d at 523-24.

The Minnesota case upon which Peterka's argument primarily relies is the Minnesota Supreme Court decision in *Gammel v. Ernst & Ernst*, in which the court declined to extend immunity to an accountant retained by the parties to perform an audit upon which the sale price of stock was to be based. 245 Minn. 249, 72 N.W.2d 364 (1955). Unlike Dennis, the accountants in *Gammel* were not retained pursuant to a court order, nor were they retained to provide independent neutral testimony to a court. *Id.* at 250, 72 N.W.2d at 366. Accordingly, accountants tried to make an aggressive argument that they were entitled to immunity because they functioned as arbitrators. *Id.* There was no other basis. Unfortunately, the arbitrator immunity doctrine has a lengthy history and is quite restricted, particularly when applied to accountants performing appraisal functions. Accordingly, the court rejected the accountant's argument. Notably, the court explained that in certain circumstances quasi-judicial immunity was appropriate when it "called for the exercise of independent judgment or discretion." *Id.* at 255, 72 N.W.2d at

368. Dennis' court appointment as an independent neutral evaluator brings him under this exception, rendering *Gammel* inapposite.

B. Cases From Other States Cited by Peterka Are Distinguishable

Comins v. Sharkansky is one of the cases from outside Minnesota that Peterka relies upon in support of her argument that Dennis is not entitled to immunity. 644 N.E.2d 646 (Mass. App. Ct. 1995). In that case, the Massachusetts court declined to give quasi-judicial arbitrator immunity to an accountant who was appointed, pursuant to a settlement agreement, to conduct a binding appraisal. This case is distinguishable, as discussed above, first and foremost because it relies on the arbitrator/appraiser analogy inapplicable to Dennis. Significantly, it appears that the decision also was based on the fact that in Massachusetts, an accountant must perform the function of an arbitrator (i.e., issue binding findings) to be entitled to quasi-judicial immunity. Minnesota has no such requirement.⁶ Furthermore, although the agreement appointing the accountant was approved by the court for settlement purposes, it was not a court order and did not provide that the services were rendered to the court in connection with a court proceeding. *Id.* That court-approved settlement is entirely different than the case at bar, in which Dennis was appointed by the court to conduct a neutral evaluation for trial

⁶ As explained above, that *Gammel v. Ernst* declined to extend quasi-judicial immunity to accountants because they were not arbitrators is not on point. Because the accountants in *Gammel* were not court appointed to conduct an independent neutral evaluation for use at trial, they needed to fall under the more restrictive category of arbitrators to obtain immunity. Dennis is not restricted in the same manner as he was court appointed specifically to provide testimony in aid of the judicial determination of the value of the Peterkas' assets.

Peterka also cites a New Jersey case, *Levine v. Wiss & Co.*, 478 A.2d 397 (N.J. 1984), in support of her argument. *Levine* was decided, in part, on the basis that a court appointment pursuant to a stipulation did not remove the accountant from his contractual obligations to the parties, explaining that "court-appointment is not a talisman for immunity." *Id.* at 402. Minnesota has correctly rejected the theory that a stipulation negates a court appointment. *E.g., Mike v. Perfetti*, 1996 WL 33102 at *2 (R. App. 67).

Furthermore, *Levine* is inapplicable to this case because it too is based on the assumption that an accountant needs to be an "arbitrator" to be entitled to immunity. Finally, the context of the accountant's work in that case is significant. Like the accountant in *Comins*, the accountant in *Levine* was selected pursuant to a settlement agreement approved by the court. No similar court order was present comparable to Dennis' order from Judge Swenson. Moreover, the court explained that "defendants' role was indistinguishable from that of the experts often retained by the parties to a private contract to fix a term upon which they cannot agree or have not the expertise to determine." There is no similar pre-existing contract at issue in Dennis' case; the sole reason Dennis was selected and then court appointed was to provide testimony at trial which the judge could count on being neutral and unbiased. Finally, the *Levine* court in its analysis relies on older case law, including *Gammel*. But Minnesota law has advanced since that decision in 1955 and has steadily expanded the reach of quasi-judicial immunity.

Peterka also relies on a Georgia decision, *Arthur Andersen & Co. v. Wilson*, 353 S.E.2d 466 (Ga. 1987). That Georgia decision does not address the same strong policy in

favor of judicial immunity as reflected in Minnesota case law as it has developed over the years. Instead, the Georgia court relied on analysis of a Georgia statute pursuant to which an auditor was appointed. *Id.* Furthermore, the defendants in *Arthur Anderson* were accountants hired by the court-appointed witness and did not have their own court appointment. Thus that case has no bearing on the issue before this court, in which Dennis was directly appointed by the court.

Peterka also cites to numerous federal cases addressing the distinction between an arbitrator and an appraiser. As explained above, this distinction is a non-issue. Regardless, the analysis in the cases Peterka cites have nothing to do with immunity. Instead, the decisions for the most part concern whether an issue is covered by the Federal Arbitration Act. Only three of the cases Peterka cites addresses the issue in the context of immunity. The first, *Salt Lake Tribune v. Management Planning, Inc.*, 390 F.3d 684, 691 (10th Cir. 2004), is inapplicable here because the conduct did not occur pursuant to a court appointment. Indeed, it was not performed in connection with judicial proceedings of any kind. In contrast, Dennis' appointment was made for the specific purpose of providing an independent neutral evaluation for the trial of a dissolution proceeding.

The second case, *Horsell Graphic Industries, Ltd. v. Valuation Counselors, Inc.*, 639 F.Supp. 1117 (N.D. Ill. 1986), is similarly inapplicable. In *Horsell*, the parties had previously entered into a contract under which the purchase price for one partner's stock was to be set by an appraisal firm. The accounting firm selected to perform the appraisal was sued in connection with the appraisal. There was no court appointment, and no

litigation context at all. Accordingly, the accounting firm had to rely on the argument that it was entitled to immunity as an arbitrator. Dennis is not similarly bound, as he was court appointed to provide testimony at trial.

The third case, *E.C. Ernst, Inc. v. Manhattan Construction Co.*, 551 F.2d 1026 (5th Cir. 1977), does not even involve an accountant, much less a court appointment. That cases addressed whether an architect was entitled to immunity pursuant to his acts as an arbitrator under a construction contract. It is not even remotely applicable to the issue before this Court.

C. Out-of-State Cases Fail to Reflect Minnesota Public Policy

The above-mentioned out-of-state cases cited by Plaintiff also should be disregarded because these cases fail to reflect the policy considerations underlying the recent development of Minnesota law involving quasi-judicial immunity.

Minnesota courts have long recognized the concept of quasi-judicial immunity and have provided protection under this doctrine to a broad range of court-appointed individuals. *E.g.*, *Myers v. Scott*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (therapists and guardians ad litem), *overruled on other grounds*, *Burns v. Reed*, 500 U.S. 478 (1991); *Kipp v. Saetre*, 454 N.W.2d 639, 643 (Minn. Ct. App. 1990) ("The concept of quasi-judicial immunity is not new to Minnesota."); *Dziubak v. Mott*, 503 N.W.2d 771, 776-76 (Minn. 1993) (granting immunity from malpractice to public defenders); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376-77 (Minn. 1989) (granting arbitrator immunity from suit); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (conferring immunity on a guardian ad litem).

In providing quasi-judicial immunity to a variety of court-appointed professionals, Minnesota courts have recognized both the important service that these individuals provide to the court and the potential risk of losing the crucial services of qualified individuals if immunity was not provided. The Minnesota Supreme Court expressed this concern over one hundred years ago and provided immunity to assessors of property stating, "[i]f [the assessors] were liable to have the considerations upon which they make the valuations impeached at the suit of every dissatisfied property owner, it is doubtful if men fit to hold the office could be induced to take it." *Stewart v. Case*, 54 N.W. 938, 938-39 (Minn. 1893). The concern expressed by the Minnesota Supreme Court is still a concern today and should not be ignored by this Court. More importantly, the work of the assessor in *Stewart* is similar to the appraisal function performed by Dennis – both are charged with determining value of property whose value is in dispute. *Stewart* is therefore the controlling precedent in this case and must be relied upon to provide quasi-judicial immunity to Dennis and his firm.

Furthermore, in contrast to the cases cited by Plaintiff, two cases from other jurisdictions better reflect the policy concerns expressed by Minnesota courts in regard to quasi-judicial immunity. A Michigan appellate court, in a case with strikingly similar facts, upheld a lower court's order granting summary judgment to a court-appointed accountant who was sued for malpractice related to his services of valuing specific business assets in a divorce action. *Shatzman v. Cunningham*, No. 231712, 2002 WL 31955214, at *1 (Mich. Ct. App. Dec. 17, 2002) (unpublished, R. App. 69). While the lower court focused on granting immunity based on the doctrine of arbitral immunity, the

Court of Appeals correctly perceived that arbitrator immunity was not proper standard to apply, and stated:

The valuation of assets in a divorce case is a judicial fact-finding function. Hence, regardless of whether [the accountant's] valuations in plaintiff's divorce case are deemed findings of a "master," "arbitrator," or even an "expert," we hold that plaintiff's action against [the accountant] is barred based on quasi-judicial immunity because Cunningham's actions arose from his court-ordered appointment to resolve valuation disputes between the parties to the divorce action, a fact-finding function that involves judgment independent of the parties.

Id. at *3 (emphasis added). In another recent case with similar facts, the North Dakota Supreme Court upheld a court-appointed accountant's motion to dismiss an action for fraud. *Riemers v. O'Halloran*, 678 N.W.2d 547, 552 (N.D. 2004). The action was brought by a husband who alleged that the accountant committed fraud in determining his income in a divorce proceeding. Based on the foregoing, it is evident that Minnesota policy surrounding the doctrine of quasi-judicial immunity supports the granting of immunity to a broad array of court-appointed professionals, including accountants. The cases cited by Plaintiff from other jurisdictions inappropriately focus on the arbitrator issue, do not adequately reflect Minnesota's policy, and should not be relied upon in this case.

Failure to provide immunity to court-appointed accountants will cause highly qualified, respected, and experienced neutral evaluators like Dennis to refuse court appointments altogether because of the exposure to lawsuits brought by whichever party is unhappy with the neutral evaluation. Without immunity, the use of neutral evaluators

will likely no longer be readily available to family court judges. Obviously, there are strong public policy reasons to use neutrals and consequently grant them immunity.

V. DENNIS IS ENTITLED TO IMMUNITY EVEN IF NOT COURT-APPOINTED

The district court held that Dennis was entitled to quasi-judicial immunity under the circumstances of the case even if he was not explicitly court-appointed. As this Court made clear in *Zagaros*, whether court appointment is a prerequisite to quasi-judicial immunity is an unsettled issue and "will need to be looked at down the road." 558 N.W.2d at 524.

This case presents the appropriate opportunity for the Court to take up the issue again. As the district court reasoned in its order,

Minnesota courts have over the last century slowly and gradually extended quasi-judicial immunity to additional groups of professionals serving court functions. Accountants have since 2000 become more frequent targets of litigation. When combined with the litigious aspect of family law practice, an extremely volatile mix is created where the potential for secondary lawsuits increases dramatically.

A. 81. The public policy benefits to extending such immunity to neutrals cannot be understated. As the district court explained, the litigious nature of family court makes neutral evaluators tempting targets for additional litigation when the underlying matter does not proceed as hoped. The court system and litigants will suffer if immunity is not extended under these circumstances. And holding Dennis liable under these circumstances would be contrary to the understanding of all relevant players – Dennis himself, Peterka's attorneys (Haugan and Nordaune), and Mr. Peterka's attorney (Nill).

Immunity should be extended to Dennis, regardless of Dennis' court appointment, because he was functioning as an independent neutral evaluator. He was beholden to neither party. Indeed, each party was free to challenge Dennis' findings, retain their own expert, or otherwise distance themselves from Dennis' testimony. Clearly, Dennis was not an advocate and should not be treated as such. Extending immunity to Dennis and others in similar roles will strengthen the judicial system by encouraging capable professionals to undertake such work. Indeed, the Minnesota Supreme Court has recently adopted a set of Family Court Early Case Management Best Practices Recommended Guidelines, which specifically advises courts to use "neutral experts to value disputed assets." *In re Family Court Early Case Mgmt. and ADR Best Practice Guidelines*, ADM-04-8002 (Minn. Apr. 23, 2004), available at <http://www.minnlawyer.com/opinions/040510/adm048002.htm>. Without immunity, the pool of available neutrals will shrink and the system will suffer.

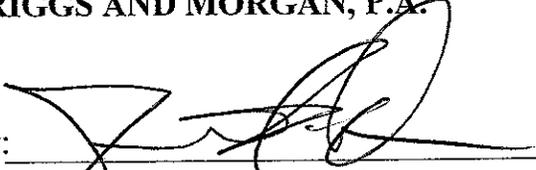
The fact that Dennis was appointed by stipulation is also significant. As Judge Davies points out in his concurring opinion in *Zagaros*, because "the parties then jointly chose [the neutral] ... [the neutral] comes to the court with the same judicial immunity that he would enjoy had the district court appointed him directly." 558 N.W.2d at 524 (Davies, J., concurring specially).

CONCLUSION

Summary judgment for Dennis should be affirmed. Alternatively, Peterka's appeal can be dismissed as untimely pursuant to the informal memorandum filed in response to this Court's March 9, 2007 Order.

Dated: March 26, 2007

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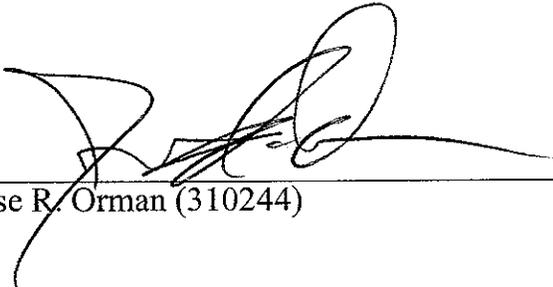
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents Stephen G. Dennis, Certified Public Accountant and Baune, Dosen & Co., certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 7,631 words, including headings, footnotes and quotations (and excluding the Table of Contents and Table of Authorities).

Dated: March 26, 2007



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