

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.

RESPONDENT'S 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. Are the Appellants-Accountants chosen under court approved stipulation to make an appraisal of the valuation of the business of the parties entitled to immunity as quasi-judicial officers?**

The district court found that the accountants were court appointed and that because of the court appointment they were entitled to immunity.

The Court of Appeals found that there was a factual dispute as to the accountant's court appointment, but irregardless held that even if they were court appointed neutrals, they were not appointed to perform a judicial function and therefore are not entitled to quasi-judicial immunity.

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

STATEMENT OF THE CASE

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

This action was commenced in the Fourth Judicial District Court in the County of Hennepin and was heard before the Honorable Tony N. Leung. The action was brought on a Complaint on February 5, 2004 (A-1). The Appellants answered the Complaint (A-29). Following discovery, several motions for summary judgment were filed by both sides.

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

summary judgment by the trial court's Order on Motion to Dismiss by Virtue of Quasi-Judicial Immunity. The trial court extended quasi-judicial immunity to the Appellants. The Respondent subsequently settled by Perringer Agreement with the Defendant Todd R. Haugan and a Final Judgment was entered in this cause on November 28, 2006.

The Court of Appeals reversed the trial court and found the Appellants not entitled to qualified immunity in *Peterka v. Dennis*, 744 N.W.2d 28 (Minn. App. 2008). This appeal ensued.

STATEMENT OF FACTS

In the spring of 1996 the Respondent retained Roselyn J. Nordaune and Nordaune & Friesen, attorneys at law, to represent her in a dissolution of marriage action from her former husband, Mark J. Peterka. A marital dissolution action was commenced on April 4, 1996. Ms. Peterka was represented by Roselyn J. Nordaune and Nordaune & Friesen.

On September 10, 1997 Roselyn J. Nordaune hired on behalf of the Respondent the Appellant Stephen G. Dennis, certified public accountant, as an appraiser for the businesses owned by Mark J. Peterka known as Mark Charles, Inc., and Deerbrooke Construction, Inc. At that time it was agreed between the Respondent and her former husband, through counsel, that they would jointly use the services of Appellant Stephen G. Dennis and his firm as the appraiser for the businesses. Such stipulation was approved by Judge Swenson, the trial court, on September 30, 1997. (A 1)

On September 23, 1997 the Defendant Todd R. Haugan was substituted as counsel for the Respondent and represented her through the dissolution of marriage action and the

trial and various post-decretal motions and matters.

The Appellants Stephen G. Dennis and Baune, Dosen & Co., performed an appraisal of the subject businesses and testified to the same on February 11, 1998 before the court at trial. Appellant Stephen G. Dennis had found and testified that the fair market value of the Respondent's former husband and her interest in Deerbrooke Construction, Inc., was \$84,000 and of Mark Charles, Inc., was \$275,900.

The court based its final judgment of July 17, 1998 on the evaluation of Appellant Stephen G. Dennis as described above. (R 46)

This accounting malpractice action was commenced against the Appellants for their failure to perform accounting and appraisal services in accordance with the generally accepted standards; for their failure to provide a true and accurate reflection of the financial conditions of the businesses in question; their misrepresentations of the financial condition of the businesses and their valuations and particularly the valuations of the businesses' inventories. The expert for the Respondent has opined that the joint value of the parties and Mark J. Peterka in the subject companies was in excess of \$1.5 million thus costing the Respondent in excess of \$750,000 in property and money in her dissolution of marriage. (See Affidavit of Mark J. Stiegel dated July 29, 2004 (R 5)).

The Respondent's expert, Mark J. Stiegel, CPA, has found and opined:

- a. On or about September 10, 1997, the Defendants Stephen G. Dennis and his company Baune, Dosen & Company were hired on behalf of the plaintiff, Catherine Peterka to perform a stipulated evaluation of

Mark Charles, Inc. and Deerbrooke Construction, Inc., companies owned by the Plaintiff's husband, Mark J. Peterka. Mr. Dennis was to prepare a report of his valuation and to testify at the trial of the dissolution of marriage between the plaintiff and her husband, Mark J. Peterka.

b. Mark Charles, Inc. was a construction company owned one hundred percent by Mark J. Peterka and Deerbrooke Construction Company was a construction company in which it was purported by Mark J. Peterka that he owned fifty percent.

c. Stephen G. Dennis performed an evaluation of the subject businesses and testified to such appraisal on February 11, 1998 before the Court at trial.

d. Stephen G. Dennis had found and testified that the fair market value of the plaintiff's husband and her interest in Deerbrooke Construction was \$86,000 and of Mark Charles, Inc. was \$275,990.

e. In preparing his report and testifying, Stephen G. Dennis had utilized the book value of the inventory of the corporations in lieu of their actual fair market value. The inventory of the corporation consisted of constructed homes, homes under construction, and lots.

f. As the Court found in its Amended Findings of Fact, Conclusions of Law, Judgment and Judgment and Decree of July 30, 1998, at paragraphs 24, 25 and 26:

24. The parties are the owners of Mark Charles, Inc. And MC Interiors, Inc., and fifty (50) percent owners in Deerbrooke Construction, Inc. Mark Charles is a home building company that builds homes in the \$300,000.00-\$500,000.00 range. Deerbrooke is a home building company that builds homes in the \$150,000.00 to \$\$250,000 range. MC Interiors is a home interior decorating company that was operated by Respondent during the marriage.

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 \$75,000.00. As of December 31, 1996, the Fair Market Value of Mark Charles was \$270,000.00.

g. Whenever preparing an appraisal of a business, it is the standard of care that such valuation should include the fair market value of the inventory, not the book value, particularly a construction company.

h. Mark Peterka had testified on his deposition of 1/8/98 at pages 13 through 16 that the fair market values in his estimation of the inventory are as follows:

Mark Charles

10522 Audubon Court	\$ 262,000
10035 Gristmill Ridge	\$ 349,000
10500 Shelter Grove(he resides here)	\$ 350,000
8602 Big Woods Lane	\$ <u>549,000</u>
	\$1,510,000

Deerbrooke

2378 Manuella Drive, Chaska	\$ 225,000
2375 Manuella Drive, Chaska	\$ 209,000
8519 Pine Court, Victoria	\$ 211,900
1210 Narcissus, Victoria	\$ 206,900
8946 Windsor Circle, Savage	\$ 249,900

Pursuant to the Court's Amended Findings of Fact, Conclusions of Law, Judgment and Judgment and Decree of July 30, 1998 the plaintiff was determined to have a 50% interest of Mark Peterka's interest in the above corporations. Due to the failure of Stephen Dennis to report and account for the accurate valuation of the inventory and to utilize such in his evaluation of the companies, the plaintiff lost or was not credited for \$746,672 and thus was damaged in this same amount. (A-14 to A-17)

Nardini v. Nardini, 414 N.W. 2d 184 (Minn. 1987) is considered the leading and seminal decision in Minnesota for evaluating the present value of a closely held business in a dissolution of marriage. In *Nardini* this Court stated at page 189:

“The value of a family business as marital property cannot be less than a sum equal to the net proceeds which could be realized from the forced sale of the tangible assets of the business and the collection or assignment of intangibles such as accounts receivable, and after payment of all liabilities. If the corporation is to continue in operation under the management of one of the owner-spouses even though the liquidation value of the business is greater than its value as a going business, assigning the corporation the lesser value as a going business patently disadvantages the spouse who must relinquish his or her interest in the corporations and unfairly benefit's the spouse to whom the marital interest in the corporation is awarded.”

The Appellant Steven Dennis has testified that *Nardini* is the leading decision in the state and he has further given conferences to his colleagues specifically dedicated to this case. See pages 17, 18, and 90 of his deposition of 12/03/04 (R 24) and the CV of Dennis (A 55). It is the standard of care to evaluate closely held corporations pursuant to such decision. Mr. Dennis utilized an adjusted book value, which is far less then the

liquidation value. This is a deviation from the standard of care. As this Court said in *Nardini* at page 189: "If the corporation is to continue in operation under the management of one of the owner-spouses even though the liquidation value of the business is greater than its value as a going business, assigning the corporation the lesser value as a going business patently disadvantages the spouse who must relinquish his or her interest in the corporation and unfairly benefits the spouse to whom the marital interest in the corporation is awarded."

Judge Swenson in his Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree of March 20, 1998 finds at paragraph 24 (A 4): "**The parties are the owners** of Mark Charles, Inc. and MC Interiors, Inc., and fifty (50) percent owners in Deerbrooke Construction, Inc." He continues at paragraph 27: "...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." Paragraph 33 of this Final Judgment is worth repeating again because the court states:

Dividing up Mark Charles, Inc. and Deerbrooke presents the Court with a very practical problem. Petitioner cannot continue to operate Mark Charles, Inc., and Deerbrooke, and generate the same income as in the past if he is ordered to liquidate half the assets of the company to pay a portion to Respondent on an immediate basis. If he is compelled to liquidate half of his interest and thus substantially reduce his ability to earn income, the order will have a negative impact on his ability to pay child support and spousal maintenance, and clearly would not be in Bennett's best interests. Petitioner [husband] suggests that he be allowed to **pay Respondent her share of the companies' assets** over time, via an 8% promissory note, secured by company assets. The note would be due and payable on

June 30, 2004 (date of emancipation and end of child support for youngest child, Bennett).

It is apparent that both the Court and the husband's attorney understood *Nardini* to require liquidation of half of the assets with the suggestion being made by the husband that he be permitted to pay her share of the assets over time via an 8% note.

Unfortunately, it was based upon the Dennis evaluation of \$361,900 without the benefit of the Peterka valuations raising the values to \$1.5 million. In fact, this is what the Court did when it distributed the marital estate at paragraph 25:

As set forth in the Findings and above, Respondent'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.

The court applied the *Nardini* liquidation values in the Peterka dissolution. It did not have available the other eight (8) factors of Revenue Ruling 59-60 as discussed in *Nardini*¹. (As shown above, definitely not good will of corporations that have been in

¹ These factors are:

- 1) The nature of the business and the history of the enterprise from its inception.
- 2) The economic outlook in general and the condition and outlook of the specific industry in particular.
- 3) The book value of the stock and the financial condition of the business.
- 4) The earning capacity of the company.
- 5) The dividend-paying capacity.
- 6) Whether or not the enterprise has goodwill or other intangible value.
- 7) Sales of the stock and the size of the block of the stock to be valued.
- 8) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks traded in a free and open market. (R 41

existence for over eleven (11) years.)

Two (2) recent decisions from the Court of Appeals are helpful, *Walbon v. Walbon*, 205 WL 1021577 (Minn. App. 2005) (R 13) and *Berenberg v. Berenberg*, 474 N.W.2d 843 (Minn. App. 1991) (R 17).

In *Walbon* the husband operated three (3) trucking companies with his brothers and owned 42.5% interest in all the businesses. The husband sold his interest in the companies to his brothers during the pendency of the dissolution for \$298,562. The wife presented testimony that the total value of the parties' interest in the companies was \$1,464,683. (It is also interesting that these figures are almost identical to the figures in the Peterka case i.e. \$360,000 vis-a-vis \$1,500,000.) The court based its evaluation on the higher value and awarded the wife her one-half interest therein. The companies' accountant testified that his valuation was based on liquidation value which "clearly produces the lowest stock value". The wife's expert testified that he had experience in the trucking industry as an accountant and was aware of the actual value of tractor trailers which have been depreciated. The husband's valuation was based upon depreciated values of his tractor trailers not their fair market value. This is the same situation as in Peterka. The Dennis evaluation is based upon the costs of the assets not their actual fair market value. This Court stressed in its decision that there has to be a starting point and

and R 42)

that the other 8 factors of Revenue Rule 59-60 must be taken into effect thereafter (which was not done by Dennis in Peterka).

In *Berenberg v. Berenberg*, 474 N.W.2d 843 (Minn. App. 1991) the trial court used an asset-based valuation of the husband's shares in closely held corporations owned by the husband and his parents. The husband argued that the court could not use such evaluation in that it was not appropriate when the trial court could not have ordered liquidation. This Court stated at page 847:

Appellant argues that adjusting the book value to reflect the value of the actual tangible assets here is inappropriate because the trial court would be unable to order a forced liquidation of the business. Appellant attempts to distinguish Nardini saying that the asset based valuation approved of in Nardini was justified because the court had jurisdiction over both owners in the dissolution and could order a liquidation of the business. See *Nardini* 414 N.W.2d at 189 (value of the business cannot be less than what would be realized by forced sale of the assets).

This Court approved the method stating that *Nardini* applied the asset-based evaluation to a buy-out, not a liquidation valuation.

In Peterka, Dennis did not adjust the book value to reflect the value of the actual tangible assets i.e. book value at \$360,000 and actual tangible assets value at \$1,500,000.

This beguiles Stephen Dennis' own preaching in his teaching of "*Nardini v. Nardini, Characterization and Valuation of the Closely-Held Business*," Minnesota CLE (1988) at pages 15 and 16 he states:

2. **Liquidation value is a floor on the value of a closely-held corporation.**
 - a. Supreme Court's comments:
Second, Ralph's appraiser testified that the amount

which could be realized by liquidating the corporation significantly exceeded its market value as a going business. Nevertheless, the trial court adopted the lesser value, which it further discounted for lack of control. **The value of a family business as marital property cannot be less than a sum equal to the net proceeds which could be realized from the forced sale of the tangible assets of the business and the collection or assignment of intangibles such as accounts receivable, and after payment of all liabilities.** If the corporation is to continue in operation under the management of one of the owner-spouses even though the liquidation value of the business is greater than its value as a going business, assigning the corporation the lesser value as a going business patently disadvantages the spouse who must relinquish his or her interest in the corporation and unfairly benefit's the spouse to whom the marital interest in the corporation is awarded. Moreover, inasmuch as Nardini of Minnesota is a thriving and vital corporation with cash and cash assets in excess of liabilities, the worst-case scenario suggested by "down and dirty" liquidation is not a suitable measure of market value. While the relinquishment of his or her interest in the family business is in effect a forced sale, the court must determine the value of the business as if the transaction were a sale of the entire business by a willing seller to a willing buyer.

b. **This principal is supported in the valuation literature.**

In the case of businesses for which liquidation is not a real possibility in the foreseeable future, the liquidation value approach still can yield information of substantial value to the appraiser. **Because the actual market value of any business that is more than minimally profitable is almost always greater than its liquidation value, an estimate of the liquidation value (orderly disposal basis) of the business can provide the appraiser with a value benchmark in the form of a lower limit on the range of possible values for the business.**

The trial court in the instant case dismissed on April 8, 2005 by way of summary judgment the Respondents by finding that they were entitled to qualified judicial

immunity. (A 88) A Perringer Settlement was reached with attorney Todd Haugan on October 17, 2006. The Court of Appeals reversed the Summary Judgment on January 29, 2008, *Peterka v. Dennis*, 744 N.W.2d 28 (Minn. App. 2008) and this appeal ensued.

ARGUMENT

I. STANDARD OF REVIEW

Rule 56.03 of the Minnesota Rules of Civil Procedure provides that summary judgment shall be granted if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material or fact that either party is entitled to a judgment as a matter of law.

In reviewing a trial court's grant of summary judgment, the appellate court's role is to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Wartnick v. Moss & Barnett*, 490, N.W.2d 108, 112 (Minn. 1992) (citing *Offerdahl v. University of Minn. Hosp. and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988)). The evidence is to be viewed in the light most favorable to the appellant, as the party against whom the summary judgment was granted. See *Gron Dahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). Any doubt about the existence of an issue of material fact should be resolved in the appellant's favor. See *Rathbun v. W. T. Grant*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974).

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

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

The Court of Appeals has followed the *Gammel* decision based on the function of the defendants "...not as arbiter but as an accountant-evaluator ..." as enunciated by this Court *id.* at 256, 72 N.W.2d at 369 (quoting *Sanitary Farm Dairies, Inc. v. Gammel*, 195 F.2d 106, 114-115 (8th Cir. 1952)². The function is not of a judicial nature. "In this case, Dennis's evaluation of business assets did not involve an exercise of authority that is essentially judicial in nature." 744 N.W.2d 28, 32.

The trial court made its determination on the fact that Dennis was court appointed. The Court of Appeals, though, concluded that at best this was a question of fact "... but whether or not Dennis was court appointed does not end the inquiry into whether he is entitled to quasi judicial immunity, because such immunity only extends to the exercise of

² "We agree with appellant that Dennis's function in the dissolution action was very similar to the function of the accountants in *Gammel*." 744 N.W.2d 28, 32.

judicial authority.” 744 N.W.2d 28, 31.

DENNIS NOT COURT APPOINTED

Even the trial courts finding of court appointment is in error. The Appellants, though, desperately needed to rely upon the finding of the trial court’s appointment to make their case.³ As will be seen below, even with Court appointment quasi-judicial immunity does not extend because of a lack of judicial function as the Court of Appeals concluded. 744 N.W.2d 28.

Dennis was not court-appointed by the trial court in the dissolution of marriage between Peterka and her husband.

Judge Swenson in his Order and Stipulation for Order of September 30, 1997 (A 1) found:

2. The purpose of this Order and Stipulation for Order is to direct that the parties shall cooperate with an independent neutral evaluation of the value of the parties’ business assets by Steve Dennis, CPA, JD; ...

He ordered:

1. The parties shall cooperate with an independent neutral evaluation of the value of the parties’ business assets by Steve Dennis, CPA, JD.

Judge Swenson in his Findings of Facts, Conclusions of Law, Order for Judgment and Judgment and Decree of March 20, 1998 (A 4) found at paragraph 25:

³ See pages 17-22 of Appellants’ Brief.

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

The trial court below found the Respondents court appointed under the above language from Judge Swenson's orders and determined that because of the court appointment, they were entitled to immunity. It found in its memorandum that the Plaintiff "does not point to a single fact which would tend to show that the accountant is not court appointed." (A 94)

The language of Judge Swenson's order, though, is clear and unambiguous. The court approved the stipulation of the parties agreeing to retain Dennis as an independent neutral to conduct an evaluation of the parties' businesses. The court did not appoint him.

In a judgment or order language that is not ambiguous is not subject to interpretation. *Gray v. Farmland Industries, Inc.*, 529 N.W.2d 514, 516 (Minn. App. 1995). Language is ambiguous if it is reasonably susceptible to more than one interpretation. *Columbia Heights Motors v. Allstate Ins.*, 275 N.W.2d 32, 34 (Minn. 1979). The language is not ambiguous as to whether the court had appointed Respondents as accountants. The court did not. He has approved the parties' stipulation to retain the accountant. The Court cannot amend an order which is not ambiguous. *Gray v. Farmland Industries, Inc.* supra.

ACCOUNTANTS AS APPRAISERS NOT AFFORDED JUDICIAL IMMUNITY

More importantly, accountants in the role of appraisers have not been afforded such judicial immunity whether or not court appointed. As the Court of Appeals noted it

has been the longstanding law of this state, as enunciated by the this Court in 1955 that accountants employed as auditors or appraisers do not acquire the status of arbitrator or quasi-arbitrator as to create judicial immunity for their actions in the performance of such service. As this Court stated in *Gammel v. Ernst & Ernst*, 245 Minn. 249, 255, 72 N.W.2d 364 (1955):

4. In most of these cases judicial immunity was held dependent upon some contractual provision which 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. But in the absence of such contractual provisions, or **where the agreement does not call for the exercise of judicial authority, ordinarily the person selected to perform skilled or professional services is not immune from charges of negligence and is required to work with the same skill and care exercised by an average person engaged in the trade or profession involved.** *East Grand Forks v. Steele*, 121 Minn. 296, 141 N.W. 181, 45 L.R.A. (N.S.) 2005; *Cowles v. Minneapolis*, 128 Minn. 452, 151 N.W. 1984; *Royal Ins. Co. v. Ries*, 80 Ohio St. 272, 88 N.E. 638; *Bruce v. James*, 12 Dom. L. R. 469; *Rogers v. James* [1891] 8 T. L. R. 67. (Emphasis supplied.)

This Court did not find that in such a situation, an appraiser or auditor sat in the position of an arbitrator. As the court stated at page 256:

“We do not think it soundly can be said that the legal effect of this was to constitute Ernst and Ernst as an ‘umpire’ or arbiter, with an obligation to hear, consider and produce a result in relation to the contentions of the parties. Rather, as suggested above, it seems to us that what the contract provided for was the *making of a sound accountancy appraisal of earnings, by an independent auditor, through the use necessarily of proper applicable auditing process, but with the ultimate result inherently to be produced by the judgment, discretion and skill which the selected expert would be called upon to exercise – not as an arbiter but as an accountant-evaluator * * **” (Italics and Emphasis supplied.)

This Court's decision in *Gammel v. Ernst & Ernst*, supra, has been the progeny for the decisions in many other states which have addressed this issue. In *Comins v. Sharkansky*, 38 Mass. App. Ct. 37, 41, 644 N.E.2d 646 (1995) the court had before it an accountant chosen by the parties under a court approved settlement agreement to appraise the stock and value of a company. The court stated:

In similar circumstances, cases elsewhere have not accorded appraisers immunity despite their claims to be arbitrators. See, e.g., *Horsell Graphic Indus. v. Valuation Counselors, Inc.*, 639 F. Supp. 1117, 1119-1120 (N.D. Ill. 1986); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 255-256 (1955); *Levine v. Wiss & Co.*, 97 N.J. 242, 248-253 (1984). See also 16 Williston, Contracts § 1920 at 227 (3d ed. 1976) (Immunity does not extend to those who are only appraisers).

In *Levine v. Wiss & Co.*, 97 N.J. 242, 252, 478 A.2d 397 (1984) the court had before it an accountant who had been appointed by the court as an impartial expert to evaluate and appraise a husband's business in a divorce proceeding. In finding themselves in full accord with *Gammel v. Ernst & Ernst*, supra, the Supreme Court of New Jersey stated: "This reasoning applies with equal cogency to the facts now before us. **'An accountant in defendants' position does not exercise judicial authority.'**" (Emphasis supplied.)

When the question has been inspected by other courts, without the benefit of *Gammel v. Ernst & Ernst*, supra, they have found that accountants, even appointed, do not meet the role of an arbitrator performing judicial functions when appraising businesses. The Georgia Supreme Court in *Arthur Andersen & Co. v. Wilson*, 256 Ga. 849, 353 S.E.2d 466 (Ga. 1987) found that a court appointed auditor was extended such privilege

in that George statutes empowered auditors to hear motions, allow amendments, pass upon all questions of law and fact, subpoena and swear witnesses and compel the production of papers. But the court found that the court appointed accountant was to “perform an examination of the books, records and accounts ... for the purposes of determining the value of the plaintiff’s stock ...” was not empowered to perform judicial functions and therefore was not extended judicial immunity as one who could hear motions and pass on questions of law and fact, swear witnesses and issue subpoenas.

More than several federal courts have found that an appraisal is not an arbitration. In *Portland Gn. Ele. v. U.S. Bank Tr. Nat. Ass’n*, 218 F.3d 1085 (9th Cir. 2000) the Ninth Circuit in interpreting Oregon law found an appraisal is not an arbitration. A like result was found in *Rastelli Bros., Inc. v. Netherland Ins., Co.*, 68 F. Supp. 2d 440 (D.N.J. 1999) in applying New Jersey law. (The court noted a “great distinction between arbitration and appraisal, for while arbitration may be wide in its scope, an appraisal is limited to the narrow issue of the amount of loss”.) In *Hartford Lloyd’s Insurance Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990) the Fifth Circuit found that under Texas law it is clear that an appraisal (insurance) only determines the value of loss and is not an arbitration. In *Salt Lake Tribune v. Management Planning*, 390 F.3d 684, 691 (10th Cir. 2004) the Tenth Circuit found that the appraisal of a newspaper business under federal law did not amount to an arbitration.

In *Brassard v. Western Capital Corp.*, 763 F. Supp. 1017, 1019 (Minn. 1990) the federal district court for Minnesota found that an agreement for an appraisal is not an

agreement for an arbitration. In citing *Sanitary Farm Dairies v. Gammel*, 195 F.2d 106, 113 (8th Cir. 1952) and applying Minnesota law, the court stated: “In general, 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.” The treatise writers have also noted such distinction. See 21 Williston on Contracts § 57:8 (4th ed. 2005) describing the distinction between appraisals and arbitration and Thomas H. Oehmke, 1 Commercial Arbitration § 1:6 (2005) that arbitration and appraisal are distinct methods of dispute resolution.

DENNIS TO APPLY SOUND ACCOUNTING PRINCIPLES OF NARDINI

The Court of Appeals found that “Dennis’s function was to apply sound accounting principles to develop factual basis supporting his expert opinion on the value of businesses ... Dennis had to exercise the same skill and judgment required by those in his profession; but like the accountants in *Gammel*, exercise of that judgment did not equate to performing a judicial function. Dennis was retained ... not as a decision-maker to determine competing claims of appellant and her husband. For the reasons stated in *Gammel*, 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.” 744 N.W.2d 28, 32.

As a side note, the Minnesota Society of Certified Public Accountants in their Amicus Curiae Brief are critical of the Court of Appeals use of the words “apply sound accounting principles” in its decision. They argue that there are no such words used in

the order by the trial court approving the Stipulation to use Dennis and that such language constitutes an unsupported premise and conclusion.

The Court of Appeals use of these words is a paraphrase of this Court's use of the words "sound accounting appraisal" in *Gammel*, 245 Minn. 249, 256 as cited from the Eighth Circuit's use of the words in *Sanitary Farm Dairies v. Gammel*, 195 F.2d 106, 114 (8th Cir. 1952). In both of these decisions the accountants had been retained by the parties to conduct an appraisal of earnings to determine the value of the stock of corporations.

The accountants miss the point. It is the principle or principles set down by this Court in *Nardini*, 414 N.W.2d 184, 189 which are the sound accounting principles to be applied. See discussion on page 8 of this Brief. It is the same principles of which the Defendant Stephen Dennis addresses in his discussion of *Nardini* (see page 13 above) when he writes "the principle is supported in the valuation literature."

APPELLANTS' CASES

The Appellants rely heavily on the Appellate Court's decision in *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. Ct. App. 1997) and *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490 (Jan. 2, 2007). Both cases involved custody evaluators in dissolution of marriage proceedings. In *Zagaros*, the court found that trial courts have statutory authority to order custody evaluations and reports (Minn. Stat. § 518.167, subd. 1 which provides "In contested custody proceedings the court may order an investigation and report concerning custodial arrangements for the child.") The Court declined to extend such immunity, based upon a lack of court appointment in lieu of an agreement of the

parties. The Appellants have no such statutory authority. The Court in *Kuberka* stated that it would extend such immunity based upon a court appointment under the statute. But the Appellants, try as desperately as they must, do not enjoy such court appointment, only a court approval of a stipulation between the parties to utilize their services.

This Court's decision in *Linder v. Foster*, 209 Minn. 43, 295 N.W. 299 (1940) (page 24 of their brief) held that physicians and surgeons appointed by the court pursuant to statute to make examinations in insanity proceedings are entitled to immunity. Again, the doctor is acting as an arm of the court under a delegation of authority from the legislature.

In *Tindell v. Rogosheske*, 428 N.W.2d 386 (Minn. 1988), page 24 of their brief, this Court found that guardian ad litem appointed by the court pursuant to statute to protect minor child's interests are entitled to immunity. Again, the guardian ad litem is acting as an arm of the court under a delegation of authority from the legislature.

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

considerations exist for the Respondents.

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

Kipp relied heavily upon the reasoning of the United States Supreme Court in extending immunity to prosecutors in *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 487 L. Ed.2d 128 (1976). The court noted at page 643 of *Kipp* that "This immunity is contingent not on the status but on the particular function of the prosecutor; ..."

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

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

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

FUNCTION, NOT STATUS, DETERMINES IMMUNITY

The Appellants argue that the status of court appointment of Dennis, if such appointment exists, renders the *Gammel* decision inapposite. But the *Gammel* decision has rested its opinion not on status but on function. Accountants performing appraisals

are not acting as hearing officers or umpires with an obligation to hear, consider and produce a result in relation to the contention of the parties but rather are only making sound accountancy appraisals (pursuant to *Nardini*, id. @ 189) – not as an arbiter but as an accountant-evaluator.

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

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

Respondent's arguments.

The Appellants also rely heavily on *Riemers v. O'Halloran*, 678 N.W.2d 547 (N.D. 2004). In this decision the trial court **appointed** under Evidence Rule 706 an accounting firm to determine a number of issues involving a husband's earning from his business and accounting irregularities. The North Dakota Supreme Court extended immunity based upon the **appointment** by the court. The court distinguished *Levine, supra*, because it "...involved an expert selected by the parties to the action." In *Levine*, though, the accountant was selected by the parties and **approved** by the court. The identical situation to the case at bar.⁴

⁴ The Appellants state at page 16 that in conformance with Rule 706 (permitting parties to call their own experts) that the Respondent retained Howard Kaminsky as a "shadow" expert. But such is not the case. Mr. Haugan, Peterka's counsel, did not believe under the Stipulation that he had the power or right to call his own expert. At page 148 of his deposition he testified:

"But I was quite confident that if I would have just hired someone else, it's not getting into evidence."

"...and I can't imagine that I would have been allowed to get another expert in." (R 70)

There is no mention of Rule 706 in the order appointing Dennis.

More importantly, Mr. Kaminsky had been retained to determine income stream and was requested to review Dennis' report. Mr. Kaminsky could not perform such review, because Dennis would not deliver the records to Haugan which had been submitted to him by Peterka's husband. Haugan testified at page 25 of his deposition that he received no documents from Mr. Dennis. (R 69) Mr. Dennis testified that production would be made only at his deposition. See page 107 and 116 of Dennis's deposition. (R 72 and R 73). Such policy and practices is unjudge like and further increases the costs of the litigation.

PUBLIC POLICY

The Appellants and the Family Law Lawyers argue that there are public policy reasons to extend such immunity. The two (2) cases cited above, *Shatzman*, supra, and *Riemers*, supra, do not extend immunity based upon public policy, but a finding of court appointment and a function as arbitrators. The Appellants rely upon this Court's statements in *Melady v. South St. Paul Live Stock Exch.*, 142 Minn. 194, 197, 171 N.W. 806 (1919) (at page 28 of Appellants' Brief) in granting immunity to a Board of Directors acting as arbitrators not "...because of any special tenderness for judges ..." but "...deeply rooted in the common law of considerations of public policy..." to a person called to serve in a judicial capacity. Again, it is function.

From this the Appellants argue under *Melady* that it is the independence and integrity of the decision maker, in the *Melady* case a board of directors acting as arbitrators pursuant to statute, which must be protected. It is their function - arbitrators - which must be protected in this regard. Dennis does not enjoy such function as an arbitrator.

Their policy argument is primarily that new court rules and studies are requiring such extension of immunity and that CPAs will not provide such services without immunity. For the later, they have no studies or evidence upon which to rely. It is pure speculation. This author attempts to locate such have proved unfruitful (as he assumes has been true for the Appellants). In discussions with several leading national malpractice defense lawyers for accountants and their carriers it appears such claims are

minimal, at best. In fact there is no evidence that an accountant-CPA in Hennepin County has been sued under similar circumstances. This writer is quite sure that Appellants' counsel, provided by Dennis's malpractice insurance carrier, would have such information, if it has occurred previously.

They argue there are new policy reasons under the Minnesota Judicial Council's *Focus on the Future* (which clearly apply only to custody evaluations). (A 137) The Council's overriding policy, though, is to develop public trust by achieving excellence in the resolution of cases by **accurately and fairly determining the facts** and enunciating the law (A 142). This Court went to great lengths in *Nardini v. Nardini, supra*, to protect spouses being forced to sell their interest in a business.⁵ The imposition of such liability "... may cause accounting firms to engage in more thorough review." *Levine v. Wiss & Co.*, 190 N.J. Super. 335, 339, 463 A.2d 396 (1983) citing *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 342 (1983).

Shadow experts will only increase the costs of the litigation (3 experts instead of 1) and is contrary to the purpose of the Rules of Civil Procedure. See Rule 1 "secure ...

⁵ The Appellant, Stephen Dennis, has testified that *Nardini* is the leading decision in the state and he has further given conferences to his colleagues specifically dedicated to this case. As this Court stated in *Nardini* at page 189: "If the corporation is to continue in operation under the management of one of the owner-spouses even though the liquidation value of the business is greater than its value as a going business, assigning the corporation the lesser value as a going business patently disadvantages the spouse who must relinquish his or her interest in the corporation and unfairly benefit's the spouse to whom the marital interest in the corporations is awarded."

inexpensive determination of every action.”⁶

This Court in its rulings has always found function to be determinative. See *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194, 171 N.W. 806 (1919) (as to board members acting as arbitrators) and *L&H Airco, Inc., v. Rapistan Corp.*, 446 N.W.2d 372, 376-77 (Minn. 1989) (as to arbitrators). The Supreme Court of the United States in *Imber v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 985, 47 L.Ed.2d 128 (1976) clearly defines that immunity is extended based upon **function** not **status**. As the Court of Appeals noted, the Supreme Court has stated that “...the touchstone for the doctrine’s applicability has been performance of **function** of resolving disputes between parties, or authoritatively adjudicating private rights.” *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36, 113 S. Ct. 2167, 2171 (1993). (Emphasis supplied.)

The Appellants rely upon a litany of cases arguing that function is not determinative. But when the cases are examined, they rely upon function or their authority. In *Myers v. Morris*, 810 F.2d 1437, 1467 (8th Cir. 1987) court-appointed psychologists, psychiatrists, guardians and therapists were granted immunity as arms of the court having been delegated such functions by the legislature pursuant to statute. This Court in *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) extended immunity to guardian ad litem protecting minors’ best interest in support actions who have been

⁶ **Rules of Civil Procedure, Rule 1. Scope of Rules**

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

delegated such authority by statute. In *Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (citing *Myers v. Morris*) immunity was granted to a psychologist supervising one appointed by the court pursuant to statute. In *Linder v. Foster*, 209 Minn. 43, 45-46, 295 N.W. 299 (1940) this Court granted immunity to a court-appointed doctor acting as an examiner in exercise of judicial authority and pursuant to statute. In *Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 212, 214 (Minn. 1981) this Court extended immunity to prosecutors based upon the United States Supreme Court's decision in *Imbler v. Pachtman*, *supra*, and this Court's decision in *Robinette v. Price*, 214 Minn. 521, 533, 8 N.W.2d 800, 807 (1943).

This Court's decision in *Gammel* and its reasoning based upon function has been consistently followed by the courts throughout this country. In *Comins v. Sharkansky*, 38 Mass. App. Ct. 37, 41, 644 N.E.2d 646 (1995) an accountant chosen by the parties under court approved settlement agreement to appraise the value of a company was not extended immunity under the reasoning of this Court in *Gammel*. In *Levine v. Wiss & Co.*, 97 N.J. 242, 252, 478 A.2d 397 (1984) an accountant appointed by the court to appraise a husband's business in a divorce proceeding was not extended immunity under the reasoning of *Gammel*. In *Arthur Andersen & Co. v. Wilson*, 256 Ga. 849, 353 S.E.2d 466 (Ga. 1987) an accountant appointed by the court to perform an examination of the books, records and accounts for determining the value of the plaintiff's stock in the business was not extended such immunity under the wisdom of *Gammel*.

QUASI-JUDICIAL IMMUNITY EXTENDED IN ONLY THREE OCCASSIONS

It is suggested by Appellees that quasi-judicial immunity has been extended to those who are not judges in only three instances. The first is when it is absolutely necessary for the administration of justice. The second is when the person is acting as an arm of the court and the third is when they are acting as an arbitrator.

Quasi-judicial immunity has been extended to those who are **absolutely** necessary for the court to function and administer justice. Those include prosecutors as determined by the United States Supreme Court in *Imbler*, supra., and this Court in *Kipp*, supra, and public defenders as determined by this Court in *Dzubiak*, supra. In extending to public defenders the Court found that there were policy reasons for such extensions which are not present for private counsels performing the same duties defending those charged with crimes. The court could not effectively administer justice without these participants, particularly the right to counsel (for public defenders). These persons are judge-like in that they are absolutely necessary for the judge to fairly administer justice. No courts have found CPA appraisers to be in the same category.

The second occurrence is when the party is acting as an arm of the court as described by the Eighth Circuit in *Myers v. Morris*, 810 F.2d 1437, 1467 (8th Cir. 1987), as approved by the Court of Appeals in *Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990). The court describes that guardian ad litems, psychologists, therapists and attorneys representing children are acting as an arm of the court in providing examinations and representing innocent victims of the proceeding. In this situation the

legislature has delegated the court's authority to such professionals by statute. Dennis and appraisers enjoy no such authority.

The Family Law Lawyers argue a number of foreign cases where qualified judicial immunity was extended to psychologists who were court appointed in family court proceedings to evaluate and render custody recommendations.⁷ In these cases it appears that there was not a statute authorizing such, but the courts extended immunity under the concept of an arm of the court. The Minnesota Court of Appeals has discussed this same scenario in *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. App. 1997) that in Minnesota such an extension of immunity is by court appointment or delegation of authority under statute and with out such appointment (agreement of the parties) no such immunity maybe extended. Dennis enjoys luxury of neither court appointment nor statutory authority.

The third occurrence is when the party is acting as an arbitrator. *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194, 171 N.W. 806 (1919); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955); and *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn. 1989). This can be by agreement of the parties or by appointment of the court. The arbitrator is acting judge-like. He is making the decision. To render the decision he normally has subpoena powers, conducts hearings with both

⁷ See e.g. *Hathcock v. Barnes*, 25 P.2d 295, 297 (Okla. App. 2001); *Diehl v. Danuloff*, 242 Mich. App. 120, 133, 618 N.W.2d 83, 90 (1999); *Foster v. Washoe Co.*, 114 Nev. 936, 937 - 938, 964 P.2d 788 (1998); *Duff v. Lewis*, supra at 570-571, 958 P.2d 82, 82 (1998); *Parker v. Dodgion*, supra at 498; *Delcourt v. Silverman*, 919 S.W.2d 777 (Tex. App. 1996); *Lythgoe v. Guinn*, 884 P.2d 1085, 1086 (1994); *Lavit v. Superior Court*, 173 Ariz. 96, 99, 839 P.2d 1141 (Ariz. App. 1992).

adversaries present and decide competing claims. His decision is normally binding between the parties by agreement or judicial order and he has been historically referred to as an arbitrator or master. Dennis and CPA appraisers enjoy no such position. He did not have subpoena powers, did not conduct hearings. He did not render the decision, the court did.

In fact, Dennis acted very unjudge-like. He conducted ex parte communications with the adversaries. (R 72) He failed to produce to Appellee's counsel evidence which he was reviewing to make his decision. His position was, "if you want to find it out, take my deposition." (R 73) Inviting a deposition of a judge is very unjudge-like. And if he was appointed, as he claims, there was no clarity in this appointment. There was no outline or delegation of his duties and authorities in the court order. (A 1) Furthermore, there is no rule, local or otherwise, which delegates his duties and authorities.

In *Horsell Graphic Ind. v. Valuation Counsel.*, 639 F. Supp. 1117, 1120 (N.D. Ill. 1986) the federal district court for Illinois had before it a defendant selected by the parties to perform evaluation of a business. The defendant argued that it was an arbitration entitled to immunity. In relying upon *Gammel v. Ernst & Ernst*, supra, and finding that the appraiser did not act as arbitrators being entitled to immunity, the following statement by the court is germane:

The terms "appraisement" and "arbitration" are sometimes used interchangeably and frequently without any clear difference in meaning. There is, however, a plain distinction between an appraisement and an arbitration. The latter, in the proper sense of the term, presupposes a controversy or a difference to be tried and decided. Arbitrators generally proceed in a quasi judicial manner to

settle the dispute. The jurisdiction is in the nature of a judicial inquiry and certain rules of procedure must be observed or the award will be void. On the other hand, an appraisal is the proper term to be used when an appraisement or valuation is to be made as auxiliary or incident to a contract Unless there are some restrictions in the agreement under which they are appointed, **appraisers are generally expected to act on their own knowledge and investigation and hence are not required to give notice of the hearings, hear evidence or receive the statements of the parties.** (citing *Sebree v. Board of Education*, 254 Ill. 438, 446, 98 N.E. 931 (1912).) (Emphasis supplied.)

The Fifth Circuit Court of Appeals explained the reasoning for such distinction and immunity in *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir. 1977):

The arbitrator's "quasi-judicial" immunity arises from his resemblance to a judge. The scope of his immunity should be no broader than this resemblance. The arbitrator serves as a private vehicle for the ordering of economic relationships. 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. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their disputes to him through the structure of the judicial system, at mostly public expense. His decisions may be glossed with public policy considerations and fraught with the consequences of stare decisis. When in discharging his function the arbitrator resembles a judge, we protect the integrity of his decision-making by guarding against his fear of being mulcted in damages. Cf. *Broom v. Douglass*, 175 Ala. 268, 57 So. 860 (1912). **But he should be immune from liability only to the extent that his action is functionally judge-like. Otherwise we become mesmerized by words.** (Emphasis supplied.)

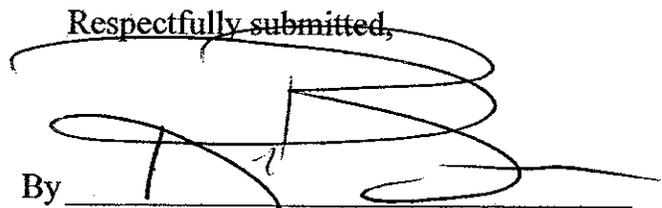
The Appellants were not acting in the role of arbitrators but as appraisers. Their argument that they are arbitrators is an attempt to mesmerize us by words. As appraisers

they are not entitled to judicial immunity. The imposition of such liability "may cause accounting firms to engage in more thorough review." *Levine v. Wiss & Co.*, 190 N.J. Super. 335, 339, 463 A.2d 396 (1983) citing *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 342 (1983).

CONCLUSION

The trial court erred in granting summary judgment on behalf of the Appellants and dismissing the Complaint by extending quasi-judicial immunity to the Appellants. The Appellants-accountants, chosen under court approved stipulation to make an appraisal of the valuation of the businesses of the parties are not entitled to immunity as quasi-judicial officers. The Court of Appeals has reversed the trial court's order on this basis. The Court of Appeals decision should be upheld by this Court and the case remanded to the trial court for further proceedings and trial.

Dated: 6/25/08

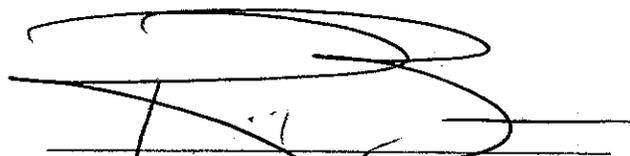
Respectfully submitted,


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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Catherine F. Peterka, 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 Works 7.0 and contains 9,610 words, including headings, footnotes and quotations (and excluding the Table of Contents and Table of Authorities).

Dated: 6/25/08


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