

NO. A07-0165

State of Minnesota
In Supreme Court

Catherine F. Peterka,

Respondent,

vs.

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

Appellants,

Todd R. Haugan, Attorney at Law,

Defendant.

**APPELLANTS' REPLY BRIEF
AND SUPPLEMENTAL APPENDIX**

LAW OFFICES OF
RICHARD E. BOSSE, CHARTERED
Richard E. Bosse (#245501)
303 Douglas Avenue
P.O. Box 315
Henning, MN 56551
(218) 583-4342

*Attorney for Respondent
Catherine F. Peterka*

BRIGGS AND MORGAN, P.A.
John M. Degnan (#21817)
Diane B. Bratvold (#18696X)
Jonathan P. Schmidt (#329022)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

*Attorneys for Appellants Stephen G. Dennis,
Certified Public Accountant, and Baune,
Dosen & Co.*

(Additional Counsel Listed on following page)

Mary C. Lauhead (#0061086)
Co-Chair, *Amicus Curiae* Committee
of the Family Law Section of the
Minnesota State Bar Association;
Member AAML
LAW OFFICES OF MARY
CATHERINE LAUHEAD
3985 Clover Avenue
St. Paul, MN 55127-7015
(651) 426-0870

Michael D. Dittberner (#158288)
Co-Chair, *Amicus Curiae* Committee
of the Family Law Section of the
Minnesota State Bar Association;
Member AAML
CLUGG, LINDER, DITTBERNER &
BRYANT, LTD.
3205 West 76th Street
Edina, MN 55435-5244
(952) 896-1099

Cheryl M. Prince (#195376)
Chair, Family Law Section of the
Minnesota State Bar Association;
Member AAML
HANFT FRIDE, P.A.
1000 U.S. Bank Place
130 W. Superior Street
Duluth, MN 55802
(218) 772-4766

Joan H. Lucas (#0146584)
President, Minnesota Chapter of the
American Academy of Matrimonial Lawyers
LUCAS FAMILY LAW LLC
889 Grand Avenue
St. Paul, MN 55405
(651) 294-0894

*Attorneys for Amici Curiae Family Law
Section of the Minnesota State Bar
Association and American Academy of
Matrimonial Lawyers, Minnesota Chapter*

Thomas J. Shroyer (#0100638)
Peter A. Koller (#150459)
MOSS AND BARNETT, P.A.
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
(612) 877-5000

*Attorneys for Amicus Curiae Minnesota
Society of Certified Public Accountants*

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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ARGUMENT

Quasi-judicial immunity protects court-appointed independent neutrals because they serve as an arm of the court. Important public policies are advanced by quasi-judicial immunity. Immunity enhances the neutral's independence, ensures their integrity, and encourages their participation. Indeed, the use of neutrals greatly benefits the court system by assisting judges with expertise, expediting litigation, tempering contention between parties, curtailing party costs and reducing post-judgment proceedings. Failing to provide immunity to independent neutral evaluators will eliminate an important judicial tool. In response to these considerations, Respondent advances "facts" that are incorrect and irrelevant. Additionally, she mistakenly relies on cases that are inapposite to the immunity question the Court must answer. In short, Peterka is wrong on the facts, wrong on the law, and wrong on public policy.

I. PETERKA'S FACTUAL DISCUSSION MISSTATES THE RECORD

Respondent misstates the record and posits a number of "facts" that are irrelevant to the narrow issue on appeal.

A. The Issue On Appeal Is Whether Dennis Is Entitled To Quasi-Judicial Immunity

Peterka's discussion of the record reads like an appeal from summary judgment on her negligence claim; yet, the merits of her negligence claim, or lack thereof, have no place in this appeal. This Court will decide a narrow question: is Dennis entitled to quasi-judicial immunity as a court-appointed independent neutral evaluator, whether or not he was negligent? Peterka muddies the water by proclaiming that Dennis performed

a faulty evaluation based on the affidavit of a purported “expert” who disagrees with Dennis’s analysis and evaluation. (Resp. br. at 4-14, 21-22.) Peterka’s version of Dennis’s analysis and evaluation, however, is irrelevant to the issue on appeal.

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) (emphasis added) (quotes omitted). Judges, for example, are immune from suit even if their decision is incorrect. The same is true for physicians, psychologists and guardians *ad litem* when acting in a quasi-judicial capacity. Parties, however, are not without a remedy. They can file post-trial motions or pursue an appeal, which Peterka never did in the underlying case. Immunity is not based on the whether the judge or neutral got it right. Thus, whether Dennis erred in his analysis has no place in this appeal.

Moreover, Peterka’s criticisms of Dennis’s analysis and valuation are wrong. (See Resp. br. at 4-14, 21-22.) Howard Kaminsky, Peterka’s former expert from the underlying trial, concluded that Dennis performed a proper analysis and valuation. Peterka’s former attorney testified that during the divorce action he asked Kaminsky to review Dennis’s evaluation for potential problems or errors. (A.84.¹) Had Kaminsky discovered any issues with Dennis’s evaluation, Peterka’s attorney would have “explored that further.” (*Id.* at 87.) But no errors were found and Kaminsky did not testify

¹ “A.” refers to Appellants’ Appendix. “SA.” refers to the Appellants’ Supplemental Appendix. “R.” refers to Respondents’ Appendix.

regarding Dennis's evaluation. (See discussion *infra* section I.B.2., "Peterka's Shadow Expert.")

Kaminsky did a second review of Dennis's evaluation for this case. (SA.1-3.) Kaminsky reviewed Peterka's expert's affidavit and concluded that Peterka's expert "did not prepare a valuation report in compliance with Minnesota Family Court guidelines[.]" (SA.1) The expert "gave no consideration" to various costs and fees that must be considered. (*Id.*) Kaminsky then conducted an independent evaluation of the businesses, which tracked Dennis's analysis and methodology. (SA.2-3.) Although Kaminsky arrived at slightly different numbers than Dennis, his evaluation establishes that Dennis's analysis and methodology were correct.² (*Id.*)

Peterka's argument that Dennis is not entitled to immunity because he conducted a faulty evaluation is simply an attempt to prejudice the Court against Dennis. Indeed, the

² Kaminsky (a CPA, ASA and an accredited appraiser) also reviewed the analysis of Peterka's expert, Mark Steigel (who has no appraisal credentials), and noted several flaws in Steigel's opinion, which reduces the "orderly liquidation value" and "fair market value" that *Nardini* requires. (SA.1.) First, Kaminsky noted that Steigel "did not prepare a valuation report in compliance with Minnesota Family Court guidelines, specifically considering Revenue Ruling 59-60," which was adopted by *Nardini* for use in marital dissolution proceedings. (*Id.*) Second, Steigel "gave no consideration to the additional costs necessary to complete the construction of model homes [and] gave no consideration to the selling fees, administrative fees, or officer's compensation necessary to operate the business." (*Id.*) Third, Kaminsky noted that Steigel used a different valuation date, which did not take into account "significant [possible] construction costs capitalized in the inventory [from September 30, 1997 to January 8, 1998]." (*Id.*) After factoring in these errors, Kaminsky opined that the values in Mark Charles, Inc. and Deerbrooke Construction, Inc. for Mr. Peterka's interest were \$96,000 and \$31,000, respectively. (SA.2-3.) Notably, these values are *less* than those found by Dennis (and the trial court) of \$275,900 for Mark Charles and \$84,000 for Deerbrooke. (A.8-9, 27.)

Court need not address Peterka's criticisms of Dennis because they have no bearing on the legal issue before the Court.

B. Peterka Ignores And Misstates The Record

1. Dennis's Actions As An Independent Neutral

Peterka asserts that Dennis acted "unjudge-like" in performing his duties as the court-appointed independent neutral. (Resp. br. at 33.) Specifically, Peterka claims Dennis "conducted *ex parte* communications," "failed to produce to Appellee's counsel evidence," and represents Dennis to have testified that "if you want to find it out, take my deposition." (*Id.*) Peterka's assertions find no support in the record.

Regarding *ex parte* communications, Dennis testified that "the attorneys essentially treat me as though I was the Court so that there would be no *ex parte* communications with me without the other party or the other attorney being on the [phone] line." (R.72.) Dennis noted that this was the normal procedure and was followed in this case. (*Id.*) If Dennis had something to say to the parties he would "send a communication to both attorneys and communicate with both attorneys." (*Id.*) If one of the attorneys called him he "would have said: Let's get [the other attorney] on the line and let's have a conversation." (*Id.*) When asked whether he would have called one attorney to respond to a letter sent to him, Dennis testified "I wouldn't have responded to him by phone unless I told [the attorney]: Hold a second. You know, I think what you're

doing is inappropriate. Why don't you call [the other attorney] and then both of you call me and you can ask whatever questions you have." (*Id.*)³

Peterka also states that Dennis failed to produce evidence to her attorney and represents that Dennis testified "if you want to find it out, take my deposition." (Resp. br. at 33 (citing R.73 (Dennis's deposition testimony).) Dennis never made that statement. Dennis's testimony is the opposite of what Peterka represents. Dennis actually testified: "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." (R.72.) Dennis also testified that he "had no objection to Mr. Haugen getting any document contained in my file. And Rule 706 permits him to take my deposition if he feels that it is necessary in order for him to do his job." (R.73.) Dennis's actions were entirely consistent with the role of a court-appointed independent neutral acting as an arm of the court.

2. Peterka's Shadow Expert

Peterka claims that Kaminsky was not a shadow expert who could scrutinize Dennis's evaluation. (Resp. br. at 26, n.4.) Peterka selectively quotes her former attorney's testimony which, when read in full, illustrates that Kaminsky did review Dennis's report and found no errors.

³ Notably, the above testimony is the *same* testimony that Peterka cites to argue Dennis "conducted *ex parte* communications." (Resp. br. at 33 (citing R.72).) The testimony, however, unequivocally establishes that Dennis never engaged in *ex parte* communications with the attorneys.

Peterka's former attorney testified that he sent Dennis's report to Kaminsky to "see whether ... there is anything missing" and "let me know what he thought of it in so many words." (A.84.) He also testified that Kaminsky informed him that "[w]hat [Dennis] was doing was appropriate, it was the proper methodology and Mr. Kaminsky couldn't see anything that he could do to help me." (*Id.*) Kaminsky "had read the report and he was of the opinion that it was done appropriately and there was nothing he could see that was a problem." (*Id.*) Had Kaminsky informed Peterka's former attorney that something was wrong with Dennis's report or methodology, Peterka's former attorney would have "taken another approach ... I'd have explored that." (A.87.) Since no problems were found with the report, Peterka's attorney made a tactical decision not to challenge the report at trial or on appeal. Peterka's assertion that Kaminsky was not a shadow expert conflicts with the testimony of her former attorney.

C. Peterka Asserts Facts Not In The Record

In discussing the court rules and studies that Appellants and the amici cited, Peterka's counsel claims that he has discussed the issue "with several leading national malpractice defense lawyers for accountants and their carriers[.]" and purports to report on those discussions. (Resp. br. at 27-28.) This passage is completely inappropriate and should be disregarded. Counsel's "discussions" with attorneys are hearsay and would not have been allowed into evidence had they been offered in the district court. *See* Minn. R. Evid. 802. Additionally, counsel's reference to Appellants' counsel as having been "provided by Dennis's malpractice insurance carrier" is a blatant attempt to prejudice the

Court. The Court should ignore or strike this passage of Respondent's brief as improper.
(Resp. br. at 28.)

II. QUASI-JUDICIAL IMMUNITY PROTECTS COURT-APPOINTED INDEPENDENT NEUTRALS LIKE DENNIS

Throughout her brief, Peterka asserts that Dennis is seeking "judicial immunity" as an arbitrator or as an "appraiser." (*See, e.g.*, Resp. br. at 17 ("accountants in the role of *appraisers* have not been afforded such *judicial immunity* whether or not court appointed.") (emphasis added).)⁴ Peterka's assertion is wrong for several reasons.

Dennis is not seeking "judicial immunity," which applies to judges, or arbitral immunity, which applies to arbitrators. (*See* App. br. at 10-28.) Rather, Dennis is seeking "quasi-judicial immunity," which is granted to independent neutrals who perform functions closely associated with the judicial process. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (immunity attaches where the "functional nature of the [defendant's] activities" are "intimately associated with the judicial" process). The distinction is important and should not be overlooked.

⁴ *See also* Resp. br. at 18 ("This Court did not find that in such a situation, an *appraiser* or auditor sat in the position of an *arbitrator*.") (emphasis added); 19 ("other courts, without the benefit of *Gammel v. Ernst & Ernst*, *supra*, they [sic] have found that accountants, even appointed, do not meet the role of an *arbitrator* performing judicial functions when appraising businesses.") (emphasis added); 20-21 ("More than several federal courts have found that an *appraisal is not an arbitration*.") (emphasis added); 27 (cases "do not extend immunity based upon public policy, but a finding of court appointment and a *function as arbitrators*") (emphasis added); 34 ("The Appellants were not acting in the role of *arbitrators* but as appraisers. *Their argument that they are arbitrators* is an attempt to mesmerize us by words.") (emphasis added).)

More importantly, Peterka bases her contention that Dennis is not entitled to immunity on cases where the neutral did not perform any functions within a judicial proceeding. (*See, e.g.*, Resp. br. at 15, 18-19, 21-22, 24-25, 30, 32-33 (citing, among other cases, *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955).) As discussed in Appellants' opening brief, these cases are inapposite because Dennis performed his evaluation within a judicial proceeding.

Contrary to Peterka's statements, Dennis has always argued that he is entitled to quasi-judicial immunity because this Court grants immunity to neutrals who (1) are appointed by the court, and (2) perform a judicial *function* within a judicial or quasi-judicial proceeding. (*See* App. br. at 10-28, 17 ("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.")) Dennis should be granted quasi-judicial immunity because he meets both requirements.

A. Dennis Was Court-Appointed

The trial court's two orders establish that Dennis was court-appointed. On March 17, 1997, the trial court entered its first order, which states that an independent neutral will be appointed to value the parties' businesses. (A.78-81 ("The parties' business will be valued by an independent evaluator from Judge Davidson's list of neutrals.")) The judge directed the parties to choose the identity of the evaluator. (*Id.*)

The parties agreed on a neutral who later resigned; and, to comply with the trial court's order, the parties later agreed by stipulation that Dennis would be the evaluator.

(A.1-3, 62-63.) On September 30, 1997, the trial court entered the second order, which appointed Dennis to be the independent evaluator and directed that he perform an “independent neutral evaluation of the value of the parties’ business assets[.]” (A.1-3.)

Peterka never mentions the trial court’s first order in her brief. The first order is important because it shows the trial court decided to appoint an independent neutral to value the parties’ businesses. The later stipulation to use Dennis as that neutral (and subsequent order appointing Dennis) is consistent with the trial court’s initial order that a neutral will be appointed. There is no question that Dennis was appointed by the court.

Peterka touts the court of appeals’ erroneous comment that there is a fact issue on whether Dennis was court-appointed. (Resp. br. at 15-16 (citing *Peterka v. Dennis*, 744 N.W.2d 28, 31 (Minn. Ct. App. 2008).) The court of appeals statement, however, was *dicta* and did not definitively address the issue of Dennis’s court-appointment. *Peterka*, 744 N.W.2d at 31 (“From our review of the record, *it appears* that there is a question of fact on this issue, but whether or not Dennis was court appointed does not end the inquiry into whether he is entitled to quasi-judicial immunity[.]”) (emphasis added). Moreover, there are no facts in dispute because Dennis’s appointment was based upon trial court orders. The orders are clear and unambiguous: the trial court ordered an independent neutral to value the parties’ businesses and later appointed Dennis as the neutral to perform that function. (A.1-3; 78-81.)

Peterka argues that the order cannot be a court appointment because it was based on the parties’ stipulation. (*See* Resp. br. at 16-17.) Indeed, Peterka does everything possible to avoid calling the trial court’s second order an “order.” (*See, e.g.*, Resp. br. at

3 (the “Stipulation was approved by Judge Swenson”), 15 (“Appellants-Accountants Chosen Under Court Approved Stipulation”), 17 (“The Court Approved Stipulation”).) The parties’ stipulation to use Dennis as the independent neutral in order to comply with the trial court’s first order does not negate the appointment. As noted in Appellants’ opening brief, the parties’ stipulation makes the subsequent court order appointing Dennis more conclusive because the parties cannot object to the merits of the order or its enforcement and the parties are estopped from re-litigating the issue. (App. br. at 20-21 (citing *Shirk v. Shirk*, 561 N.W.2d 519, 521-22 (Minn. 1997); *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).) The parties’ stipulation can only be seen as enhancing Dennis’s appointment.

B. Dennis Performed A Quasi-Judicial Function In A Judicial Proceeding

Peterka incorrectly claims that Appellants argue Dennis should be given immunity simply because of his “status” as a court-appointed neutral. (Resp. br. at 24-26.) Peterka ignores Appellants’ argument that to obtain immunity a neutral must meet two requirements, the second of which is to perform “a judicial *function* during a judicial or quasi-judicial proceeding.”⁵ (App. br. at 17 (emphasis added).) Dennis has consistently

⁵ In its opening brief, Appellants argued that “*the person’s status ... 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.*” (App. br. at 13 (emphasis added) (citing *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987), *abrogated in part on different grounds by Burns v. Reed*, 500 U.S. 478 (1991).)

argued that the function the appointed neutral performs and the proceeding where the neutral provides services are important to determine whether immunity attaches.

Peterka later abandons the function versus status argument and claims immunity only attaches in three circumstances: (1) to judges or prosecutors for the administration of justice, (2) when a person acts as an arm of the court, and (3) to arbitrators. (Resp. br. at 31-33.) Peterka again distorts Dennis's argument in claiming Dennis is seeking immunity as a judge or an arbitrator. (*Id.*; *see also* Resp. br. at 17-21.) Nothing in Appellants' opening brief suggests that Dennis is seeking judicial or arbitral immunity.

Dennis is entitled to immunity because he was court-appointed and performed a quasi-judicial function within a judicial proceeding. His function was to evaluate and make recommendations on the resolution of one disputed issue – the value of the businesses. Determining business value in a marital dissolution proceeding is a judicial function. If Dennis had not been appointed, the trial court would have performed that function. *Nardini* establishes that such a valuation is a judicial function. *See Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987). Dennis is, therefore, entitled to quasi-judicial immunity.⁶

⁶ Peterka does not dispute that if Dennis is immune his employer (Baune, Dosen) is vicariously entitled to immunity.

C. Case Law Supports Granting Dennis Immunity

1. Peterka's Cases Are Inapposite

Peterka relies on a number of cases, primarily from other jurisdictions, in arguing that Dennis is not entitled to immunity. (Resp. br. at 19-20, 25-26, 30, 33-34.) The one Minnesota authority Peterka cites, *Gammel*, is irrelevant because the defendant in that case was hired by private parties to perform a private audit. *Gammel v. Ernst & Ernst*, 245 Minn. 249, 255-56, 72 N.W.2d 364, 368-69 (1955). Thus, the defendant was not court-appointed and did not perform any function associated with judicial or quasi-judicial proceedings. *Id.* (See also App. br. at 25-28.)

The non-Minnesota cases that Peterka offers are similarly inapplicable because those cases concerned different circumstances, such as defendants who: were privately hired by the parties, were not court-appointed, did not perform a judicial function within a judicial proceeding, and sought immunity as an arbitrator even though they did not function as an arbitrator. See, e.g., *Levine v. Wiss & Co.*, 478 A.2d 397, 398 (N.J. 1984) (denying immunity to accountant where accountant was privately hired by parties to value businesses and was not court-appointed, thus accountant's "role was comparable to that of any expert hired by parties to a contract to resolve a dispute over a particular term's meaning, and therefore ... [accountant was] not shielded from potential liability");⁷ *Arthur Andersen & Co. v. Wilson*, 353 S.E.2d 466, 467-68 (Ga. 1987)

⁷ *Levine* was later distinguished by a New Jersey Superior Court. See *P.T. v. Richard Hall Cmty. Mental Health Care Ctr.*, 837 A.2d 427, 430 (N.J. Super. Ct. App. Div. 2000). *P.T.* recognized *Levine*'s holding that professionals hired by parties and not

(auditor who was court-appointed was immune, but accountant who merely reported to the auditor (not the court) and was not court-appointed was not immune).⁸ These cases do not discuss a situation where the neutral was court-appointed and performed a judicial

appointed by a court should be denied immunity. *Id.* The court in *P.T.*, however, granted immunity to a psychologist because “she was appointed by court order to conduct an evaluation and render a report and recommendation and that she in fact thereafter did so pursuant to that order.” *Id.*

⁸ See also *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 686-87 (10th Cir. 2004) (appraiser hired by buyer and seller prior to litigation during contract negotiations was not entitled to immunity); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1087 (9th Cir. 2000) (immunity not at issue, but holding that appraisals are not governed by the Federal Arbitration Act, and appraiser was appointed through a declaratory judgment action to act on behalf of the parties in resolving a contract dispute); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1059 (5th Cir. 1990) (immunity not at issue, but concluding that appraisals are not arbitration; appraisers hired by parties pursuant to a private contract, reported to an umpire appointed by the court, but made no report to court and did not act on behalf of court); *E.C. Ernst, Inc. v. Manhattan Constr.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (defendant immune as an arbitrator, which “serves as a private vehicle ... He is a creature of contract, paid by the parties to perform a duty, and his decision binds the parties because they make a specific, private decision to be bound”); *Sanitary Farm Dairies v. Gammel*, 195 F.2d 106, 108 (8th Cir. 1952) (immunity not addressed by court, which concluded that appraisal was not arbitration where appraiser hired per a private contract to value stock, was not court-appointed and made no report to any court); *Horsell Graphic Indus. v. Valuation Counselors, Inc.*, 639 F. Supp. 1117, 1119-20 (N.D. Ill. 1986) (defendant not immune as an arbitrator where defendant hired per the terms of a private contract to set price of one partner's stock and did not act in any quasi-judicial manner); *Rastelli Bros. v. Netherland Ins. Co.*, 68 F. Supp. 2d 440, 445-47 (D.N.J. 1999) (concluding that an appraisal clause in insurance contract was not an arbitration clause, but never addressing immunity as it was not an issue before the court); *Comins v. Sharkansky*, 644 N.E.2d 646, 648-49 (Mass. App. Ct. 1995) (private agreement that designated accountant to appraise fair market value of stock was not entitled to immunity, but recognizing immunity is available to experts “appointed at a judge's discretion to render expert services ‘to the court’ and to give the disinterested objective opinion that the court seeks”) (quotations omitted).

function within a judicial (or quasi-judicial) proceeding. Thus, Peterka's analysis of non-Minnesota cases has no bearing on this appeal.

2. Other Jurisdictions Agree With Minnesota's Rule

The focus of this appeal is the quasi-judicial immunity law in Minnesota, which, as noted above, is well settled: court-appointed professionals who perform functions on behalf of the court within a judicial proceeding are entitled to immunity. Contrary to Peterka's contentions, many jurisdictions are in line with Minnesota's rule. *See, e.g., Lythgoe v. Guinn*, 884 P.2d 1085, 1088 (Alaska 1994) (court-appointed independent custody evaluator immune because she "perform[ed] a function pursuant to a court directive related to the judicial process"); *Reddy v. Karr*, 9 P.3d 927, 928 (Wash. Ct. App. 2000) ("family court investigators performing court-ordered parenting evaluations act as an arm of the court and accordingly are entitled to quasi-judicial immunity"); *Paige K.B. v. Molepske*, 580 N.W.2d 289, 296 (Wis. 1998) (court-appointed guardian *ad litem* immune because "without the assistance and impartial judgment of a [guardian *ad litem*], the [trial] court would have no practical or effective means to assure itself that all of the essential facts have been presented untainted").⁹ (*See also* Family Law br. at 13 (citing

⁹ *See also Broom v. Douglass*, 57 So. 860, 865-66 (Ala. 1912) (justice of the peace immune when performing a judicial act of issuing a warrant); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 894 (Cal. Ct. App. 1990) (court-appointed psychologist immune when making neutral recommendations to the court in a custody proceeding); *Stone v. Glass*, 35 S.W.3d 827, 830 (Ky. Ct. App. 2000) ("the functions served by court-appointed psychologists conducting evaluations and making recommendations regarding custody are integral to the judicial process. Therefore, such individuals are entitled to quasi-judicial immunity"); *Duff v. Lewis*, 958 P.2d 82, 86-87 (Nev. 1998) (court-appointed psychologist immune since his "recommendations aided the trial court" and "his services

non-Minnesota jurisdictions granting immunity to neutral psychologists appointed in family court proceedings to evaluate and render opinions in contested custody litigation).)

The cases addressing immunity for accountants who perform functions closely related to judicial proceedings in other jurisdictions are limited, but at least two jurisdictions have granted immunity for court-appointed accountants performing functions within judicial proceedings. *See Riemers v. O'Halloran*, 678 N.W.2d 547, 549-51 (N.D. 2004) (court-appointed accountant performing valuations in a divorce proceeding entitled to immunity because immunity was essential to ensure “that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation”) (quoting *Loran v. Iszler*, 373 N.W.2d 870, 875 (N.D. 1985)); *Shatzman v. Cunningham*, No. 231712, 2002 WL 31955214, at *1-*3 (Mich. Ct. App. Dec. 17, 2002) (accountant appointed by a court pursuant to a stipulated order to value “certain business assets pursuant to a court order in an underlying divorce action” was entitled to “quasi-judicial immunity because [the accountant]’s actions arose from his court-ordered

were performed pursuant to a court order”); *Holder v. Frim*, No. Civ. 06-CV-162-JD, 2006 WL 2190723, at *3 (D.N.H. Aug. 1, 2006) (court-appointed guardian *ad litem* immune as a quasi-judicial actor) (SA.4-7); *Bluntt v. O'Connor*, 291 A.D.2d 106, 117-19 (N.Y. App. Div. 2002) (court-appointed guardian immune as arm of the court in determining the best interest of a child); *Winchester v. Little*, 996 S.W.2d 818, 827 (Tenn. Ct. App. 1998) (court-appointed guardian *ad litem* immune because “[c]ourts rely upon the guardian *ad litem* to provide an objective opinion”); *Delcourt v. Silverman*, 919 S.W.2d 777, 783, 785 (Tex. Ct. App. 1996) (court-appointed mental health expert and court-appointed guardian *ad litem* immune); *Parker v. Dodgion*, 971 P.2d 496, 498-99 (Utah 1998) (court-appointed psychologists immune); *West v. Osborne*, 34 P.3d 816, 821 (Wash. Ct. App. 2001) (court-appointed guardian *ad litem* immune because guardian acts as arm of the court).

appointment to resolve valuation disputes between the parties to the divorce action, a fact-finding function that involves judgment independent of the parties”) (SA.8-11).

In short, many decisions from other jurisdictions are consistent with Minnesota cases that hold quasi-judicial immunity should be granted to independent neutrals who are court-appointed to serve as an arm of the court. *See Schmidt v. Gayner*, 59 Minn. 303, 308, 62 N.W. 265, 265 (1895) (receivers immune from negligence suit); *Melady v. S. St. Paul Live Stock Exch.*, 142 Minn. 194, 196, 171 N.W. 806, 807 (1919) (expressing principles of immunity and concluding that a board of directors acting in a quasi-judicial function are immune); *Linder*, 209 Minn. at 46, 295 N.W. at 300 (court-appointed physician and surgeon were quasi-judicial officers and are immune); *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. Ct. App. 1990) (therapist and clinic immune).¹⁰ *See also Imbler*, 424 U.S. at 430 (immunity attaches where the “functional nature of the [defendant’s] activities” are “intimately associated with the judicial” process); *Myers v. Morris*, 810 F.2d 1437, 1466-68 (8th Cir. 1987) (court-appointed guardians *ad litem* and psychologists immune from negligence suit; psychologist who was not court-appointed also immune).

¹⁰ Peterka continues to misstate Dennis’s position by contending that “Appellants rely heavily on the Appellate Court’s decisions in *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. Ct. App. 1997) and *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490 [sic] ([sic] Jan. 2, 2007).” (Resp. br. at 22.) These cases, however, were cited in a footnote and a string cite in Appellants’ opening brief. (App. br. at 22 n.10, 24.) Additionally, *Zagaros* and *Kuberka* support the conclusion that Dennis should be granted quasi-judicial immunity. *See Zagaros*, 558 N.W.2d at 519-24 (court-appointed custody evaluator immune); *Kuberka, v. Anoka Mediation, Inc.*, No. A05-2490, 2007 WL 3525, at *3 (Minn. Ct. App. Jan. 2, 2007) (court-appointed custody evaluator immune) (A.145-47).

Peterka contends the Minnesota cases are inapposite because the trial court made appointments “pursuant to [a] statute” “under a delegation of authority from the legislature.” (Resp. br. at 22-23; *see also* Resp. br. at 27, 29-30.) This contention falls short because immunity was granted in these cases without relying on any statute. Some cases observed that the neutral was appointed pursuant to a statute, but the courts then determined that immunity applied because the neutral performed a function as an arm of the court within a judicial (or quasi-judicial) proceeding. *See, e.g., Melady*, 142 Minn. at 169-97, 171 N.W. at 807 (noting that a corporation was organized under a statute, but concluding that board of directors were immune because they acted as “a quasi-judicial tribunal”); *Linder*, 209 Minn. at 48, 295 N.W. at 301 (noting that physician and surgeon were appointed “in accordance with the provisions of 2 Mason Minn. St. 1927, §§ 8958 and 8959,” but concluding neutrals were immune because “defendants were quasi judicial officers and that what they did was in the scope of their duties as such”); *Myers*, 463 N.W.2d at 775-76 (never addressing any statute by which therapist was appointed, and concluding therapist is immune because “immunity is designed to protect the judicial process, it also extends to persons who are integral parts of that process immunity”).¹¹

¹¹ *See also Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (noting that guardian *ad litem* was appointed pursuant to Minn. Stat. § 257.60 (1986), but extending immunity to guardians *ad litem* “for the very reasons that the doctrine arose in the first instance, ... A guardian must be free, in furtherance of the goal for which the appointment was made, to engage in a vigorous and autonomous representation of the child. Immunity is necessary to avoid harassment from disgruntled parents who may take issue with any or all of the guardian’s actions”); *Myers*, 810 F.2d at 1465-67 (noting that defendants were appointed pursuant to Minn. Stat. § 260.155(4) (1982) to serve as guardians *ad litem*, but granting immunity because “nonjudicial persons who fulfill quasi-

Additionally, even under Respondents' argument, Dennis would be entitled to immunity because the trial court had statutory authority to appoint a neutral expert under Minnesota Rule of Evidence 706, which states:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. *The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.*

Minn. R. Evid. 706 (emphasis added). As provided in Rule 706, the order defines Dennis's duties and requires the parties to pay half of Dennis's fees. (A.1-3, 78-81.) Moreover, Peterka's counsel had her expert review Dennis's analysis and conclusion to "see whether ... there is anything missing" and "let me know what he thought of it in so many words." (A.84.) This is consistent with Rule 706, which allows parties to "call[] expert witnesses of their own selection." Minn. R. Evid. 706(d).

Minnesota Rule of General Practice 114 also supports the conclusion that court-appointed neutrals are entitled to quasi-judicial immunity. *See* Minn. R. Gen. Prac. 114. As discussed in the Family Law amicus brief, Rule 114 recognizes that family court proceedings benefit from having an independent perspective on various issues, such as asset valuations, cash flow analyses, vocational assessments and custody evaluations. (*See* Family Law br. at 2-5 (citing Minn. R. Gen. Prac. 114).) Thus, the trial court's

judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions").

orders are authorized by Minnesota Rule of Evidence 706 and Minnesota's General Practice Rule 114.

III. PUBLIC POLICY SUPPORTS APPLYING IMMUNITY TO DENNIS

Peterka largely ignores the public policy reasons to grant immunity to independent neutrals like Dennis. (Resp. br. at 27-30.) Instead, Peterka returns to a function versus status argument. (*Id.*) Public policy concerns should not be given short shrift. The Minnesota Judicial Council encourages judges to use neutrals in family law litigation to swiftly resolve disputes. *See Focus on the Future: Priorities & Strategies for Minnesota's Judicial Branch (FY2007-FY2009) (A.125-44); In re Family Court Early Case Mgmt. & ADR Best Prac. Guidelines, ADM-04-8002 (Minn. Apr. 23, 2004) (A.119-24).* This Court specifically advises judges to use "neutral experts to value disputed assets" 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." *See In re Family Court Early Case Mgmt. & ADR Best Prac. Guidelines, ADM-04-8002.*

Several jurisdictions have determined that failing to provide immunity to the independent neutrals could result in fear of subsequent litigation, which would discourage neutrality and reduce the willingness of experts to act on behalf of the court. As the Nevada Supreme Court noted in granting a court-appointed psychologist immunity, "[w]ithout immunity, these professionals risk exposure to lawsuits whenever they perform quasi-judicial duties. Exposure to liability could deter their acceptance of court appointments or color their recommendations." *Duff*, 958 P.2d at 85-86. *See also Stone*,

35 S.W.3d at 830 (noting that individuals subject to suit will be less willing to serve the court and less likely to offer a disinterested opinion); *Winchester*, 996 S.W.2d at 826 (“Human nature indicates that court-appointed experts, faced with the threat of personal liability, will be less likely to offer the disinterested objective opinion that the court seeks.”) (quoting *Miller v. Niblack*, 942 S.W.2d 533, 537 (Tenn. App. 1996)); *Parker*, 971 P.2d at 498-99 (“First, if these individuals are subject to suit, they will be much less willing to serve the court in such a capacity. Second, a psychologist who agrees to fill the role of court-appointed evaluator will be less likely to offer the disinterested, objective opinion the court seeks in making such an appointment if he or she is subject to suit.”).

Parties who feel aggrieved by a court-appointed neutral’s report are not without a remedy. The parties have the trial judge, post-trial motions, and the appellate review process to protect their rights. *See, e.g., Dziubak v. Mott*, 503 N.W.2d 771, 774 (Minn. 1993) (“it is thought unlikely that officials [protected by immunity] will commit abuses since the appellate review process is likely to prevent serious torts.”); *Imbler*, 424 U.S. at 427 (“Various post-trial procedures are available to determine whether an accused has received a fair trial.”). Peterka did not challenge Dennis’s evaluation either post-decision or on direct appeal. The time to appeal the trial court’s order, which utilized Dennis’s evaluation, expired long ago.

Public policy supports applying quasi-judicial immunity to the neutrals because they are acting as an arm of the court. Quasi-judicial immunity preserves the neutral’s integrity and independence, allows the neutral to freely perform services for the court’s

benefit, and benefits the parties. Immunity also prevents unhappy litigants from filing malpractice suits against court-appointed neutrals who serve a judicial function. Public policy provides a solid rationale to apply quasi-judicial immunity to independent neutral evaluators, like Dennis.

CONCLUSION

This Court faces a narrow issue on appeal – whether a court-appointed neutral evaluator is entitled to quasi-judicial immunity. Minnesota’s case law and public policy support recognizing that immunity protects independent neutrals, like Dennis, who are court-appointed and perform a judicial function within a judicial proceeding. Thus, quasi-judicial immunity precludes Peterka’s claims against Dennis. The court of appeals should be reversed.

Dated: July 17, 2008

BRIGGS AND MORGAN, P.A.

By: 

John M. Degnan (#21817)

Diane B. Bratvold (#18696X)

Jonathan P. Schmidt (#329022)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2157

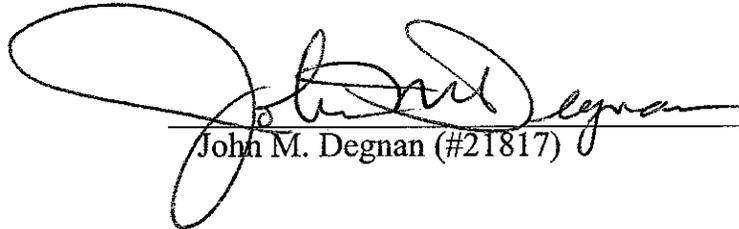
(612) 977-8400

**ATTORNEYS FOR APPELLANTS
STEPHEN G. DENNIS, CERTIFIED
PUBLIC ACCOUNTANT, AND
BAUNE, DOSEN & CO.**

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 5,894 words, including headings, footnotes and quotations (and excluding the Table of Contents and Table of Authorities).

Dated: July 17, 2008



John M. Degnan (#21817)

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