

NO. A07-0165

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State of Minnesota  
**In Supreme Court**

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Catherine F. Peterka,

*Respondent,*

vs.

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

*Appellants,*

Todd R. Haugan, Attorney at Law,

*Defendant.*

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**APPELLANTS' BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

1. Does quasi-judicial immunity protect an independent neutral who is appointed pursuant to a court order to evaluate a business's value during marital dissolution litigation?

The district court held that an independent neutral evaluator who is court-appointed to recommend the value of businesses in marital dissolution litigation is entitled to quasi-judicial immunity. The district court also determined that public policy concerns support granting quasi-judicial immunity to independent neutrals even if they are not court-appointed.

The court of appeals reversed, concluding that immunity does not apply because the independent neutral evaluator does not act "as a decision-maker to determine competing claims." (A.114.) Similarly, the court of appeals concluded that public policy does not support granting the neutral evaluator immunity because he provided "a service to the parties, not the court," even though the court observed that the evaluator aided the district court's decision-making. (*Id.*)

### **Apposite Authorities:**

*Linder v. Foster*,  
209 Minn. 43, 295 N.W. 299 (1940).

*Melady v. S. St. Paul Live Stock Exch.*,  
142 Minn. 194, 171 N.W. 806 (1919).

*Imbler v. Pachtman*,  
424 U.S. 409 (1976).

## STATEMENT OF THE CASE

This dispute arises out of a disgruntled litigant's negligence claim against a court-appointed independent neutral evaluator who testified in marital dissolution proceedings over ten years ago. (A.109.<sup>1</sup>) During the dissolution action, the district court issued an order requiring the parties' businesses to be valued by an independent evaluator. (A.80.) Respondent Catherine Peterka signed a stipulation with her husband to ask the trial court to appoint Appellant Stephen G. Dennis and Baune, Dosen & Co. (collectively referred to as "Dennis") as the independent neutral to provide an opinion on the value of two businesses relevant to the dissolution proceeding. (A.1-3.) The Hennepin County District Court, the Honorable James T. Swenson presiding, approved the parties' stipulation and appointed Dennis to act as an independent neutral. (A.2.) Dennis conducted the evaluation, prepared a report and testified at trial. (A.53, 110.) The trial court adopted Dennis's conclusion of the businesses' value and entered judgment. (A.8-9, 26-27, 110.) No appeal was taken from this judgment.<sup>2</sup>

Years later, Peterka sued Dennis and her former attorney for negligence in the marital dissolution proceeding. (A.29-37.) Dennis moved for summary judgment on the ground that he was entitled to quasi-judicial immunity.<sup>3</sup> (A.88-98.)

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<sup>1</sup> "A." refers to Appellants' Appendix.

<sup>2</sup> Later, Peterka appealed unsuccessfully from the district court's subsequent order modifying spousal maintenance, an issue with which Dennis had no involvement. *Peterka v. Peterka*, 675 N.W.2d 353 (Minn. Ct. App. 2004) (A.38-51).

<sup>3</sup> Peterka's former attorney also moved for summary judgment. (A.89.) After the

The Hennepin County District Court, the Honorable Tony N. Leung presiding, held that Dennis was entitled to quasi-judicial immunity. (A.98.) The district court decided Dennis was a court-appointed neutral. (A.96-98.) The district court also held that public policy supported applying quasi-judicial immunity to Dennis even absent court appointment, relying on the “theory that persons who are integral to the judicial process must be able to perform their functions without the intimidating effect of potential lawsuits.” (*Id.*) The district court entered judgment for Dennis. (A.99.) After Peterka’s claim with her former attorney was resolved, final judgment on the remaining claims was entered. (A.100-01.) Peterka filed a notice of appeal. (A.102-03.)

The court of appeals reversed. Relying almost entirely on *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955), the court determined that Dennis was not entitled to quasi-judicial immunity because he was not a “decision-maker” and, therefore, he was not appointed to perform a “judicial function.” *Peterka v. Dennis*, 744 N.W.2d 28, 32 (Minn. Ct. App. 2008) (A.108-16). The court also concluded that public policy does not favor granting quasi-judicial immunity to an independent neutral evaluator. *Id.* at 32-33 (A.114-16). Dennis petitioned for further review, and this Court granted the petition. (A.117-18.)

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district court denied the motion, Peterka’s former attorney settled. (A.110.)

## STATEMENT OF FACTS

### A. The Underlying Marital Dissolution Litigation

Peterka was party to a marital dissolution action commenced in 1996. (A.30.)

One of the issues in the dissolution proceeding was the value of the parties' interest in two businesses – Deerbrooke Construction, Inc. and Mark Charles, Inc. (*Id.*)

#### 1. The Parties Agreed To Retain An Independent Neutral Evaluator And The Court's Order Provided A List of Neutrals

The parties agreed to have the businesses valued by an independent neutral evaluator. (A.61, 63.) Consistent with this agreement, the trial court issued an order for temporary relief, and identified a list of neutrals the parties should use:

The parties' business will be valued by an independent evaluator from Judge Davidson's list of neutrals. Each party shall advance one-half of the retainer with final responsibility for the entry fee reserved.

(A.78-81.)

The parties selected an evaluator, who later withdrew. The parties then asked Dennis to act as the independent neutral evaluator. (A.62-63.) Dennis is a partner at Baune, Dosen and has performed hundreds of business and property evaluations in the marriage dissolution context. (A.52, 62-63, 65-66, 72.) Before he would agree to perform this valuation, Dennis required that the court appoint him. (*Id.*) Dennis requested the court appointment to avoid litigation by disgruntled parties. (A.65-66, 72.)

## **2. The Parties Stipulated To Dennis And The Court Appointed Dennis**

The parties stipulated to Dennis's appointment, and submitted the stipulation and a proposed order to the trial court. (A.1-3, 62-63.) On September 30, 1997, the trial court approved the parties' stipulation and entered an order.

1. The parties shall cooperate with an independent neutral evaluation of the value of the parties' business assets by Steve Dennis, CPA, JD. Each party shall within three days of entry of this Order advance one-half of the retainer requested by Mr. Dennis. Each party shall be responsible for one-half of Mr. Dennis' total evaluation fee and costs. If a party fails to cooperate and promptly sign and provide all documents as requested by Mr. Dennis, that party shall be responsible for attorney fees incurred in seeking court enforcement of this Order and Stipulation for Order or sanctions.

(A.1-3.) The trial court sent a copy of the order directly to Dennis. (A.66-67.) The order required each party to cooperate with Dennis, pay his fees, and any failure to comply could subject the parties to "sanctions." (A.2.)

Dennis understood his appointment was pursuant to Rule 706 of the Minnesota Rules of Evidence. (A.52, 73-75, 77.) The parties' attorneys also understood Dennis was court-appointed. (A.62-63, 86-87.) Consistent with Dennis's neutral role and court-appointed status, everyone agreed and understood that the parties were not to have *ex parte* contact with Dennis. (A.73-75, 77.)

## **3. Dennis Performed The Evaluation, The Court Tried The Case And Adopted Dennis's Evaluation In The Final Judgment**

Dennis conducted an independent and neutral evaluation of the businesses' value and prepared a report. (A.53.) Dennis testified in court relating to his opinions and valuations. (A.54.)

During this litigation, Peterka's attorney testified that he did not completely rely on Dennis's opinion because he was "kind of like the judge." (A.87.) Instead, Peterka retained Howard Kaminsky, as a so-called "shadow expert," to review Dennis's report. (A.83-85.) Although Kaminsky's main role was with respect to the maintenance calculation, and not the business valuation, Kaminsky was asked to review Dennis's report for cross-examination, but found no potential weaknesses. (*Id.*) Kaminsky eventually testified at trial regarding only the maintenance issue, and was available to testify as needed regarding Dennis's report, but did not.

After the trial, the trial court issued Findings of Fact, Conclusions of Law and an Order for Judgment. (A.4-28.) The trial court adopted Dennis's determination of the businesses' value and considered this in the final distribution of the marital estate. (*Id.*)

### **FINDINGS OF FACT**

...

25. The parties retained Steve Dennis, CPA, JD, as an independent neutral to conduct an evaluation of the parties' businesses.

26. Dennis found that the Fair Market Value of the parties' 50% interest in Deerbrooke Construction, Inc. as of December 31, 1996, was \$75,000. As of December 31, 1996, the Fair Market Value of Mark Charles was \$270,000.

27. He prepared an updated valuation just before trial. Based on September 30, 1997 figures, the value of the parties' share in Deerbrooke has increased to \$86,000.00 and the value of the parties' share in Mark Charles has increased to \$275,900.00, for a total value of \$361,900.00.

...

## CONCLUSIONS OF LAW

...

As set forth in the Findings and above, Respondent's [Peterka's] disbursement from Mark Charles and Deerbrooke totals \$180,950 (43,000 + 137,950), repayable with monthly interest payments of \$1,206.33 (8%) until June, 2004, and the principal of \$180,950 then payable as a lump sum. Petitioner's interest in both companies shall serve as security for repayment. Counsel for Respondent is directed to draft the requisite instrument(s) for filing in the proper location.

(A.8-9, 27.)<sup>4</sup>

Peterka did not appeal the final judgment. Importantly, Peterka raised *no issues* with regard to the trial court's decision to adopt Dennis's valuation of the businesses.

### **B. This Negligence Suit**

Unhappy with the ultimate outcome of the underlying dissolution proceedings, Peterka commenced a negligence action against Dennis, his accounting firm, and Peterka's former attorney nearly six years after the trial court adopted Dennis's value determination and dissolved the marriage. (A.29-37.)

#### **1. This District Court Concluded That Dennis Is Entitled To Quasi-Judicial Immunity**

The district court granted Dennis summary judgment, concluding that quasi-judicial immunity protected Dennis. (A.88-98.) The district court determined that Dennis was court-appointed and rejected Peterka's contrary argument because she did "not point to a single fact which would tend to show that Accountant was not court

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<sup>4</sup> In the trial court's conclusions of law, \$43,000 represented 50% of the value Dennis recommended for Deerbrooke (\$86,000); and \$137,950 represented 50% of the value Dennis recommended for March Charles, Inc. (\$275,900). (A.8-9, 26-27.)

appointed.” (A.93-94.) The district court relied on public policy on concerns that weighed in favor of granting immunity. “[E]xtending quasi-judicial immunity to Accountants encourages professionals to become involved as independent neutrals and/or experts. This is particularly important in the family law area where independent neutral evaluators serve to reduce the costs to litigants and to increase the efficiency of family court in general.” (A.96-97.) The court also noted that “these professionals serve a court function by providing a basis on which the court can ground its decision.” (A.97.) The court determined that, even if Dennis had not been court-appointed, he is entitled to quasi-judicial immunity based on “public policy concerns and the overall trend in terms of extending quasi-judicial immunity[.]” (A.96-98.)

## **2. The Court of Appeals Reversed**

The court of appeals reversed. *Peterka v. Dennis*, 744 N.W.2d 28 (Minn. Ct. App. 2008) (A.108-16). Despite the presence of a court order, that court of appeals noted that “it appears that there is a question of fact on” whether Dennis was a court-appointed neutral. *Id.* at 31 (A.112-13). The court determined, however, that whether Dennis was court-appointed does not end the inquiry because quasi-judicial “immunity only extends to the exercise of judicial authority.” *Id.* (A.113). Relying almost entirely on *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955), the court determined that Dennis was not retained “as a decision-maker to determine competing claims of appellant and her husband.” *Peterka*, 744 N.W.2d at 32 (A.114).

The court of appeals also reversed the district court’s conclusion that public policy supports applying quasi-judicial immunity to Dennis. *Id.* at 32-33 (A.114-16). The court

determined that “Dennis was providing a service to the parties, not the court, by providing evidence to the court on the value of the businesses at issue.” *Id.* at 32 (A.114). The court stated that “[g]enerally, judicial immunity applies to those who resolve disputes through the exercise of independent and impartial judgment[.]” *Id.* at 33 (A.115). The court concluded that “[u]nder the facts of this case, ... the language in *Gammel* does not support a grant of quasi-judicial immunity to an accountant valuing assets in a dissolution action purely on public policy grounds.” *Id.* at 32-33 (A.115).

## ARGUMENT

### I. STANDARD OF REVIEW

“The applicability of immunity is a question of law, which this court reviews *de novo*.” *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004). A district court’s decision on a motion for summary judgment is also subject to *de novo* review. *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000).

### II. QUASI-JUDICIAL IMMUNITY PROTECTS COURT-APPOINTED INDEPENDENT NEUTRALS

This appeal presents a narrow question: whether Dennis is entitled to quasi-judicial immunity. Defendants entitled to immunity “cannot be called to account in a civil action for his determinations and acts in his judicial capacity, however erroneous or by whatever motives prompted.” *Linder v. Foster*, 209 Minn. 43, 46, 295 N.W. 299, 300 (1940) (quotes omitted). In other words, the issue before the Court is not whether Dennis was negligent, but whether he is subject to suit. *See Melady v. S. St. Paul Live Stock Exch.*, 142 Minn. 194, 196, 171 N.W. 806, 807 (1919) (quasi-judicial tribunal is “protected by the rule that a civil action for damages does not lie against one whose acts, however, erroneous they may have been, were done in the exercise of judicial authority clearly conferred, no matter by what motives such acts may have been prompted”). Consequently, it is irrelevant, for the purposes of this appeal, whether Dennis correctly evaluated and recommended the businesses’ value in the dissolution action (he clearly did). That question arises only if he is not entitled to quasi-judicial immunity.

### **A. Immunity And Quasi-Judicial Immunity In Minnesota**

This Court has historically “extended immunities to participants within the judicial system.” *Dziubak v. Mott*, 503 N.W.2d 771, 774 (Minn. 1993). Immunity protects judicial participants “so that [they] may feel free to act upon [their] own convictions, uninfluenced by any fear or apprehension of consequences personal to [themselves].” *Linder*, 209 Minn. at 45, 295 N.W. at 300. The United States Supreme Court has held that immunity extends to “all persons – governmental or otherwise – who were integral parts of the judicial process.” *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). The reason for the rule is to encourage full disclosure in court proceedings so the truth may be determined. *Id.*

The court of appeals’ decision relied on an overly narrow view of the immunity doctrine when it held that Dennis was not entitled to quasi-judicial immunity because he did not “resolve disputes.” Although no single case sets out the applicable factors to consider when deciding whether quasi-judicial immunity applies, a careful review of this Court’s precedent reveals that this Court has established criteria for determining how, when and under what circumstances judicial participants are immune from civil liability. The rule that this Court has implicitly applied, and should now formally adopt, is: A party receives quasi-judicial immunity when two requirements are met: (1) the party was court-appointed, and (2) the party performed a judicial or quasi-judicial function within a judicial proceeding.

## **1. Immunity Attaches Through Court Appointment**

Quasi-judicial immunity protects a person who has been court-appointed to perform a judicial function within a judicial or quasi-judicial proceeding. *See Melady*, 142 Minn. at 197, 171 N.W. at 807 (“[t]he protection afforded by the rule ought not to be confined to those having to do with the trial and decision of lawsuits only, but should be extended to all to whom the law or the agreement of the parties commits the exercise of authority of an essentially judicial nature.”); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (court-appointed guardian *ad litem* entitled to immunity); *Linder*, 209 Minn. at 48, 295 N.W. at 301 (court-appointed physician and surgeon were quasi-judicial officers and entitled to immunity). The court of appeals correctly recognized that immunity applies to persons who are appointed by the trial court.

## **2. Immunity Applies When Performing Functions Closely Associated With A Judicial Proceeding When Performed Within A Judicial Proceeding**

For nearly a century, Minnesota case law has consistently reflected that quasi-judicial immunity is not “confined to those having to do with the trial and decision of lawsuits only[.]” *Melady*, 142 Minn. at 197, 171 N.W. at 807. Instead, it applies to persons whose judicial or quasi-judicial functions are closely associated with the judicial process. *Id.*; *Linder*, 209 Minn. at 45, 295 N.W. at 300 (“[F]or acts done in the exercise of judicial authority, clearly conferred, an officer or judge shall not be held liable to any one in a civil action, so that he may feel free to act upon his own convictions, uninfluenced by any fear or apprehension of consequences personal to himself.”).

The United States Supreme Court has recognized that the first factor regarding the person's status – whether or not the person is court-appointed – is less important than the second factor – the function the person performs and whether that function is being performed within a judicial or quasi-judicial proceeding. *See Briscoe*, 460 U.S. at 342 (“our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.”). *See also Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987)<sup>5</sup> (“[I]mmunity depends not upon [appellant’s] status as a prosecutor but upon the functional nature of the activities of which [respondent] complains[.]”) (quotes omitted), *abrogated in part on different grounds by Burns v. Reed*, 500 U.S. 478 (1991). Instead, immunity attaches where the “functional nature of the [defendant’s] activities” are “intimately associated with the judicial” process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). A neutral who performs one or more of the judicial functions is immune even though he does not perform *all* of the judicial functions, i.e., he does not make the ultimate adjudication.

Whether federal or Minnesota state case law is examined, the rule established is that quasi-judicial immunity applies to persons performing a function closely associated with a judicial proceeding. Immunity protects people other than judges “because their judgments are ‘functional[ly] comparab[le]’ to those of judges – that is, because they, too, ‘exercise a discretionary judgment’ as part of their function.” *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) (quoting *Imbler*, 424 U.S. at 423 n.20). The

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<sup>5</sup> *cert. denied* 484 U.S. 828 (1987).

Eighth Circuit echoed the Supreme Court's focus on the defendant's function within the judicial process when it stated, "nonjudicial persons who fulfill quasi-judicial functions *intimately related to the judicial process* have absolute immunity for damages claims arising from their performance of the delegated functions." *Myers*, 810 F.2d at 1466-67 (emphasis added). The court noted that the defendants are acting "as an arm of the ... judge" by, among other things, performing the function for the court, e.g., conducting an evaluation and preparing the report, and the judge's subsequent use of the report in making the ultimate decision. *Id.*

In this case, the court of appeals stated that the only "judicial function" that receives immunity is that of a "decision-maker." *Peterka*, 744 N.W.2d at 32-33 ("*Dennis was retained ... not as a decision-maker* to determine competing claims of appellant and her husband. [Thus] we conclude that even if Dennis was a court-appointed neutral, he was not appointed to perform a judicial function, and therefore is not entitled to quasi-judicial immunity.") (emphasis added); ("[g]enerally, judicial immunity applies to those who *resolve disputes* through the exercise of independent and impartial judgment[.]") (emphasis added).

The court of appeals got it half right – decision-makers are indeed entitled to immunity. This Court has concluded decision-makers such as judges, arbitrators, court commissioners, city council members and even a board of directors acting as arbitrators are entitled to immunity. *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376 (Minn. 1989) (arbitrators immune); *DePalma v. Rosen*, 294 Minn. 11, 15-16, 199 N.W.2d 517, 519-20 (1972) (city council members immune); *Linder*, 209 Minn. at 44-48, 295

N.W. at 300-01 (court commissioner entitled to immunity); *Melady*, 142 Minn. at 196-98, 171 N.W. at 807-08 (board of directors acting in a quasi-judicial function are immune); *Stewart v. Case*, 53 Minn. 62, 66, 54 N.W. 938, 939 (1893) (tax assessor immune from negligence suit); *Stewart v. Cooley*, 23 Minn. 347, 350 (1877) (judges immune from civil liability).

This Court has not, however, limited immunity – as the court of appeals did below – to just “decision-makers” or “those who resolve disputes.” Rather, this Court has granted immunity to examining physicians and surgeons, guardians *ad litem* and receivers. *Tindell*, 428 N.W.2d at 387 (guardians *ad litem* immune from negligence suit); *Linder*, 209 Minn. at 48, 295 N.W. at 301 (court-appointed examining physicians and surgeons immune from negligence suit); *Schmidt v. Gayner*, 59 Minn. 303, 308, 62 N.W. 265, 265 (1895) (receivers immune from negligence suit). What all of these persons or roles have in common are two things: independence and neutrality – both of which are hallmarks of the judicial function.<sup>6</sup>

The Eighth Circuit has similarly applied immunity to psychologists and guardians *ad litem* who did not make decisions, but conducted evaluations and reported opinions and recommendations to the trial court. *Myers*, 810 F.2d at 1466-68 (court-appointed

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<sup>6</sup> Minnesota courts have also extended immunity to appointed advocates who are not neutral but without whom our court system could not function effectively. *See, e.g., Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 213 (Minn. 1981) (prosecutors immune from negligence suit); *Dziubak*, 503 N.W.2d at 775-78 (public defenders immune from negligence suit); *Kipp v. Saetre*, 454 N.W.2d 639, 643-45 (Minn. Ct. App. 1990) (prosecutor and probation officer immune from negligence suit).

guardians *ad litem* and psychologists immune from negligence suit; psychologist who was not court-appointed also immune). In other cases, the court of appeals has recognized that immunity protects non-“decision-makers” such as therapists. *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. Ct. App. 1990) (therapist and clinic immune from negligence suit).

In addition, and perhaps obviously, quasi-judicial immunity only applies when a person performs the quasi-judicial function during a judicial or quasi-judicial proceeding. See, e.g., *Tindell*, 428 N.W.2d at 387 (guardian *ad litem* in court proceeding is immune); *Linder*, 209 Minn. at 48, 295 N.W. at 301 (examining physicians are quasi-judicial officers in court proceedings and are immune). See also *Dziubak*, 503 N.W.2d at 775-78 (public defenders in court proceedings are immune); *Brown*, 314 N.W.2d at 213 (prosecutors in judicial proceedings are immune).

Quasi-judicial immunity does not, however, attach where no judicial or quasi-judicial proceedings are involved. In *Gammel v. Ernst & Ernst*, 245 Minn. 249, 254-58, 72 N.W.2d 364, 368-70 (1955), this Court held that quasi-judicial immunity does not extend to private “contracts of employment” where no judicial or quasi-judicial proceedings are involved.<sup>7</sup> There, a neutral third-party was not entitled to quasi-judicial immunity because the third party was hired to provide an evaluation for one aspect of an agreement between two parties. *Id.* In that case, there was no judicial or quasi-judicial proceeding, and the parties were simply trying to finalize a transaction.

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<sup>7</sup> *Gammel* is discussed in more detail at *infra* II.C.

In sum, the terms of the immunity being sought are important – “quasi-*judicial* immunity.” Thus, before quasi-judicial immunity can attach, the defendant must have performed a judicial function in a judicial or quasi-judicial proceeding – i.e., litigation or arbitration.

## **B. Dennis Is Entitled To Quasi-Judicial Immunity**

As noted above, this Court’s precedent suggests that a party should receive quasi-judicial immunity when two criteria are met: First, the party has been court-appointed, and second, the party performs a judicial function during a judicial or quasi-judicial proceeding. When these criteria are applied to the undisputed facts of this case, Dennis should be immune from liability under the doctrine of quasi-judicial immunity.<sup>8</sup>

### **1. The Court Appointed Dennis**

The court of appeals erred in concluding that there was a fact issue on whether Dennis was court-appointed. *Peterka*, 744 N.W.2d at 31 (A.112-13). There were no facts in dispute because Dennis’s appointment was entirely based upon the trial court’s orders, which show Dennis was appointed by the court to perform an independent neutral evaluation of the businesses. (A.1-3, 80.)

The trial court first ordered that “[t]he parties’ business will be valued by an independent evaluator from Judge Davidson’s list of neutrals.” (A.80.) After the first

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<sup>8</sup> As Dennis’s employer, Baune, Dosen is vicariously entitled to immunity. *Lutheran Day Care v. Snohomish County*, 829 P.2d 746, 750 (Wash. 1992) (an employer “which employs an officer also enjoys the quasi-judicial immunity of that officer for the acts of that officer”); *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. Ct. App. 1990). *Peterka* has not claimed otherwise.

evaluator withdrew, the parties stipulated to designate Dennis as the independent evaluator to “value[]” the businesses, pursuant to the temporary order. The parties submitted the stipulation to the trial court, which approved the stipulation and issued an order appointing Dennis. (A.1-3.) Significantly, the order characterized Dennis as an “independent neutral” evaluator, specifically required each party to cooperate with Dennis, advance one-half of his retainer, and be responsible for one-half of his total fee and costs. (*Id.*)

Furthermore, the order placed the full power of the court behind Dennis’s appointment, subjecting the parties to attorney fees and other sanctions for failure to comply. (*Id.*) Like any other court order, this order could also be enforced through the trial court’s contempt powers. *See* Minn. Stat. § 588.01, subd. 3(3) (2006); Minn. Stat. § 588.02 (2006). In contrast to Dennis’s appointment as a neutral evaluator, an ordinary witness does not have the court’s authority behind him to gain party cooperation during the litigation. The court of appeals queried whether a question of fact existed, but no “facts” need to be resolved because Dennis’s appointment was based on unambiguous court orders.

Other record facts, not disputed by Peterka, also support the conclusion that Dennis was court-appointed. Before Dennis’s appointment, the husband’s attorney confirmed by letter that Dennis specifically requested a court appointment as a condition to performing the evaluation. (A.70.) Dennis would not have performed the work without the court’s appointment. After the court issued the order, the attorneys considered Dennis to be a court-appointed independent neutral. (A.62-63 (“Dennis was

court-appointed to act as an independent, neutral evaluator’)). The attorneys believed that Dennis was performing the valuation on behalf of the trial court. (*Id.* (“the valuation conducted by Mr. Dennis was performed on behalf of the court as agreed to by the parties.)). Peterka presented no evidence in dispute. Indeed, as the district court concluded, Peterka did “not point to a single fact which would tend to show the Accountant was not court appointed.” (A.94.)

Importantly, the parties’ understanding that Dennis was court-appointed was based on 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.”). Rule 706 does not require any “magic language.” Instead, the Rule explains the court’s power to appoint a witness and then gives some guidelines. For example, the rule requires that the witness advise the parties of his or her findings in writing and that the witness’ compensation be paid by the parties as directed by the court. Minn. R. Evid. 706(a), (b).

Here, the order meets all of the Rule 706 requirements. It spells out Dennis’s duties and requires the parties to each pay half of Dennis’s fees. (A.1-3.) Moreover, Dennis complied with Rule 706 requirements as he provided two written reports to the parties. (A.74.) Peterka even took advantage of Rule 706’s provision that allows the parties to retain and call their own experts and not rely solely on the court-appointed expert. Minn. R. Evid. 706(d). Indeed, Peterka retained her own “shadow” expert, which she chose not to call to testify regarding Dennis’s testimony on the business valuation.

Thus, the district court orders and other record evidence established that Dennis was court-appointed.

The undisputed record evidence, including the trial court's orders, indicates that Dennis was court-appointed to perform an independent neutral evaluation and recommend the value of the businesses. Thus, Dennis meets the first prerequisite to obtaining quasi-judicial immunity.

## **2. The Parties' Stipulation Enhanced And Did Not Diminish Dennis's Court Appointment**

Peterka argued that the order was not a court "appointment" because it was based on a stipulation. Initially, it is undisputed that the parties stipulated that Dennis was to be the independent evaluator who would provide expert testimony on the value of the businesses. (A.1-3.) The parties selected Dennis in order to comply with the trial court's order that "[t]he parties' business will be valued by an independent evaluator." (A.80.) *See generally* Minn. R. Evid. 706(a) (a witness can be appointed as "agreed upon by the parties").

Peterka's point, however, has no basis in the law. A stipulation for an order does not negate the subsequent order. If the opposite were true, every stipulation for an order of dismissal would make the subsequent order vulnerable to challenge because it was entered based upon the parties' stipulation. If anything, the parties' stipulation makes the subsequent court order appointing Dennis more conclusive because neither party can object to the merits of the order or its enforcement. *See Shirk v. Shirk*, 561 N.W.2d 519, 521-22 (Minn. 1997) ("Courts favor stipulations in dissolution cases as a means of

simplifying and expediting litigation, and to bring resolution to what frequently has become an acrimonious relationship between the parties. ... [W]hen a judgment and decree is entered based upon a stipulation, we hold that the stipulation is merged into the judgment and decree and the stipulation cannot thereafter be the target of attack by a party seeking relief from the judgment and decree.”). Indeed, this Court has recognized that a court-approved stipulation collaterally estops parties from re-litigating issues. *Kronzer v. First Nat’l Bank of Minneapolis*, 305 Minn. 415, 428-29, 429 n.19, 235 N.W.2d 187, 195, 195 n.19 (1975) (“Both the stipulation, as approved by the district court, and the order of distribution should be treated as having a collateral estoppel effect equivalent to that of a consent judgment and precluding litigation of all issues which could have been litigated at that time”).<sup>9</sup> Thus, the parties’ stipulation actually enhances Dennis’s appointment.

Although not necessary to the decision in this case because Dennis’s appointment was the product of a court order *and* the parties’ stipulation, it is worth noting that immunity may also attach where the parties stipulate to having someone perform certain

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<sup>9</sup> In an unpublished decision, the court of appeals correctly rejected Peterka’s argument in the immunity context: “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.” *Mike v. Perfetti*, No. C3-95-1650, 1996 WL 33102, at \*2 (Minn. Ct. App., Jan. 30, 1996) (A.148-50). Even though the parties agreed to the custodian before the court appointment, the custodian was entitled to quasi-judicial immunity “for all conduct within the scope of his appointment as receiver.” *Id.* at \*3.

functions in a judicial or quasi-judicial proceeding.<sup>10</sup> For example, arbitrators have immunity, even though they are selected through a stipulation or an agreement between the parties. *L & H Airco*, 446 N.W.2d at 376-77 (“The parties to the underlying dispute in this case agreed to resolve their differences through binding arbitration under the rules of the American Arbitration Association[.]”). Similarly, a board of directors of a corporation who, by contract, acted in a quasi-judicial function is immune from civil liability. *Melady*, 142 Minn. at 196, 171 N.W. at 807. Also, the Eighth Circuit has determined that one psychologist who performed an evaluation for judicial proceedings, but was not court-appointed, was entitled to immunity. *See Myers*, 810 F.2d at 1466-68. In sum, this Court has applied quasi-judicial immunity to protect court-appointed *or* party-stipulated defendants who performed judicial functions within judicial or quasi-judicial proceedings.

Consequently, even if Dennis had not been court-appointed, the parties’ stipulation to have Dennis recommend a value for the businesses – an issue that would otherwise need to be resolved by the court – confers quasi-judicial immunity upon Dennis. *L & H*

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<sup>10</sup> The court of appeals’ decision incorrectly implies that *only* court-appointed neutrals may obtain immunity. *Peterka*, 744 N.W.2d at 31 (noting there is a “question of fact” on whether Dennis was court-appointed but assuming appointment for its decision). This is not the first time the court of appeals has limited immunity to court-appointed persons. *See Zagaros v. Erickson*, 558 N.W.2d 516, 523 (Minn. Ct. App. 1997) (“We decline to formally extend judicial immunity to custody evaluators without court appointment. ... For now, the doctrine of judicial immunity protects those who are appointed by the court to perform judicial or quasi-judicial functions.”). *See also Sloper v. Dodge*, 426 N.W.2d 478, 479 (Minn. Ct. App. 1988) (reversing because a fact question existed as to whether a therapist was court-appointed so that he would be entitled to discretionary immunity as a quasi-judicial officer).

*Airco*, 446 N.W.2d at 376 (arbitrators entitled to immunity, even though no court appointment involved); *Melady*, 142 Minn. at 196-98, 171 N.W. at 807-08 (agreement to arbitrate through contract entitled corporate board of directors conducting an arbitration to immunity). The stipulation here – pursuant to the trial court’s requirement – granted Dennis the authority to recommend the value of the business, which would be reviewed by the district court. (A.1-3, 80.) Thus, even absent the order appointing him, Dennis meets the first prerequisite to obtaining quasi-judicial immunity.

Again, the Court need not decide whether the parties’ stipulation would be enough, by itself, to confer immunity. Here, there was an order appointing Dennis and, at the very least, the stipulation reinforced that order and presented an even stronger case for immunity.

### **3. Dennis Performed A Quasi-Judicial Function In A Judicial Proceeding**

Dennis was appointed to perform a function that is closely associated with the judicial process. His function was to evaluate and make recommendations on the resolution of one disputed issue – the value of the businesses. (A.80 (“[t]he parties business *will be valued* by an independent evaluator”) (emphasis added)).

Determining the value of businesses is a judicial function. First, had Dennis not been appointed, the trial court would have had to independently evaluate and determine the value of the businesses, which probably would have required weighing conflicting expert testimony. Dennis’s “acts [were] done in the exercise of judicial authority,” which was “clearly conferred[.]” *Linder*, 209 Minn. at 45, 295 N.W. at 300. Second, Dennis’s

independence fosters an impartial determination. Dennis's function was to value the disputed property by engaging in a vigorous examination without bias towards either party. This independence is another central judicial function that must be protected. As this Court noted, "[i]mmunity is necessary to avoid harassment from disgruntled parents who may take issue with any or all of" the neutral's evaluator's actions. *Tindell*, 428 N.W.2d at 387.

In similar cases, this Court has held independent neutrals that perform evaluations and make recommendations for the benefit of the court are performing a quasi-judicial function and, thus, are entitled to immunity. In *Linder*, this Court held that physicians and surgeons who were appointed to examine the plaintiff and report on her mental condition were performing a judicial function. 209 Minn. at 48, 295 N.W. at 301. The Court concluded "[i]t is clear that these defendants were quasi judicial officers and that what they did was in the scope of their duties as such. That being so, they are within the protection of the rule and immune from suit." *Id.* Similarly, guardians *ad litem* perform a judicial function by acting in furtherance of the child and are entitled to quasi-judicial immunity. *Tindell*, 428 N.W.2d at 387. Court-appointed custody evaluators are also entitled to quasi-judicial immunity because they perform a judicial function by providing the court with an independent evaluation of the custody case. *Zagaros*, 558 N.W.2d at 519-24 (recognizing court-appointed custody evaluators are entitled to immunity, but declining to apply immunity where no court appointment); *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490, 2007 WL 3525, at \*3 (Minn. Ct. App. Jan. 2, 2007) (court-appointed custody evaluator immune from negligence suit) (A.145-47).

This Court's decision in *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987) illustrates that business valuation is a "judicial function." That case involved a divorce where the value of a closely held corporation was at issue. *Id.* at 188-90. This Court determined that "[i]n any case a sound valuation [of a business] requires not only the consideration of all relevant facts but also the application of common sense, sound and informed judgment, and reasonableness to the process of weighing those facts and determining their aggregate significance." *Id.* at 190 (quotes omitted). Thus, there can be no question that determining the value of a business in a marital dissolution proceeding involves a "judicial function."

Dennis's appointment required him to exercise independent judgment and perform an evaluation to recommend the value of the businesses. Maintaining independence and determining a business's value are judicial functions when the value is central to the litigation, as it was here. There is no dispute that Dennis performed as an independent neutral evaluator within a judicial proceeding. Dennis, therefore, meets all requirements to obtain immunity. He was court-appointed to perform a judicial function by independently determining the value of the businesses, and he performed this function within a judicial proceeding. Dennis is, therefore, entitled to quasi-judicial immunity.

### **C. *Gammel* Is Inapposite**

In denying Dennis immunity, the court of appeals relied almost entirely on *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955). *See Peterka*, 744 N.W.2d at 31-33 (A.112-16). *Gammel* is inapposite in every respect. The auditors in *Gammel* met none of the requirements to obtain quasi-judicial immunity.

*Gammel* involved auditors who were retained, before any litigation had commenced, through a private “employment contract” to perform an audit and determine the “net earnings per share of ... common stock[.]” 245 Minn. at 251, 256, 72 N.W.2d at 366, 369. Before the auditors were hired, the parties agreed that the subsequent audit would be “controlling” in the sale of stock from one party to the other in order to merge two companies. *Id.* at 252-53, 72 N.W.2d at 366. The auditors were not, however, parties to that separate contract. *Id.* After the audit was performed and the Eighth Circuit enforced the contract against the recalcitrant party,<sup>11</sup> the losing party sued the auditors. The auditors’ defense was that they were immune from liability because they acted as “quasi arbitrators.” *Id.* at 253, 72 N.W.2d at 367.

This Court rejected the auditors’ defense of immunity because the “employment contract” under which the auditors were hired did not call for a person to act “as an arbitrator,” and the contract did not make the auditors’ “determinations ... binding upon the parties selecting him.” *Id.* at 255, 72 N.W.2d at 368. Instead, the “contract[] of employment” “provided merely that they were to make an examination and audit of the corporation books and a report as to its earnings for the year 1944.” *Id.*<sup>12</sup>

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<sup>11</sup> *Sanitary Farm Dairies v. Gammel*, 195 F.2d 106 (8th Cir. 1952).

<sup>12</sup> Notably, this Court explained that quasi-judicial immunity would be appropriate where “a contractual provision ... called for the exercise of independent judgment or discretion by a person acting as an arbitrator and which made his determinations binding upon the parties selecting him.” *Gammel*, 245 Minn. at 255, 72 N.W.2d at 368. Thus, the Court did not overrule its prior opinions, which concluded that arbitrators are entitled to immunity where the parties privately agree to arbitrate their claims. *See, e.g., Melady*, 142 Minn. at 196, 171 N.W. at 807.

The Court correctly rejected the auditors' plea for immunity because none of the necessary factors were present. First, the auditors were not court-appointed. There was no court to appoint the auditors because the parties hired the auditors before seeking a judicial forum. Second, the auditors were neither performing a function that was closely associated with the judicial process, nor did they perform services within a judicial or quasi-judicial proceeding. A private "contract[] of employment" hired the auditors to provide auditing services to facilitate a transaction, unrelated to the judicial process. At the time the auditors performed services for the parties, there was no litigation and the parties did not agree to arbitrate the disagreement that developed after the audit.

This fact cannot be overstated. The Eighth Circuit, in addressing a related case between the two parties, specifically noted that the disagreement had not risen to the level where arbitration was necessary, thus the agreement was not one to arbitrate the claims. *Sanitary Farm Dairies*, 195 F.2d at 113 ("where parties to a contract, *before a dispute and in order to avoid one*, provide for a method of ascertaining the value of something related to their dealings, the provision is one for an appraisal and not for an arbitration.") (emphasis added). Just because the parties in *Gammel* ultimately used the audit to support or refute a business's value in a subsequent legal dispute does not transform the auditors into arbitrators. Thus, this Court's rejection of the auditors' claim of immunity was a foregone conclusion because there was no judicial or quasi-judicial proceeding when the auditors performed services.

In contrast to *Gammel*, Dennis was appointed by the trial court. (A.1-3, 80.) This fact alone is a bright-line distinction that separates this case from *Gammel*. Unlike the

auditors in *Gammel*, Dennis's appointment was to perform a quasi-judicial function by evaluating and making recommendations on the business's value within a judicial proceeding. Under these circumstances, Minnesota law supports recognizing that quasi-judicial immunity protects "participants in the judicial system" like Dennis. *Dziubak*, 503 N.W.2d at 774. The court of appeals, therefore, should be reversed.

**III. PUBLIC POLICY SUPPORTS THE APPLICATION OF QUASI-JUDICIAL IMMUNITY FOR INDEPENDENT NEUTRAL EVALUATORS**

**A. Quasi-Judicial Immunity Is Rooted In Public Policy Considerations And Includes Independent Neutrals Like Dennis**

This Court has consistently examined public policy when determining whether to grant judicial or quasi-judicial immunity to defendants. Public policy favors applying quasi-judicial immunity to court-appointed independent neutrals, like Dennis, for three reasons: (1) immunity preserves the neutral's integrity and independence, (2) immunity allows the neutrals to perform services for the court's benefit, and (3) immunity benefits the parties.

Independence and integrity are essential to the effective performance of judicial and quasi-judicial functions. The rule of granting immunity to judicial and quasi-judicial actors did not evolve "because of any special tenderness for judges or for those who exercise quasi judicial functions[.]" *Melady*, 142 Minn. at 197, 171 N.W. at 807. Rather, the rule was "deeply rooted in the common law out of considerations of public policy." *Id.* A person called to serve in a judicial capacity "ought to feel free to act on his own convictions, uninfluenced by the fear of consequences personal to himself." *Id.*

Although the rule started with judges and decision-makers, early on it applied to other actors within a judicial proceeding: “[t]he protection afforded by the rule ought not to be confined to those having to do with the trial and decision of lawsuits only, but should be extended to all to whom the law or the agreement of the parties commits the exercise of authority of an essentially judicial nature.” *Id.*

The primary purpose compelling immunity for judges is “to preserve the integrity and independence of the judiciary and to insure that judges will act upon their convictions free from the apprehensions of possible consequences.” *Gammel*, 245 Minn. at 254, 72 N.W.2d at 368 (citations omitted). Similarly, granting immunity to quasi-judicial arbiters preserves integrity and independence because, like judges, “[a]rbitrators must be protected from the harassment of personal suits brought against them by dissatisfied parties so that ... they are able to act upon their convictions free from the apprehensions of possible consequences.” *L & H Airco*, 446 N.W.2d at 376 (quotes omitted). *See also Melady*, 142 Minn. at 197, 171 N.W. at 807 (granting quasi-judicial immunity to a board of directors when acting in a quasi-judicial capacity so they could “feel free to act on [their] own convictions, uninfluenced by the fear of consequences personal to [themselves]”).

These same reasons – integrity and independence – support applying immunity to protect court-appointed independent neutrals, such as medical and other expert evaluators. *See, e.g., Linder*, 209 Minn. at 48, 295 N.W. at 301. Likewise, immunity for court-appointed guardians *ad litem* “is necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian’s actions.” *Tindell*, 428

N.W.2d at 387. *See generally Stewart*, 53 Minn. at 67, 54 N.W. at 938 (“[T]he public interest requires full independence of action and decision on [the tax assessor’s] part, uninfluenced by any fear or apprehension of consequences personal to himself[.]”). Minnesota policy supports granting immunity to a broad array of court-appointed professionals who perform evaluations for judicial proceedings in order to protect the neutral’s independence and integrity. If the threat of a lawsuit is present, the appointed neutral would not be able to freely investigate and candidly evaluate the value of property at issue.

Second, granting immunity to the independent neutral also benefits the courts. The trial judge is advantaged by having a neutral with a specific expertise both conduct an independent evaluation and provide an expert opinion. With an independent neutral expert in place to conduct complex asset evaluations, the trial judge can focus on final resolution of all issues in the case. Granting immunity increases the neutral’s independence, which thereby increases the neutral’s value to the court. The trial court is able to more fully rely on the expert who is beholden to neither party.

The benefits to the trial courts are even more striking in the context of family law litigation. Immunity for neutral evaluators is necessary in hotly contested family law cases like this one because judges often have neither time nor expertise to evaluate the parties’ assets and must be able to rely on a trusted and experienced evaluator. The court of appeals has gone so far as to hold that “it is incumbent upon the [trial] court to appoint an expert well-versed in ... valuation to give it a neutral viewpoint” where complex

valuations of businesses are at issue. *Pekarek v. Pekarek*, 362 N.W.2d 394, 397 (Minn. Ct. App. 1985) (remanding and directing “the trial court to appoint a neutral expert”).

Without immunity, many potential neutrals would be discouraged from participating altogether. As this Court noted, no person “would willingly serve” in a judicial or quasi-judicial role if the person “might be sued for damages by the party against whom the verdict was found on the plea that personal ill will or malice led to it.” *Melady*, 142 Minn. at 197, 171 N.W. at 807. *See also L & H Airco*, 446 N.W.2d at 377 (permitting civil suits “would chill the willingness of arbitrators to serve”). This would have significant consequences for the trial courts. Without immunity, qualified and experienced neutral evaluators will no longer be readily available to family court judges and the system will suffer. *See, e.g., Stewart*, 53 Minn. at 67, 54 N.W. at 938-39 (“[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”). In contrast, applying immunity to Dennis and others in similar roles will strengthen the judicial system by encouraging capable professionals to undertake such work.

Finally, granting immunity to independent evaluators also benefits the parties by preserving resources during marital dissolution litigation. The cost-savings to spouses and families is substantial because they share the fees of a single expert. As the district court noted, independent neutral evaluators such as Dennis “serve to reduce the costs to litigants and to increase the efficiency of family court in general,” thus providing “swifter relief to all parties involved, children in particular.” (A.97.) Appointing an independent

neutral to perform a quasi-judicial function, such as asset valuation, reduces the substantial time and money that would otherwise be expended in hiring dueling experts for the litigation.

Neutrals are particularly effective in family law litigation because the proceedings are more amicable. For instance, the Minnesota Judicial Council recommends using “Early Neutral Evaluation to settle disputed issues early in the dissolution case” to have “[m]ore timely, efficient, and peaceable resolution of cases involving children and the family.” *See Focus on the Future: Priorities & Strategies for Minnesota’s Judicial Branch (FY2007-FY2009) (A.125-44)*. The Council noted that such evaluations “reduce[] costs and acrimony among the parties,” promote “earlier resolution and certainty for the children,” “increase[] settlement rates,” “reduce time from filing to judgment,” and produce “fewer number of appeals and post judgment motions to modify decree[.]” *See also In re Family Court Early Case Mgmt. & ADR Best Prac. Guidelines, ADM-04-8002 (Minn. Apr. 23, 2004) (A.119-24)* (advising courts to use “neutral experts to value disputed assets” because in order to “expedite resolution of litigation, reduce acrimony among the parties, reduce costs to family court litigants by peacefully resolving disputes, and reduce the number of appeals and post judgment motions to modify decrees”).

Both the parties and the courts benefit by granting immunity to independent neutrals because the neutral’s work and recommendations will not be subject to attack in a separate lawsuit. Unfortunately, the often times fiercely-litigious arena of dissolution proceedings makes a neutral evaluator a tempting target for additional litigation. At least one party is often disappointed with the final judgment and outcome on appeal; a

negligence suit against the independent neutral allows the disgruntled litigant to continue to press her claim and some element of finality is lost.

More fundamentally, imposing liability on independent neutrals robs the neutrals of the very independence and integrity that enhances their value to the judicial process. Instead of freely exercising independent discretionary judgment, the neutral will weigh “every decision in terms of potential civil liability.” *Dziubak*, 503 N.W.2d at 775. Further, the neutral and the parties will incur significant additional expenses in collateral litigation. *See generally id.* at 776 (immunity saves “[s]ubstantial time, energy and money [which] are consumed in discovery: answering interrogatories, filing affidavits, and deposing witnesses”). Because independent neutrals perform quasi-judicial functions in judicial proceedings, the neutrals should be protected from collateral litigation in order to ensure their independence, integrity, and willingness to accept judicial appointment.

All of these policy considerations support applying quasi-judicial immunity to Dennis. First, granting Dennis quasi-judicial immunity preserves the independence and integrity of Dennis’s evaluation. Dennis received remuneration from both parties, but was beholden to neither. (A.1-3, 80.) The court also ordered the parties to cooperate with Dennis. (*Id.*) Thus, Dennis’s independence and integrity were never impinged throughout his evaluation of the businesses, enabling him to give unbiased testimony and recommendations to the court.

Second, Dennis’s evaluation benefited the trial court. Dennis’s expert testimony and recommendation saved judicial resources because the trial court did not have to weigh the opinions of different experts, who are hired to advocate for a certain position.

Instead, Dennis provided the trial court with an independent neutral recommendation, which was based on information collected from both parties. Notably, the trial court adopted Dennis's independent recommendations.

Finally, Dennis's independent evaluation benefited the parties. Both parties had advance notice that the businesses would be valued through an independent, neutral evaluation. (A.80.) Thus, Dennis's independent evaluation saved the parties both the time and expense of having to hire their own experts and present testimony at trial. The parties were not, however, forced to rely solely on Dennis's evaluation. Both parties had the opportunity to present testimony of their own experts at trial to refute Dennis's evaluation and recommendations. Peterka even retained a shadow expert who reviewed Dennis's report. Nonetheless, neither party presented partisan experts at trial. The parties also had the opportunity to ask the trial court to reconsider its decision or to challenge the judgment on appeal. Neither party elected to do so.

Thus, public policy considerations support applying quasi-judicial immunity to Dennis because immunity preserves the independence and integrity of Dennis's recommendations and the evaluation was performed solely for the benefit of the court, which in turn benefited the parties.

#### **B. Parties Are Not Without Remedy When Quasi-Judicial Immunity Applies**

Simply because independent neutral evaluators are entitled to immunity does not mean that aggrieved parties are without a remedy. Appropriate checks are available in the post-trial process. As this Court has noted, "it is thought unlikely that officials

[protected by immunity] will commit abuses since the appellate review process is likely to prevent serious torts.” *Dziubak*, 503 N.W.2d at 774. For instance, numerous remedies are available to redress prosecutorial misconduct even though the prosecutor is immune from direct suit:

Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under the law.

*Imbler*, 424 U.S. at 427.

Similarly, an independent neutral’s business valuation in a marital dissolution proceeding is subject to several levels of review. The parties may present testimony that contradicts the neutral’s evaluation or argue that a different value is supported by the record. Post-trial motions to amend are also available to both parties to challenge the trial court’s decision to adopt the neutral’s recommendation. Moreover, parties always have the right to appeal. Thus, parties are not without a remedy when independent neutrals are granted immunity for performing a function closely associated with the judicial process.

It is worth noting that Peterka failed to take advantage of any of these remedies. Peterka had every right to offer testimony, for example, from her shadow expert, to argue that the trial court should reject Dennis’s determination. Peterka also had every right to appeal the trial court’s finding of business value to correct any perceived errors. Peterka, however, failed to offer any testimony or appeal from the judgment, which incorporated the trial court’s business valuation. Peterka’s only appeal in the marital dissolution case involved the trial court’s subsequent order modifying maintenance, an issue not

addressed by Dennis. *Peterka v. Peterka*, 675 N.W.2d 353 (Minn. Ct. App. 2004) (A.38-51). Peterka cannot now appeal the trial court's order and she cannot sue the trial court for adopting Dennis's determination because the judge is entitled to absolute immunity. *Stewart*, 23 Minn. at 350. Instead, she has filed suit against Dennis.

If immunity does not apply to Dennis and other independent neutral evaluators, then unhappy litigants will sue independent evaluators as a way to launch a second attack on the judgment with which they disagree. If immunity applies to Dennis and other independent neutrals, then unhappy litigants may still seek redress through the post-trial and appellate process. Public policy supports recognizing that quasi-judicial immunity protects independent neutral evaluators, like Dennis, who perform functions that are closely associated with a judicial proceeding by conducting evaluations and provide recommendations to the court.

## CONCLUSION

The court of appeals' decision is contrary to this Court's precedent, which has applied immunity to court-appointed evaluators and experts who perform functions closely associated with, and for use in, a judicial or quasi-judicial proceeding. Dennis performed exactly that role. The trial court appointed Dennis to evaluate and make a recommendation on the value of businesses to assist the court in reaching findings of fact and conclusions of law in a marital dissolution proceeding. Indeed, in this case, the trial court adopted Dennis's independent evaluation, which was not challenged by Peterka or her husband.

Public policy considerations also dictate that immunity should protect independent neutrals like Dennis. Quasi-judicial immunity ensures the independence and integrity of independent neutral evaluators who will freely offer opinions without fear of subsequent civil litigation. If immunity does not attach to independent neutrals like Dennis who perform services for the benefit of the court and the parties, the entire judicial system will suffer, especially in the resolution of family law matters. Thus, this Court should reverse and Dennis should be granted quasi-judicial immunity.

Dated: May 14<sup>th</sup>, 2008

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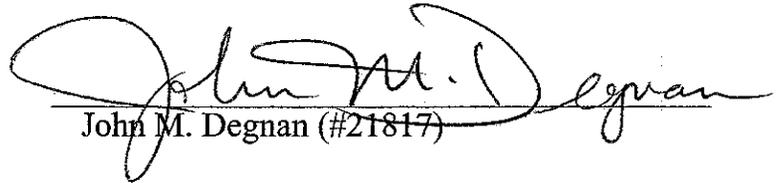
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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants 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 9,291 words, including headings, footnotes and quotations (and excluding the Table of Contents and Table of Authorities).

Dated: May 14<sup>th</sup>, 2008

  
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