

NO. A09-1172

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State of Minnesota  
**In Court of Appeals**

Pond Hollow Homeowners Association, a Minnesota non-profit corporation,  
*Plaintiff,*

vs.

The Ryland Group, Inc., a Maryland corporation,  
*Defendant and Third-Party Plaintiff/ Respondent,*

vs.

Larry D. Barnabo Builders, a Minnesota corporation; D.S.M. Excavating Co.,  
 Inc., a Minnesota corporation; Automated Building Components, Inc., a  
 Minnesota corporation; Gopher State Concrete, Inc., a Minnesota corporation;  
 Metro Siding, Inc., a Minnesota corporation; Waterproofing, Inc., a Minnesota  
 corporation, and Manor Concrete Construction, a Minnesota corporation,  
*Third-Party Defendants,*

and

Pioneer Engineering, Inc., a Minnesota corporation,  
*Third-Party Defendant/ Appellant.*

and

Automated Building Components, Inc.,  
*Fourth-Party Plaintiff,*

vs.

Reliant Building Products, Inc., a Florida corporation; and  
 Philips Products, Inc., an Indiana corporation,  
*Fourth-Party Defendants.*

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**BRIEF AND ADDENDUM OF PIONEER ENGINEERING, INC.**

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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 LEGAL ISSUES

1. Courts may involuntarily dismiss a case without prejudice pursuant to procedural Rule 41.02 if a litigant has abused the litigation process or has not followed any court directives. Procedural rules, though, cannot abridge a litigant's substantive rights. After the court determined that Ryland substantively failed to establish its prima facie professional-negligence case against Pioneer and granted Pioneer summary judgment, did it err by dismissing the case *without* prejudice?

Apposite authority:

*Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423 (Minn. 1987);  
*Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992);  
*Lombardo v. Seydow-Weber*, 529 N.W.2d 702 (Minn. App. 1995); and  
Minn. R. Civ. P. 41.02

## STATEMENT OF THE CASE AND FACTS

In this construction-defect case, respondent The Ryland Group, a home builder, brought a third-party complaint against appellant Pioneer Engineering, a professional-engineering firm contracted to do specific work on a new housing development, Pond Hollow, located in Maple Grove, Minnesota. (A. 22-37). Pioneer brought a motion for summary judgment against Ryland, alleging that it had failed to establish the essential elements of its claim against Pioneer and that Pioneer was thus entitled to judgment in its favor and dismissal *with* prejudice. (A. 38-39). The district court agreed that Ryland had failed to come forward with evidence establishing professional negligence and it granted Pioneer summary judgment. (Add. at 13). The court, though, then directed that the dismissal be *without* prejudice. (*Id.*). In this appeal, Pioneer contends that the court had no discretion to enter a dismissal without prejudice and that it erred as a matter of law. As such, Pioneer seeks to have this court either modify the district court's order to

indicate that it is with prejudice or to remand the matter to the district court with instructions to do the same.

In May 1998, Janco, a real-property-development company, purchased an interest in what is known as the Pond Hollow property. (A. 25 ¶ 19). Janco then hired Pioneer to perform engineering work for the property before construction on the site began, including boundary and topographical surveys of the site to determine elevations in its original condition, to delineate the wetlands, and to sketch a lay out of the lots, streets and ponds on the site. (A. 25 ¶ 20; 115 ¶¶ 4, 5, 6).

Because Pioneer is not the geotechnical-soils-engineering firm, it was not hired to test the soil at Pond Hollow. (A. 116 ¶ 16). Instead, Janco hired Braun Intertec as the soils engineer. Braun was charged with determining the site's soil conditions and whether the soils created unique circumstances that would have an impact on construction of the homes. (A. 116 ¶ 16). Pioneer used Braun's geotechnical report to determine that there was suitable soil on the site for development, to set the site elevations for the building pads and streets, and to advise Janco about project costs (for instance, whether additional soil will need to be imported to the site, etc.). (A. 115 ¶ 7; 65-90). Pioneer also relied on Braun's soil reports when it created a preliminary grading plan, utility plan, and plat drawing. (A. 115 ¶¶ 8, 9).

On September 8, 1998, the Maple Grove City Council approved the final plat for the site. (A. 49-53). On that same day, Janco and Ryland entered into an assignment agreement in which Ryland purchased the property. (A. 54-56).

As the new owner of the site, Ryland hired Pioneer to stake the site before construction began, to outline the proposed streets, to stake the four corners of each individual building pad, and to create an outline for each proposed home for the grading contractor that Ryland hired. (A. 115 ¶¶ 10, 11). Ryland also retained Braun to do additional soil testing. (A. 115-16 ¶¶12; 57-61).

Shortly after moving in to their new homes, the Pond Hollow residents started complaining about constantly running sump pumps, movement of sun-porch footings, heaving patio slabs, heaving of sidewalks, driveways, and foundations. (A. 2). On October 5, 2005, the Pond Hollow Association served a summons and complaint on Ryland, alleging the following claims: breach of contract, breach of statutory warranty, negligence, and breach of fiduciary duty. (A. 1-6). The Association sought over \$3-million in consequential damages to remedy these problems.

Ryland commenced a third-party action against several contractors involved in the project, but not appellant Pioneer Engineering. (A. 7-11). One of those third-party defendants, DSM Excavating Company, brought a fourth-party action against Pioneer, alleging contribution and indemnity for any damages that may be attributable to Pioneer's work on the project. (A. 17-20). DSM Excavating filed an expert disclosure on March 28, 2008 that did not articulate any deficiencies with Pioneer's work at the site. Based on the lack of evidence of any negligence on the part of Pioneer, Pioneer was dismissed from the lawsuit. (A. 21).

On June 27, 2008, Ryland served an amended third-party complaint, bringing Pioneer back into the lawsuit. (A. 22-28). Ryland's third-party complaint alleged that if

Ryland is found liable for any of plaintiff's alleged damages, that liability is the fault of Pioneer and the other third-party defendants' to provide work or materials for the homes according to their duties or with reasonable care. (A. 26-27). Ryland claimed that it was thus entitled to contribution and/or indemnification from the third-party defendants, and it served an expert affidavit to support its allegations that Pioneer Engineering deviated from the standard of care applicable to engineers. (A. 29-30).

Pioneer then brought a motion for summary judgment, arguing that Ryland failed to present any evidence establishing that Pioneer breached its contractual duty to perform professional engineering work with reasonable care. (A. 38-39). In response, Ryland relied on its already-served expert disclosure of Steve Klein, who opined:

- Pioneer Engineering deviated from the standard of care applicable to engineers in that it failed to properly recognize and evaluate the water tables when determining the building pad elevations.
- Pioneer Engineering deviated from the standard of care applicable to engineers because it failed to recognize that the combination of the elevation of the homes in relation to the water table, plus the predominantly clay soils at the development, created the potential for heaving of sun porch footings due to adfreezing.<sup>1</sup>
- Pioneer Engineering deviated from the standard of care applicable to engineers because it should have anticipated the potential for heaving due to adfreezing and should have advised real property developer Janco of the same.

(A. 108-109).

Pioneer replied by pointing to the evidence demonstrating that it did not have any

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<sup>1</sup> Adfreezing in this case refers to frost heaving of porches that can occur when soils adhere to the footing columns and then lift those columns, or when frost penetrates the soils below the footings, lifting the footings.

responsibility for determining soil conditions on the project (that was Braun's responsibility) or anything relating to sun-porch footings, a point conceded by Ryland's expert. (A. 108 ¶ 7b).

Prior to the hearing, Ryland did not seek a continuance or file affidavits pursuant to Minn. R. Civ. P. 56.06. Nor did it supplement its expert-interrogatory answers prior to the hearing on the motion.

The Hennepin County District Court, the Honorable Lloyd Zimmerman, reviewed the evidence before it and determined in a December 10, 2008 order that Klein's expert opinion failed to "define the appropriate standard of care applicable to engineers or how Pioneer fell short." (Add. at 6-7). Specifically, the court determined Ryland had failed to come forward with evidence demonstrating that Pioneer had any contractual duty to determine soil type or the depth of the water table [Add. at 9]; that "Braun (not Pioneer) was responsible for evaluating the subsurface soil and ground water conditions" [Add. at 9]; that there was no "evidence in the record to show that Pioneer had any responsibility for determining design of the sun porch footings, specifications for the sun porch footings, depth of the sun porch footings, or how the sun porch footings should be wrapped and installed" [Add. at 10]; there was "no duty on the part of Pioneer to warn Janco of the possibility of adfreezing" and that there thus was no evidence before the court that Pioneer had any "responsibility to advise any party with respect to the sunporch footings" [Add. at 13]; and that Ryland had not offered "any evidence to show that either it or Janco were unaware of the potential for adfreezing," and that, in fact, "the record show[ed] that both Janco and Ryland were aware of the conditions." [Add. at 10]. The

court concluded that because Ryland had not come forward with any evidence demonstrating that there were material issues of fact as to Pioneer's negligence, Pioneer was entitled to summary judgment. (Add. at 13).

Nevertheless, it dismissed Pioneer "without prejudice," explaining that it was doing so because of a companion case that Ryland brought against Janco, Inc., the real-estate development company that assigned its interest in the Pond Hollow property to Ryland. ["Janco action"]. (Add. at 13). Instead of joining Janco in the Pond Hollow action, Ryland brought a separate action against Janco, alleging breach of contract, negligence and specific performance and seeking a declaratory judgment that Janco was required to indemnify Ryland for all liability costs and expenses that Ryland had incurred in the Pond Hollow matter. (A. 168-173). Janco counterclaimed against Ryland, essentially alleging the same claims. (A. 174-180).

At the time of the court's decision in this case, Pioneer was not a party to the Janco action. After the summary-judgment order, though, both Janco and Ryland asserted claims against Pioneer, alleging that if they had to pay each other, they were entitled to indemnity and contribution from Pioneer and Braun for the very same alleged professional negligence that was at issue in the Pond Hollow action. (A. 180-186; 186-197).

Eventually, all claims against all remaining parties in the Pond Hollow matter were resolved, and the court entered a final judgment on April 29, 2009. (A. 139-141). The Janco action, on the other hand, continues with multiple summary-judgment motions pending before the same district court.

After the court granted Pioneer summary judgment in this case, Ryland requested that it be given 60 days to cure the defects in its expert affidavit or be allowed to file a motion for reconsideration pursuant to Minn. R. Gen. Prac. 115.11. (A. 131). The court denied both requests, finding that because it was ruling on a summary-judgment motion, and not a “motion to dismiss an action under [Minn. Stat. § 544.42, subd. 6 (c)] based upon claimed deficiencies of the affidavit or answers to interogatories[,]” it did not need to provide Ryland with time to cure whatever defects might exist in its expert’s interrogatories. (A. 137). The court also concluded that Ryland had not demonstrated compelling circumstances for reconsideration pursuant to Minn. R. Gen. Prac. 115.11. (*Id.*).

This appeal follows. (A. 142-146). Ryland has filed a notice of review. (A. 148).

## ARGUMENT

### I. Standard of Review and Summary of Argument.

A reviewing court is not bound by and need not give deference to a district court’s decision on a purely legal issue. *Frost-Benco Elec. v. Minnesota Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984). Construction of a procedural rule is question of law subject to de novo review. *Kastner v. Star Trails Ass’n*, 646 N.W.2d 235, 238 (Minn. 2002). *See also In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 753 (Minn. 2005) (noting that appellate courts review de novo questions of interpretation of court rules of procedure).

Here, the district court erred as a matter of law when it implicitly applied Minn. R. Civ. P. 41.02, a procedural rule, and entered a dismissal without prejudice, even those it

also determined as a substantive matter that Ryland had failed to establish a prima facie case of professional malpractice against Pioneer.

## **II. The District Court Erred When It Dismissed Ryland's Action Against Pioneer Without Prejudice.**

*A. Because the district court determined that Ryland failed to establish his prima facie case, it was requiring to enter summary judgment in favor of Pioneer.*

In actions against a professional, a prima facie case of malpractice is established by showing (1) the standard of care recognized by community applicable to that defendant; (2) that the defendant departed from that standard (the breach); and (3) that the defendant's breach was a direct cause of plaintiff's injuries. *See Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993) (applying standard to medical professional); *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992) (applying standard to attorney); *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 218 (Minn. 2007) (applying standard to accountants); *Prichard Bros., Inc. v. Grady Co.*, 436 N.W.2d 460, 465 (Minn.App.1989) (applying standard to architects); *City of Eveleth v. Ruble*, 302 Minn. 249, 254-55, 225 N.W.2d 521, 525 (Minn. 1974) (applying standard to engineers). Put simply, a professional, such as an engineer, is under duty to exercise such care, skill, and diligence as persons in that profession ordinarily exercise under like circumstances. *Id.*, 302 Minn. at 254-55, 225 N.W.2d at 525. A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any essential element of the claim. *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

In order to establish a prima facie case of malpractice in Minnesota, a "plaintiff [bears] the burden to prove, by expert testimony, that it was more probable that

[plaintiff's injury] resulted from some negligence for which defendant was responsible than from something for which he was not responsible." *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979) (emphasis added). *See also Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992) (holding that to establish prima facie case of malpractice, plaintiff must prove it is more probable than not that injury was result of defendant's negligence; failure to present such proof, normally in form of expert testimony, *mandates either summary judgment or directed verdict for defendant*).

Here, the district court determined that Ryland failed to substantively support its professional-malpractice claim against because Ryland did not come forward with evidence at the time of the summary-judgment hearing establishing that Pioneer owed the duties that its expert, Steve Klein, opined that Pioneer breached. "Lacking duty, there can be no negligence." *Rasmussen v Prudential Ins. Co.*, 277 Minn. 266, 270, 152 N.W.2d 359, 362 (1967). And because the court found that Ryland failed to establish any of the elements of its prima facie case, it appropriately determined that Pioneer was entitled to summary judgment in its favor.

*B. Having found that Ryland substantively failed to establish its case against Pioneer, the district court had no discretion to apply a procedural rule and dismiss Ryland's action without prejudice.*

The problem with the district court's ultimate determination, though, is that it then entered a dismissal without prejudice, rather than with prejudice, implicitly applying Minn. R. Civ. P. 41.02, which governs involuntary dismissals and permits a court under

certain circumstances to dismiss a matter without prejudice.<sup>2</sup> It is not intended to govern where, as here, plaintiff has failed to establish the merits of its case. *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). The *Lampert* decision is controlling on this point. There, a material supplier sued a property owner and a contractor to foreclose on mechanics' lien. The property owner counterclaimed against the material supplier and cross-claimed against the contractor. *Id.* at 424. After a trial, the court ruled, among other things, that the property owner had failed to establish her cross-claim, yet it dismissed the cross claim *without* prejudice. *Id.* The contractor appealed, “[b]elieving that [the property owner] should not have been given a second chance to sue him.” *Id.*

The Minnesota Supreme Court reversed, rejecting the notion that a trial court “has wide discretion in determining whether dismissals shall be with or without prejudice.” *Lampert Lumber Co. v. Joyce*, 396 N.W.2d 75, 77-78 (Minn. App. 1986) (quoting *Falkenstein v. Braufman*, 251 Minn. 444, 452, 88 N.W.2d 884, 889 (1958)). Instead, after examining the purpose of Rule 41.02, the court explained that it “is designed to let the trial court manage its docket and eliminate delays and obstructionist tactics by use of the sanction of dismissal. If a party does not cooperate with the litigation process by failing to comply with the rules of procedure or an order of the court, the judge may dismiss the case with or without prejudice.” *Lampert*, 405 N.W.2d at 425 (citing *Firoved v. General Motors Corp.*, 277 Minn. 278, 152 N.W.2d 364 (1967) (trial court properly dismissed plaintiff's action under Rule 41.02(1) for refusal to proceed

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<sup>2</sup> While the court did not specifically reference Rule 41.02, there is no other conceivable basis for its determination that it had authority to enter a dismissal without prejudice.

with trial as directed by the court, but dismissal, under the circumstances, should have been without prejudice)).

Importantly, though, the court held that Rule 41.02 was of “no help” to the property owner because she had “not abused the litigation process” or “refused to follow the rules or any directives of the court” but had, instead, failed to establish a claim for relief. *Lampert*, 405 N.W.2d at 426. And because “failure to plead or prove a case goes to the substantive legitimacy of the case itself,” it “is not the kind of procedural problem to be resolved by a Rule 41.02(1) dismissal.” *Id.* The court further explained that “the rules do not provide for the trial court, on its own, to dismiss a case without prejudice because a claimant is in trouble on the merits of her case.” *Id.*

True, Rule 41.02(c) states that a dismissal pursuant to this rule “operates as an adjudication on the merits *unless the court specifically provides otherwise* in the order for dismissal.” (Emphasis added). But *Lampert* holds that a court does not have the discretion to enter a without-prejudice dismissal when, as here, it dismisses the action for substantive deficiencies. Indeed, the three stated exceptions to the rule that a dismissal operates as an adjudication on the merits — lack of jurisdiction, forum non conveniens, and failure to join a party indispensable pursuant to Rule 19 — are involuntary dismissals for procedural, rather than, substantive, defects. *See, e.g., Sausser v. Republic Mortg. Investors*, 269 N.W.2d 758, 762 (Minn. 1978) (noting “[a] dismissal for lack of personal jurisdiction is not an adjudication on the merits. A claimant may properly commence another action if the statute of limitations has not run and if he can properly get jurisdiction over the person of the defendant”) (quoting 1 *Hetland & Adamson*,

*Minnesota Practice*, at 442)); *Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978) (holding dismissal for lack of subject-matter jurisdiction is not adjudication on the merits, and dismissal is therefore made without prejudice, leaving plaintiff free to bring claim elsewhere); *Unbank Co. LLP v. Merwin Drug Co.*, 677 N.W.2d 105, 109 (Minn.App.2004) (holding that dismissal of action for failure to join indispensable party was not on the merits and designating the dismissal without prejudice).

In contrast to these procedural dismissals, this court held that a district court's dismissal without prejudice pursuant to a motion to dismiss under Minn. Stat. 145.682, the medical-malpractice expert affidavit statute, was error. *Lombardo v. Seydow-Weber*, 529 N.W.2d 702 (Minn. App. 1995). There, plaintiff had failed to serve either affidavit required by the statute — both the affidavits of expert review and the identification of expert witnesses — within the time required by the statute. Plaintiff moved to voluntarily dismiss the action without prejudice pursuant to Minn. R. Civ. P. 41.01(b), but defendants brought a motion to dismiss for failure to comply with the affidavit requirements mandated by statute. *Id.* at 703. The district court concluded that Rule 41.01 superceded the statute and dismissed plaintiff's case without prejudice.

This court reversed, noting that while “the Rules of Civil Procedure flow from the Supreme Court's inherent authority to regulated pleadings, practice, and forms in civil actions” but that they “cannot abridge, enlarge, or modify the substantive rights of litigants.” *Id.* at 704. The court then explained that while the time limits imposed under Minn. Stat. § 145.682 are procedural, “the language requiring mandatory dismissal of malpractice claims regulates substantive rights, has a jurisdictional component, and can

be outcome determinative.” *Id.* at 705. Ultimately, this court held that the district court Court rules — i.e., Rule 41.01 — cannot be used “to circumvent a substantive provision of a statute.” *Id.* In other words, *Lombardo* is an extension of settled law set forth in *Lampert*. Both demonstrate that the district court’s entry of dismissal without prejudice in this case was contrary to Minnesota law.

Here, while motion before the court was one for summary judgment — and not based on the expert-affidavit statute, Minn. Stat. § 544.42 — the right at issue was, nonetheless, a substantive one. *See Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009) (stating that “statutory requirement for an affidavit parallels the common-law requirement that expert testimony is necessary in malpractice cases”). Pioneer’s substantive right is to have Ryland establish before proceeding to trial that more probably than not its damages were the result of some breach of the standard of care by Pioneer before it is allowed to proceed to trial. Because this is a claim that “is predicated on conduct subject to a professional standard of care” and involves issues that are not within an area of common knowledge, expert evidence is required to establish Ryland’s prima facie case. *Blatz v. Allini Health Sys.*, 622 N.W.2d 376, 388 (Minn. App. 2001) (citing *Hestbeck v. Hennepin County*, 297 Minn. 419, 424, 212 N.W.2d 361, 364 (1973)). But here, the district court determined that Ryland failed to meet its burden because it did not present sufficient expert evidence establishing what duty Pioneer owed, what the standard of care is that applies to Pioneer, how Pioneer breached any duty, or how any alleged breach caused the Pond Hollow Association complained-of damages. As such, Pioneer had the substantive right to have the case against it dismissed with prejudice, and that

right cannot be abridged by application of a court rule. *Lombardo*, 529 N.W.2d at 704 (stating that court rules cannot abridge substantive rights); *see also Leubner*, 493 N.W.2d at 121 (failure to present proof of a prima facie case of malpractice “(normally in the form of expert testimony) *mandates* either summary judgment or direct verdict”).

In fact, this court has noted that “a district court’s designation of ‘with prejudice’ or ‘without prejudice’ must be viewed in light of the basis for the dismissal.” *Unbank Co. v. Merwin Drug Co.*, 677 N.W.2d 105, 109 (Minn. App. 2004); (citing *Branstrom & Assocs., Inc., v. Cmty. Mem’l Hosp.*, 296 Minn. 366, 367 n. 1, 209 N.W.2d 389, 390 n. 1 (1973) (concluding that a dismissal without prejudice was, in effect, a dismissal with prejudice); *Hulmes v. Honda Motor Co.*, 924 F.Supp. 673, 683 (D.N.J.1996) (characterization of “with prejudice” or “without prejudice” is not dispositive of whether second suit is barred); *Minn. Fed’n of Teachers v. Mammenga*, 485 N.W.2d 305, 310 (Minn.App.1992) (dismissal of federal action “with prejudice” did not constitute adjudication on the merits entitled to preclusive effect in successor suit in state court), *review denied* (Minn. June 30, 1992)). Here, the basis of the district court’s decision was a complete failure on the part Ryland to establish the elements of its claim. The nature of the dismissal constitutes an adjudication on the merits.

Indeed, the language in Rule 56.03 demands a finding that summary judgment is by its very nature *with* prejudice. That Rule provides “if the pleadings, 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 fact and that either party is entitled to a judgment as a matter of law,” then “[j]udgment *shall* be rendered forthwith.”

(Emphasis added). Thus, once the district court determined that, based on the record before it, there were no genuine issues of material fact that Ryland had failed to establish its prima facie case against Pioneer, it was required to order that “judgment be rendered forthwith,” rather than enter a dismissal without prejudice. *See also Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (holding complaint should be dismissed with prejudice and on the merits for failure to state a claim upon which relief can be granted).

The Minnesota Supreme Court has, in fact, held on at least two occasions that “[s]ummary judgment is a determination on the merits.” *Burma v. Stransky*, 357 N.W.2d 82 (Minn. 1984) (citing *In re Estate of Bush*, 302 Minn. 188, 224 N.W.2d 489 (1974), *cert. denied*, 420 U.S. 1008 (1975)). *Burma*, too, is controlling here because the supreme court there held that once the district court made a determination on the merits, it could not thereafter dismiss without prejudice. 357 N.W.2d at 89. As the court earlier pointed out in *Bush*, the purpose of Rule 56 is to dispose of the case on its merits when appropriate:

‘a device designed to implement the stated purpose of the rules to secure a just, speedy and inexpensive determination of any action. A summary judgment permits the court to make a prompt disposition of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such established facts.’

*Bush*, 302 Minn. at 211, 224 N.W.2d at 503 (quoting 2 *Hetland & Adamson, Minnesota Practice*, Civil Rules Ann. p. 563). Thus, the district court’s finding that there were no genuine issues of material fact and that Pioneer was entitled to summary judgment

operated as a determination on the merits, and it could not thereafter dismiss the matter without prejudice.

This court has so held on a number of prior occasions. *See, e.g., Noske v. Friedberg*, 713 N.W2.d 866 (Minn. App. 2006) (affirming summary judgment for defendant attorney after concluding that plaintiff's expert affidavit failed to set forth assertion of professional negligence); *Laurie & Laurie v. Bondpro Corp.*, 2009 WL 1374889 \*2-3 (Minn. App. May 19, 2009) (affirming summary judgment in favor of defendant on grounds that plaintiff's expert's affidavit failed to state a prima facie case of legal malpractice) (A. 164-167) ; *Haefele v. Franson*, 2007 WL 1815859 (Minn. App. June 26, 2007) (affirming summary judgment for defendant attorney because plaintiff provided an insufficient expert affidavit) (A. 157-163); *Diebold v. Nelson Oyen & Torvi, P.L.L.P.*, 2003 WL 282430 (Minn. App. Feb. 11, 2003) (affirming summary judgment in favor of defendant attorney on grounds that plaintiffs' expert evidence failed to show admissible facts for trial) (A. 153-156). As in the *Lampert* and *Lombardo* cases, the district court here erred when it abridged Pioneer's substantive rights by applying a court procedural rule and dismissed Ryland's action without prejudice, rather than with prejudice.

Nor should Ryland be heard to complain that it was not the appropriate time to grant summary judgment. Pioneer was entitled to bring its motion when it did. Rule 56.02 ("a party against whom a claims, counterclaim, or cross-claim is asserted \* \* \* may, *at any time*, move with or without supporting affidavits for summary judgment in

the party's favor as to all or any part thereof").<sup>3</sup> The time for Ryland to come forward with evidence to defeat Pioneer's motion was *before* the hearing. Minn. R. Civ. P. 56.05 (providing that when a summary-judgment motion is made, adverse party must present specific facts showing that there is a genuine issue for trial). In order to successfully oppose a motion for summary judgment, a party may not rely on general statements of fact but rather "must demonstrate *at the time the motion* is made that specific facts are in existence which create a genuine issue for trial." *Dalco Corp. v. Dixon*, 338 N.W.2d 437, 440 (Minn. 1983) (emphasis added) (quoting *Erickson v. Gen'l United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn.1977)). In the alternative, Ryland could have filed affidavits pursuant to Rule 56.06, stating that it could not present facts essential to justify its opposition to the motion. Ryland, however, did not do that or seek a continuance of the hearing from the court. While Ryland sought relief *after* the summary-judgment hearing, "[t]he district court record cannot be supplemented by new evidence after the court grants summary judgment." *Midway Nat'l Bank of St. Paul v. Bollmeier*, 462 N.W.2d 401, 404-05 (Minn.App.1990) (concluding that district court correctly refused to consider materials submitted in motion to reconsider that were not presented to district court on motion for summary judgment), *aff'd*, 474 N.W.2d 335 (Minn.1991).

The result of the district court's dismissal of Pioneer without prejudice has meant that Ryland has essentially been allowed a "do over," subjecting Pioneer to serial

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<sup>3</sup> In any event, Pioneer brought this motion three years after plaintiffs commenced this action against Ryland and not until six months after Ryland asserted claims against Pioneer.

litigation. In fact, three weeks after the district court granted Pioneer's motion for summary judgment, Ryland commenced another action for contribution and indemnity against Pioneer based on facts and allegations identical to that in this action — i.e., that it negligently performed its engineering duties on the Pond Hollow project. (A. 184). And because of the without-prejudice dismissal, Pioneer cannot argue that this second action is barred on res judicata grounds. *See Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 398 (Minn.App.2006), *review denied* (Minn. Sept. 19, 2006) (requiring there to be a final judgment on the merits for res judicata to apply). Ryland should not be permitted to remedy the deficiencies in its prima facie case against Pioneer by starting an entirely new action against it. Pioneer thus respectfully requests that this court either modify the dismissal to indicate that it is with prejudice or remand the case to the district court for an order entering a dismissal with prejudice that will operate as an unequivocal adjudication on the merits and preclude the present and any subsequent do-over attempts by Ryland .

### CONCLUSION

Because the court found that Ryland had substantively failed to establish the essential prima facie elements of his professional-malpractice claim against Pioneer, it was required to entered judgment in Pioneer's favor, which it did do, and then enter a dismissal with prejudice, which it did not do. Its dismissal without prejudice was error as a matter of law, and Pioneer respectfully requests that this court remand the matter back to the district court for entry of dismissal with prejudice.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 5,081.

Dated: July 29, 2009

A handwritten signature in black ink, appearing to read 'K. McBride', written over a horizontal line.

Katherine A. McBride, No. 168543