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NO. A07-0165

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State of Minnesota  
 In Supreme Court

Catherine F. Peterka,

*Respondent,*

vs.

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

*Appellants,*

and

Todd R. Haugan, Attorney at Law,

*Defendant.*

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**BRIEF AS AMICUS CURIAE**  
**MINNESOTA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS**

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## INTRODUCTION<sup>1</sup>

The Minnesota Society of Certified Public Accountants (the “Society”) is a non-profit Minnesota corporation whose members are certified public accountants.<sup>2</sup> The Society was founded in 1904. Over the past 100 years, it has grown to include representatives from over 1,100 accounting firms located throughout Minnesota, with approximately 9,100 members.

The mission of the Society is to help its members succeed professionally, while being mindful of serving the public interest through the promotion of ethics and excellence in the rendering of certified public accounting services, innovation, life-long learning, community service and inclusiveness. The Society’s strategic plan can be viewed at [www.mncpa.org](http://www.mncpa.org). The Society believes that its role as an *amicus* in this matter is to advise the Court concerning (a) the profession of public accounting, (b) the rules and standards that govern that profession, and (c) the impact that the present matter may have on that profession and the entire civil justice system if the decision of the court of appeals is sustained.

The Society’s interest in this matter is primarily public in nature. The Society has no interest whatsoever in the particular dispute between these litigants. Rather, the Society is only concerned with the orderly development of the law in Minnesota. Since

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<sup>1</sup> Amicus adopts Appellants’ Statements of the Issues, the Case and the Facts.

<sup>2</sup> This brief was written entirely by the Society’s counsel. No party or counsel to a party authored any portion of the brief and no person or entity other than the Society or its counsel made any monetary contribution to the preparation or submission of this brief.

the Society's members are professionals who may themselves be sued on similar facts, a decision regarding this issue by this Court could be said to raise a private interest as well. Nonetheless, the Society's primary concern is that the law of Minnesota on this issue be clear, precise, and consistent with well-recognized and long-standing principles of law and public policy. Because the ruling of the court of appeals failed to achieve these goals, the Society urges this Court to overturn that ruling.

One likely consequence if the decision of the court of appeals is allowed to stand will be to limit the willingness (and availability) of certified public accountants to serve as neutral advisors hired by both sides to a marital dissolution (or any other type of dispute, for that matter). Presently, divorcing couples are well-served by accountants who are neutral and who, thereby, facilitate the speedy resolution of issues that might otherwise become focal points for internecine, protracted and vastly more costly, adversarial litigation. If neutral valuation experts are faced with the threat of lawsuits by disgruntled litigants (particularly in the emotionally-wrought area of family law), it is likely to be difficult to convince qualified CPAs to serve as neutrals. Alternatively, those CPAs who may be willing to continue to serve as court-appointed, non-binding neutral experts are likely to materially increase the fees they would otherwise have charged — to take into account the higher risk of incurring claims that will be occasioned by the erroneous decision of the court of appeals.

To avoid these consequences, and to uphold the strong public policies favoring the expeditious, less-costly, and amicable resolution of legal disputes (especially family law disputes), the Society urges this Court to reverse the decision of the court of appeals.

## ARGUMENT

In reaching its decision, the court of appeals (a) ignored or misinterpreted controlling principles established by this Court, (b) was uninformed or misguided about differing roles and standards in the practice of public accounting, and (c) failed to give due consideration to key changes in the area of civil litigation (including the increased use of alternative dispute resolution methods and the increased use of neutrals, special masters, and other professionals — via court appointment or otherwise — to facilitate the prompt, fair and economical resolution of legal disputes).

The Society, as *amicus curiae*, urges this Court to reject the flawed reasoning and necessary consequences of the decision of the court of appeals and to apply the analytical framework and public policy established by this Court over decades of careful deliberation. Adopting the rule imposed by the court of appeals would unfairly expose certified public accountants and other professionals to liability for neutral and non-binding opinions and recommendations that parties to litigation and/or district court judges voluntarily accept (or freely reject) as a reasonable basis for the resolution of disputed claims.

**I. THERE IS NO REASON TO DISTINGUISH CERTIFIED PUBLIC ACCOUNTANTS FROM OTHER “LITIGATION NEUTRALS” IN THE APPLICATION OF QUASI-JUDICIAL IMMUNITY.**

The Society is dismayed to note that under the ruling of the court of appeals, persons licensed by the Minnesota Board of Accountancy to practice public accounting

will enjoy less protection as court-appointed, neutral experts than other professional — and even unlicensed service providers — including:

- Guardians-ad-litem — *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988).
- Public defenders — *Dzuiubak v. Mott*, 503 N.W.2d 771, 777 (Minn. 1993).
- Prosecuting attorneys — *Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 213 (Minn. 1981).
- Child therapists — *Myers v. Price*, 463 N.W.2d 773, 775-76 (Minn. Ct. App. 1990).
- NASD admin. staff — *Honn v. Nat'l Ass'n of Securities Dealers, Inc.*, 182 F.3d 1014, 1017-18 (8th Cir. 1999).
- Bankruptcy trustees — *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1390-91 (9th Cir. 1987); *cert. denied*, 486 U.S. 1040 (1988); *Smallwood v. United States*, 358 F. Supp. 398, 404 (E.D. Mo. 1973), *aff'd*, 486 F.2d 1407 (8th Cir. 1973).
- Bankruptcy clerks — *Smallwood*, 358 F. Supp. at 404.
- U.S. attorneys — *Id.* at 404-05.
- Trustee's attorneys — *Id.* at 404.

There is no reason to single out certified public accountants and deny them the protection of quasi-judicial immunity. On the contrary, the public interest and the rights of litigants are safeguarded by the use of CPAs, because CPAs are subject to strict professional licensing requirements, continuing education mandates, and rigorous oversight. In order to become licensed as a CPA, a candidate must complete 150 semester hours of undergraduate course work and a one-year apprenticeship. Minn. Stat. § 326.A.03, subd. 6. To remain licensed, a CPA is required to attend 120 hours of

continuing education every three years. Minn. R. 1105.3000. Furthermore, CPAs are obligated under the rules established by the Minnesota Board of Accountancy to honor at all times a detailed Code of Professional Conduct (including the ethics code of the American Institute of Certified Public Accountants (“AICPA”)). See Minn. R. 1105.7800 (expressly incorporating the AICPA Code of Professional Conduct); see also AICPA Professional Standards, ET § 51.01 *et seq.* (published at [www.aicpa.org](http://www.aicpa.org)). Pursuant to that Code, CPAs who are licensed in Minnesota are directed to “honor the public trust,” because “[a] distinguishing mark of the profession is acceptance of its responsibility to the public . . . [and] the collective well-being of the community of people and institutions the profession serves.” AICPA Professional Standards, ET § 53.01.

Given all of the foregoing educational and ethical obligations, there is no reason to believe that CPAs will perform quasi-judicial offices less ably or honorably than other licensed professionals — including attorneys.

**II. IN BLINDLY RELYING UPON *GAMMEL*, THE COURT OF APPEALS OVERLOOKED THE CIRCUMSTANCES OF THIS CASE AND APPARENTLY MISUNDERSTOOD THE PROFESSION OF PUBLIC ACCOUNTING.**

The appeals court relied extensively on the 1955 decision of this Court, *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955). While that case was decided correctly, it was misapplied by the court of appeals, possibly because the court of appeals failed to recognize the fundamental differences between the privately-arranged audit work performed by the CPA-defendants in *Gammel* and the court-appointed business valuation services provided by Mr. Dennis in the present case.

In *Gammel*, a corporation hired a CPA firm to perform a standard financial statement audit in accord with professional standards (referred to by the accounting profession and commonly known as “generally accepted auditing standards” or “GAAS”). 72 N.W.2d at 368. The CPAs were not court-appointed and their contract did not include any reference to a court-related or dispute-resolution function. *Id.* To the contrary, the CPAs were charged with simply rendering a GAAS-audit, which the shareholders of the contracting company had *independently* agreed to abide by in setting the value of that company for their separate dispute. *Id.* Thus, the *Gammel* court readily (and correctly) concluded that the CPAs had entered into nothing more than a garden variety professional services engagement. *Id.* (noting that “it was provided merely that they were to make an examination and audit of the corporation books”).

In the instant matter, by way of contrast, Mr. Dennis was expressly appointed by *the court* to render an “independent neutral evaluation of the value of the parties’ business assets” *as a part of the judicial process*. A.A. 2.<sup>3</sup> Mr. Dennis was not appointed to perform that function according to any particular professional standards, though his licensure as a CPA required him to comply with the AICPA Code of Conduct — which specifies the use of due professional care. AICPA Professional Standards, ET § 56. More fundamentally, Mr. Dennis was not hired by either party, but instead was appointed by the court, and he issued his opinion to the court while serving in the judicial role of a court-appointed expert, as contemplated by Minnesota Rule of Evidence 706. Finally,

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<sup>3</sup> References to Appellants’ Appendix in this brief are in the form “A.A. \_\_\_\_.”

Mr. Dennis' opinion was not binding on the parties (unlike the audit opinion issued in *Gammel*), and either side was free to accept or reject that opinion and to submit the opinion of an expert of their choosing to buttress or contradict any portion of Mr. Dennis' opinion.

Given all of these factual differences between this case and *Gammel*, the reliance that the court of appeals placed upon *Gammel* is indefensible.

In reaching its decision, the court of appeals appears to have conflated the role of a CPA performing audit or accounting work regarding the financial statements of a client (such as the role of the accountant-defendant in *Gammel*), with the role that a CPA performs when acting as a consultant (such as the role of Mr. Dennis in the present case). That is, the court of appeals seems to have erroneously assumed that valuing a business is the equivalent to providing audit or accounting services and is subject to the professional standards applicable to those services.

That error was, perhaps, based upon an overly-restrictive view of the many roles served by Minnesota's licensed, certified public accountants:

In this case, Dennis' evaluation of business assets did not involve an exercise of authority that is essentially judicial in nature. Dennis' function was to *apply sound accounting principles* to develop factual bases supporting his expert opinion on the value of the business in which the appellant and her husband had an interest.

A.A. 113-14 (emphasis added).

We note, first of all, that nowhere in the court order appointing Mr. Dennis was he directed to apply "accounting principles." A.A. 1-2. Nor did the appointing order

mention any particular set of business appraisal standards (of which there are several competing versions). In fact, the appointing order did not specify the use of any standards unique to accountants serving as business appraisers. *Id.* (referring to “neutral evaluation of the ... business assets”). In deciding that Mr. Dennis was supposed to “apply accounting principles,” the court of appeals spoke entirely *ex cathedra* on a crucial point.<sup>4</sup>

Nor is there anything whatsoever in the record that so much as even hints at the possibility that Mr. Dennis ever applied any “accounting principles” in expressing his opinion. In reaching its mistaken conclusion, the court of appeals assumed that Mr. Dennis’ engagement could somehow be reduced to a formulaic, “cookbook” exercise that would produce the desired result. Quite possibly, the court of appeals adopted its unsupported premises and conclusions based on a misunderstanding of the nature and wide variety of professional services rendered by CPAs, many of which emerged after the decision in *Gammel*.

Today, CPAs perform a broad array of professional services, including, without limitation:

- accounting and review services
- audits

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<sup>4</sup> As this Court has noted, “[t]here is . . . no universal formula for determining the value of a closely held business.” *Nardini v. Nardini*, 414 N.W.2d 184, 189-90 (Minn. 1987). Rather, “the valuation of a business is an art, influenced by various subtle and subjective factors.” *Id.* at 190. The *Nardini* decision does not make any mention of applying “accounting principles.”

- agreed upon procedures engagements
- financial forecasts
- pro forma financial projections
- tax services (preparation and planning)
- technology consulting
- financial planning
- forensic examinations
- litigation support
- “elder care” and other assurance services
- business valuation consulting

Strictly speaking, however, most of these services do not involve the application of “*accounting* principles.” Indeed, only the first two types of service listed above — “accounting and review services” and “audits” — always involve the application of “*accounting* principles.”

In a very general way (sufficient for this discussion), the term “accounting” is normally understood by accountants to refer to the preparation (“recording” or “booking”) of the financial transactions of a business on its books and records, which are expressed on financial statements in accord (or not) with a complex set of accounting conventions known as *generally accepted accounting principles* (“GAAP”). The profession’s understanding of the term “accounting” is reflected in the AICPA’s “Standards for Accounting and Review Services.” AICPA Professional Standards, AR § 50 (published at [www.aicpa.org](http://www.aicpa.org)). While those standards address the compilation and

review of financial statements for clients, they do not apply to the development or expression of a business valuation opinion.

By way of further illustration, the performance of the financial statement audit in *Gammel* is (and was) professionally regulated by the AICPA's "Statements of Auditing Standards." *See, generally*, AICPA Professional Standards, AS §§ 100 *et seq.* (published at [www.aicpa.org](http://www.aicpa.org)). Again broadly stated, those standards provide guidance on *how* an audit is to be performed (*i.e.*, in accordance with GAAS).

Returning to the evident misapplication of professional vernacular by the court of appeals, after an audit has been completed, its results are expressed in a set of financial statements that are presented (*i.e.*, explained to users) by the use of accounting conventions known as GAAP. GAAP are established, by and large, by the Financial Accounting Standards Board, a self-regulatory organization that is independent of the AICPA. *See* [www.fasb.org](http://www.fasb.org). As this discussion shows, GAAS is not the same as GAAP — and neither is involved in the expression of a business valuation opinion.<sup>5</sup>

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<sup>5</sup> That is not to say, of course, that a CPA such as Mr. Dennis might not sometimes be able to use his professional training and knowledge to detect a departure from GAAP in the financial statements of a subject business, thereby leading to a higher or lower valuation. But that possibility is a far cry from "applying accounting principles" to formulate an opinion, as the court below would have it. Moreover, there is nothing in the record to suggest that Mr. Dennis found any such evidence in this case.

The professional standards governing Mr. Dennis' business valuation engagement are provided by an altogether different regime promulgated by the AICPA. *See* AICPA Professional Standards, CS §§ 100.01-.10 (specifically CS § 100.05(d)). This set of standards provides that such consulting services are different from attestation services (such as reviews or audits of financial statements, and certain types of agreed upon procedures):

Consulting services differ fundamentally from the CPA's function of attesting to the assertions of other parties. In an attest service, the practitioner expresses a conclusion about the reliability of a written assertion that is the responsibility of another party, the assert. In a consulting service, the practitioner develops the findings, conclusions and recommendations presented.

*Id.* at CS § 100.02.<sup>6</sup> These standards do *not* require or even imply that a CPA will apply "accounting principles" in any particular consulting engagement, including business valuation services, in contrast to the mistaken assertion of the court of appeals.

As revealed by even a casual review of the accounting profession's consulting standards, they are succinct and broadly stated. This is consistent with the fact that they apply to a host of services (*e.g.*, business advice, strategic planning, computer system installation and support, bankruptcy trusteeship, etc.), which by definition defy the

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<sup>6</sup> Recognizing that the rubric of the Consulting Standards is not as specific to business appraisals as the standards set by other organizations, for example the National Association of Certified Valuation Analysts ([www.nacva.com](http://www.nacva.com)), the AICPA recently established specific standards for valuation services, which went into effect on January 1, 2008. *See* "Statement on Standards for Valuation Services" (published at [www.aicpa.org](http://www.aicpa.org)). Those standards were not yet in effect at the time of Mr. Dennis' appointment in this matter, however.

development of more specific standards because each service and engagement is so unique and highly variable.

The court of appeals was understandably tempted to apply the decision in *Gammel* to this matter, but justice and public policy require that this matter be analyzed with an eye toward the substantial differences between the circumstances of *Gammel* and the circumstances of this matter, including the differences in the nature of the professional engagements at issue in the two cases.

### **III. PUBLIC POLICY STRONGLY FAVORS THE PROTECTION OF COURT-APPOINTED NEUTRAL EXPERTS.**

The role of neutral, court-appointed experts is long-standing and well-established. The district courts have been empowered to employ such experts since the adoption of Minn. R. Evid. 706 by this Court in 1977. The utility of using an independent, neutral expert in a marital dissolution proceeding is unquestionable, as this procedure allows the parties and the courts to save costs and avoid the acrimony so often associated with the intense emotions surrounding such proceedings. *See Nardini*, 414 N.W.2d at 188 (“[W]e are reminded that the art of advocacy . . . is not nearly as well-suited to the resolution of family disputes”).

Unfortunately, the very fractiousness that all too often characterizes the dissolution of a marriage can lead a disappointed spouse to seek to visit “blame” for a perceived inequitable result on the professionals (and sometimes the judicial officers) involved in the underlying proceedings. The instant case has proven to be no exception, as years after voluntarily acquiescing in Mr. Dennis’ non-binding, neutral business

evaluation opinion at her trial, Respondent now seeks to recover for her perceived grievance from Appellants.

The purpose of quasi-judicial immunity is to eliminate the threat of such serial litigation and, by doing so, to encourage qualified professionals to continue to help litigants and the courts to economically resolve disputes. In the absence of such immunity, what qualified expert (CPA or otherwise), will again agree to render an independent, neutral opinion on the value of divorcing spouses' marital assets? And, even if a qualified expert can be found to render such an opinion, surely the cost of such engagements will increase for the parties, as reluctant experts with the necessary experience and credibility will undoubtedly seek to cover the cost of the enhanced risk of suffering a later suit for damages.

In short, the failure to grant quasi-judicial immunity to Appellants in this case will defeat the very rationale for having a court-appointed, independent and neutral expert to begin with; namely, the faster, less contentious, and less costly resolution of what is all too often litigation that divorcing spouses (and, most of all, their minor children) simply cannot afford.

**CONCLUSION**

For all of the foregoing reasons, the Minnesota Society of Certified Public Accountants urges reversal of the decision of the court of appeals.

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

Dated: May 22, 2008.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 3,251 words, exclusive of the cover page, table of contents, table of authorities, signature block and this certification, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: May 22, 2008.



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