

NO. A09-1172

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.

REPLY BRIEF OF PIONEER ENGINEERING, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The District Court Properly Found That Ryland Failed to Establish the Essential Elements of its Claim, Thus Entitling Pioneer to Summary Judgment.	1
A. Standard of Review.	1
B. Ryland failed to provide the necessary expert evidence to establish its prima facie case of professional negligence against Pioneer.	2
1. <i>There was no evidence that Pioneer failed to properly recognize and evaluate the water tables when determining the building-pad elevations.</i>	5
2. <i>There was no evidence that Pioneer 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 or that it had any duty to do so.</i>	8
3. <i>There was no evidence that Pioneer failed to anticipate the potential for heaving due to adfreezing and failed to advise real property developer Janco of the same or that it had any duty to do so.</i>	10
II. The District Court Erred As a Matter of Law When it Dismissed Pioneer Without Prejudice.	11
A. Standard of Review	11
B. Once the court found that Ryland failed to establish the essential elements of its claim, it was required to direct entry of judgment and dismissal with prejudice.	14
CONCLUSION	19
FORM AND LENGTH CERTIFICATION	

TABLE OF AUTHORITIES

Cases

<i>Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan</i> , 494 N.W.2d 261 (Minn.1992).....	4
<i>Asmus v. Ourada</i> , 410 N.W.2d 432 (Minn. App. 1997)	14, 15, 16
<i>Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.</i> , 355 N.W.2d 138 (Minn.1984).....	12
<i>Burma v. Stransky</i> , 357 N.W.2d 82 (Minn. 1984)	15
<i>Carlisle v. City of Minneapolis</i> , 437 N.W.2d 712 (Minn.App.1989)	2, 18
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	1, 2, 18
<i>City of Eveleth v. Ruble</i> , 302 Minn. 249, 225 N.W.2d 521 (1974).....	5
<i>Dalco Corp. v. Dixon</i> , 338 N.W.2d 437 (Minn. 1983)	18
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn.1997)	18
<i>Erickson v. Gen'l United Life Ins. Co.</i> , 256 N.W.2d 255 (Minn.1977).....	18
<i>Firoved v. General Motors Corp.</i> , 277 Minn. 278, 152 N.W.2d 364 (1967)	12
<i>Hauschildt v. Beckingham</i> , 686 N.W.2d 829 (Minn.2004).....	16, 17
<i>Iacona v. Schrupp</i> , 521 N.W.2d 70 (Minn. App. 1994).....	1
<i>Lampert Lumber Co. v. Joyce</i> , 405 N.W.2d 423 (Minn. 1987)	12, 15, 18
<i>LTD v. Paulson</i> , 699 N.W.2d 1 (Minn.App.2005).....	4
<i>Madson v. Minn. Mining & Mfg. Co.</i> , 612 N.W.2d 168 (Minn. 2000).....	13
<i>Minnesota Humane Soc'y v. Minn. Fed'n Humane Soc'ys</i> , 611 N.W.2d 587 (Minn. App. 2000).....	11, 13
<i>Rouse v. Dunkley & Bennett, P.A.</i> , 520 N.W.2d 406 (Minn. 1994).....	1
<i>Rucker v. Schmidt</i> , 768 N.W.2d 408 (Minn. App. 2009).....	17
<i>Smith v. Knowles</i> , 281 N.W.2d 653 (Minn. 1979)	4

<i>Sorenson v. St. Paul Ramsey Med. Ctr.</i> , 457 N.W.2d 188 (Minn. 1990)	4
<i>STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.</i> , 644 N.W.2d 72 (Minn. 2002)	1
<i>Walton v. Jones</i> , 286 N.W.2d 710 (Minn.1979)	4
<i>Wessin v. Archives Corp.</i> , 592 N.W.2d 460 (Minn. 1999)	11, 13

Statutes

Minn. Stat. § 145.682	4
Minn. Stat. § 544.42	4

Rules

Fed. R. Civ. P. 56(c).....	1
Minn. R. Civ. P. 41.02.....	11, 12, 13, 15, 16, 18
Minn. R. Civ. P. 41.02(a)	12, 18
Minn. R. Civ. P. 56.05.....	17

ARGUMENT

I. The District Court Properly Found That Ryland Failed to Establish the Essential Elements of its Claim, Thus Entitling Pioneer to Summary Judgment.

A. Standard of Review.

On appeal from a grant of summary judgment, the reviewing court applies the *de novo* standard of review to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). When, as here, a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” summary judgment is mandated. *Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. App. 1994); *see also Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994) (“The moving party is entitled to summary judgment as a matter of law” if non-moving party “completely fails” to prove essential element of claim); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding plain language of Fed. R. Civ. P. 56(c) “mandates” entry of summary judgment when plaintiff fails to make showing regarding essential element of claim). Here, Ryland completely failed to establish that Pioneer owed the duties alleged, that any of Pioneer’s work on the project violated the standard of care applicable to engineers, and that any of the alleged breaches caused the damages that the Pond Hollow plaintiffs alleged. Thus, because Ryland was unable to make a *prima facie* case of professional negligence against Pioneer, the district court properly entered summary judgment in Pioneer’s favor.

B. Ryland failed to provide the necessary expert evidence to establish its prima facie case of professional negligence against Pioneer.

Ryland's singular point in support of its notice-of-review argument is that there are fact issues that should have precluded the district court from entering summary judgment in favor of Pioneer. The problems with Ryland's argument both before the district court and on appeal (indeed they are almost word-for-word identical) are that 1) Ryland fails to actually point out any issues of fact; and 2) the basis for Pioneer's motion and the court's ultimate order was instead that Ryland failed to establish the essential elements of its professional-negligence claim. "[T]here can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.App.1989) (quoting *Celotex Corp.*, 477 U.S. at 322-23).

Nor were Ryland's expert's qualifications at issue — another irrelevant tangent argued below and in Ryland's response brief. Indeed, Steve Klein, Ryland's expert, would have the qualifications to render an opinion about Pioneer's duty as it pertains to this project, whether Pioneer breached that duty, and whether that alleged breach caused the damages that the Pond Hollow plaintiffs claimed to have sustained. The problem, though, and as the district court appropriately determined, was that he failed to do so. Instead, the sum total of Klein's expert conclusions about Pioneer's alleged failure to meet the standard of care appeared in the following three, short conclusory sentences:

- 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.
- 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. 108-09; R-APP015).

Perhaps recognizing that these superficial musings were not enough to establish its prima facie case, Ryland now points to a report from the plaintiff's expert engineer, Geoffrey Jillson, as support for its professional-negligence claim against Pioneer. (R-APP044). Yet Jillson provided no expert opinion concerning Pioneer. In fact, his report does not even mention Pioneer. (R-APP0035-46). Ultimately, Ryland was and is left with the summary opinions of Klein to support its case against Pioneer. But as the district court determined, that proffered proof fell far short of what the law requires.

Although each of Klein's cursory opinions has its own specific evidentiary shortcoming, the common denominator for all three statements is that they fail to set forth the essential elements necessary to establish Ryland's prima facie case against Pioneer. 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). Generally speaking, expert testimony is required to establish the professional standard of care and the breach of the standard. *Admiral Merchs. Motor Freight, Inc. v. O’Connor & Hannan*, 494 N.W.2d 261, 266 (Minn.1992); Expert testimony must also demonstrate that the professional’s negligence was the proximate cause of damages. *Walton v. Jones*, 286 N.W.2d 710, 715 (Minn.1979); *see also Thomas A. Foster & Assocs., LTD v. Paulson*, 699 N.W.2d 1, 8 (Minn.App.2005) (stating that litigation of attorney-malpractice claim required expert testimony on “complicated issues of causation and damage”). But as the district court found, Klein “does not define the appropriate standard of care applicable to engineers,” “how Pioneer fell short” of that standard, or “how any alleged wrongdoing on the part of Pioneer caused any damages to Pond Hollow.” (Add. at 6, 8). Klein’s perfunctory opinions provide nothing useful and certainly nothing that permitted Ryland to establish its prima facie case. On this basis alone, the district court properly determined that Ryland had not come forward with the necessary proof to support its professional-negligence claim.

Ryland’s criticism of the court for citing to *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188 (Minn. 1990) because it applies the medical-malpractice expert-affidavit statute [Minn. Stat. § 145.682] misses the court’s broader point that “[t]he purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes malpractice and causation.” (Add. at 7) (citing *Sorenson*, 457 n.W.2d at 192-193). Indeed, long before the enactment of Minn. Stat. §§ 145.682 & 544.42 and the statutory requirements forcing plaintiffs to produce proof of expert support for their

allegations within specific deadlines, the Minnesota Supreme Court stated that “[o]rdinarily, a determination that the care, skill, and diligence exercised by a professional engaged in furnishing skilled services for compensation was less than that normally possessed and exercised by members of that profession in good standing and that the damage sustained resulted from the variance requires expert testimony to establish the prevailing standard and the consequences of departure from it in the case under consideration.” *City of Eveleth v. Ruble*, 302 Minn. 249, 254-55, 225 N.W.2d 521, 525 (1974) (citing in footnote numerous decisions that stand for this proposition). That has been the case long before the legislature enacted expert-affidavit statutes, and there certainly has been no suggestion that this is the type of case that is within the expertise of a layperson such that expert testimony is not required. Thus, the district court properly determined that Klein’s summary opinions utterly failed to establish Ryland’s professional-negligence claim, and the district court appropriately entered summary judgment in favor of Pioneer on that basis.

Moreover, and as discussed in the three sub-sections below, the lower court perceptively observed that Klein’s conclusions were not even supported by the record and that Ryland failed to satisfy the minimum requirements for opposing a summary judgment motion.

1. *There was no evidence that Pioneer failed to properly recognize and evaluate the water tables when determining the building-pad elevations.*

Aside from the fact that it is difficult to discern precisely what Klein meant when he wrote that Pioneer “failed to recognize and evaluate the water tables,” the record

shows that just the opposite is true. But because Pioneer was not a geotechnical-soils-engineering firm, it was not within the scope of Pioneer's contract to actually test the soil at Pond Hollow. (A. 43J-K, ¶¶ A-8& A-9; A. 65-82; A. 115 ¶¶ 4 & 5; A.116, ¶16). In fact, Pioneer's project specifications for grading for Pond Hollow provided that "[t]he Contractor¹ is reminded that Section 5 of the General Conditions *places the responsibility for determining all surface and sub-surface conditions solely on the Contractor.* This shall be construed to include the location of all underground utilities, the soil type, *the depth of water table*, and all other factors having an influence on the work." (emphasis added) (A. 43J, ¶A-8). Those specifications also provide that "[t]he Owner, at his expense, has undertaken a program of having soil borings taken by a soils engineer for the design of the project. The soil boring information is included in these specifications. No warranty is given, implied or otherwise as to the accuracy or completeness of the data to show all underground soil conditions." (emphasis added) (A. 43K, ¶ A-9).

Pursuant to those specifications, Janco hired Braun to evaluate and determine 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). Braun did so and included the following in its geotechnical-evaluation report that was available to both Janco and Ryland:

- the depth of ground water at the site;
- that the soils of the development are predominantly clay; and

¹ Pioneer is defined in the specifications as "The Owner's representative as engineer for the project", and not as the "Contractor." The "Contractor" is not named presumably because it was undetermined at the time the specifications were drafted.

- a recommendations regarding the depth of the footings for frost protection.

(A. 65-82).

Pioneer then used Braun's geotechnical report to determine that there was suitable soil on the site for development, including "the depth of the water table," 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). In fact, there is no dispute that the final grades for the homes are generally set a minimum of two feet higher than the high-water level. (A. 116, ¶ 14; A. 64²).

Moreover, and as the district court found, the record shows that Pioneer also used information in the City of Maple Grove Comprehensive Storm Sewer Water Plan to determine the high-water level for the site. Pioneer then included information about the high-water level on the preliminary grading plan, the grading and erosion plan and the individual home site plans. (A. 115, ¶ 8). The preliminary grading plan and the grading and erosion plan both clearly designate the high-water level for the site [demarcated as HWL]. (A. 43A; A.44-45³). The city of Maple Grove ultimately approved each of these plans. (A. 46-53).

Finally, and again as the district court determined, there was "no specific evidence in this record that Pioneer's work did not comply with acceptable engineering standards."

² Although this document was included in appellant's appendix at A. 64, it was not fully reproduced due to a binding error. Appellant has again attached this document to its reply brief, leaving it designated as A. 64).

³ Although this document was included in appellant's appendix at A. 44-45, it was not fully reproduced due to a binding error. Appellant has again attached this document to its reply brief, leaving it designated as A. 44-45).

(Add. 7-8). Ryland makes indecipherable argument that the contract specifications placing the responsibility of for determining all surface and sub-surface conditions, including the depth of water table, on the Contractor “does not relieve Pioneer of its obligation to properly recognize and evaluate the water table when determining the minimum building pad elevations.” (Ryland Br. at 15). But what is missing from this empty declaration is any evidence that Pioneer had some obligation beyond those that it undeniably carried out or that any such obligatory action or inaction on its part caused plaintiff’s alleged damages. In light of Ryland’s complete failure to produce any evidence that *Pioneer* deviated from the applicable standard of care with regard to the water table, the district court properly granted Pioneer’s motion for summary judgment.

2. *There was no evidence that Pioneer 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 or that it had any duty to do so.*

Here, again, this allegation fails from any factual support. Importantly, Ryland never produced any evidence establishing that Pioneer had any responsibility for anything related to the sun-porch footings. (A. 116, ¶¶ 17-22). Instead, the evidence establishes that, as the builder, Ryland had sole responsibility for supervising the installation of the sun-porch footings, while Pioneer’s responsibility was limited to setting the elevations for the building pads and streets. (A. 115, ¶¶ 5-6, 10; A. 116 ¶¶ 13-14). Pioneer was not even on the site during construction. In fact, Ryland’s own expert disclosure sets out Pioneer limited project responsibilities, implicitly acknowledging that Pioneer had nothing to do with the sun-porch footings:

Pioneer Engineering located delineated wetlands, surveyed soil borings placed by Braun, and prepared the preliminary plat, preliminary grading plan, final plat, final plans and specifications for grading, and providing staking for ponds and migration areas.

(A. 108 at 7b). And as set forth above, there is no evidence that Pioneer did not take the property's water table into consideration when it prepared the plat and grading plans for the building-pad elevations. Nor does Klein explain how any of the work that Pioneer performed had any impact whatsoever on the footings or the subsequent problems with adfreezing.

Instead, the record demonstrates that Braun's geotechnical evaluation, which it provided to Janco and then Ryland, incorporated "recommendations for earthwork, spread footing foundations and pavements," including the proposal that "the perimeter footings bear a minimum of 3½ feet below exterior grade for frost protection." (A. 69, ¶A.3; A. 74, ¶ C.4.b.). Braun also recommended that during winter construction, "all footings be placed at frost depth. Footings in unheated areas should be extended to a minimum depth of 5 feet." (A. 74-75, ¶C.4.b). Braun's report likewise notes that it found groundwater at a depth of one foot at one of Braun's soil borings, and at one and one-half to two-and-one-half feet in three other soil borings. (A. 71, ¶ B.4). Moreover, the Braun report specifically points out that the site consists mostly of clay soils. (A. 70-71, ¶ B.3). Braun geotechnical engineer, Henry Vloo, who authored the geotechnical-evaluation report for Janco, testified that "[f]rost heave is always present in clay soils. That is always an issue that has to be dealt with, and it's usually dealt with by the builder." (A. 92, p. 27). In short, it was Braun, rather than Pioneer, that analyzed the soil

where the footings were placed, and it was Braun that provided the information to Ryland, which then installed those footings.

In any event, according to Braun — the only entity Ryland called to evaluate the Pond Hollow residents' complaints about heaving sun porches in 2001, 2004 and 2005 — the problem with adfreezing was not even a soils issue, but was instead due to the fact that the footings were not wrapped in a non-adhesive material. (A. 93-103). Ryland, though, was the builder and therefore Ryland, and not Pioneer, was responsible for determining whether the footings were to be wrapped, or not wrapped, in non-adhesive material. There was no evidence submitted to the contrary.

In summary, based on the evidence — or lack thereof — it is no wonder that the district court determined that “[o]n this record, even assuming all facts in the light most favorable to Ryland, there is nothing to show that Pioneer had any responsibility for determining [the] design of the sun porch footings, specifications for sun porch footings, depth of the sun porch footings, or how the sun porch footings should be wrapped and installed.” (Add. 10). As such, this court should affirm the district court's finding that Pioneer was entitled to summary judgment as a matter of law.

3. *There was no evidence that Pioneer failed to anticipate the potential for heaving due to adfreezing and failed to advise real property developer Janco of the same or that it had any duty to do so.*

This allegation is essentially the same as the previous one, with the added claim that Pioneer had a duty to advise Janco about the potential for adfreezing, even though there is no evidence that Pioneer had any responsibility for the design, specifications or placement of the sun-porch footings. Klein does not explain where this alleged duty

comes from or why Pioneer, which was neither the soils engineer nor the builder, would have such a duty. In any event, the undisputed evidence is that both Janco and Ryland were aware of Braun's report warning that the site consisted mostly of clay soils and that "frost heave is always present in clay soils." (A. 92). For that reason, Braun advised that the builder — Ryland — would have to take certain precautions when placing the footings. Notably, Ryland does not contend that it was unaware of Braun's report. In fact, in its briefing below, Ryland stated that it bought the property at a premium because the engineering work had already been completed. (Ryland's June 13, 2008 memo. at 4). As such, there is ample support for the lower court's finding that there is no evidence that Pioneer had any duty to warn about the possibility of adfreezing and that Pioneer was, thus, entitled to summary judgment.

II. The District Court Erred As a Matter of Law When it Dismissed Pioneer Without Prejudice.

A. Standard of Review

Ryland claims that this court reviews decisions to dismiss a case without prejudice pursuant to Minn. R. Civ. P. 41.02 under an abuse-of-discretion standard of review. (Resp.'s br. at 10) (citing *Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999) (holding that dismissal without prejudice for failure to follow pleading requirements for derivative claims was not abuse of discretion) and *Minnesota Humane Soc'y v. Minn. Fed'n Humane Soc'ys*, 611 N.W.2d 587, 590 (Minn. App. 2000) (holding dismissal with prejudice for alleged failure to prosecute where case not called for trial was abuse of discretion)). While that is correct, that statement is not useful for determining the proper

standard of review in this case. And that is because once the district court determined that Ryland had failed to establish the essential elements of its claim against Pioneer, it had no discretion to apply Rule 41.02.

Instead, Rule 41.02 “permits dismissal for trial management reasons, not for lack of substantive merits of a claim.” *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). Under the court’s rules, “whether a plaintiff’s cause of action should be dismissed by order of the court before trial *on procedural grounds* is to be decided by the trial court in the exercise of its discretionary authority.” *Firoved v. General Motors Corp.*, 277 Minn. 278, 282-83, 152 N.W.2d 364, 368 (1967). Rule 41.02 “is designed to let the [district] court manage its docket and eliminate delays and obstructionist tactics by use of the sanction of dismissal.” *Lampert*, 405 N.W.2d at 425. Involuntary dismissal pursuant to rule 41.02(a) “is infrequent and is within the sound discretion of the trial court.” *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn.1984). Thus, if the lower court had dismissed this case on procedural grounds, its decision would indeed be review under an abuse-of-discretion standard.

Here, though, the court dismissed this case on its substantive merits, finding that Ryland had failed to establish the essential elements of its claim, but then implicitly applied Rule 41.02 and entered a dismissal without prejudice.⁴ It had no discretion to do

⁴ Although Ryland takes issue with Pioneer’s contention that the court implicitly applied Rule 41.02 because it dismissed the matter without prejudice, it has not provided any other basis under the Rules for doing so. Moreover, the very decisions on which Ryland relies for its argument that the court did not abuse its discretion when it dismissed Ryland’s case against Pioneer without prejudice are those in which the courts there

so under Rule 41.02. Its interpretation that Rule 41.02 allows for dismissal without prejudice after determining the case on its merits was erroneous, entitling this court to de novo review. Appellate courts give de novo review to interpretations of procedural rules. *Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 170 (Minn. 2000). If a procedural rule is to be construed, the reviewing court applies the plain language of the rule consistent with its purpose. *Id.* at 171. Here, the purpose of Rule 41.02 is to permit district courts to manage their dockets; it is not intended to provide parties with do-over opportunities once they have failed to establish the substantive merits of their claims at the time of summary judgment.⁵

Not only that, but the court erred as a matter of law by ignoring the directive of Rule 56.03 that “[j]udgment *shall* be rendered forthwith” “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.” Here, the court determined that Pioneer was entitled to summary judgment as a matter of law because Ryland completely failed to prove the essential element of claim against Pioneer. This is what the court determined, yet it did not direct entry of judgment “forthwith.” Put simply, the court erroneously interpreted Rule 56 as permitting it to enter a dismissal without prejudice even though there were no

explicitly applied Rule 41.02. *See, e.g. Wessin*, 592 N.W.2d at 467 *Minnesota Humane Soc’y*, 611 N.W.2d at 590.

⁵In any event, even if the district court’s decision were reviewed under an abuse-of-discretion standard, its application of rule 41.02 under these facts would be a clear and reversible abuse of discretion.

genuine issues of material fact and even though the court determined that Ryland substantively failed to establish the necessary elements of its claim. Its error is reviewed de novo by this court.

B. Once the court found that Ryland failed to establish the essential elements of its claim, it was required to direct entry of judgment and dismissal with prejudice.

Ryland relies on *Asmus v. Ourada*, 410 N.W.2d 432 (Minn. App. 1997) for the proposition that following a motion for summary judgment, the district court always retains the discretion to enter a dismissal with or without prejudice and that the lower court here thus did not abuse that discretion when it entered a dismissal for Pioneer without prejudice. In fact, *Asmus* proves the exact opposite point. True, the court in *Asmus* did have a motion for summary judgment before it, and true, the court did enter summary judgment in favor of defendant. But the critical distinctions between *Asmus* and the matter before this court is that in *Asmus*, unlike here, the court “never reached the legal merits of [defendant’s] motion,” and it never addressed “[t]he legal theory upon which [defendant’s] motion was based.” *Id.* at 435. Instead, the trial court there “based its grant of summary judgment *solely* on Asmus’s procedural inadequacies.” *Id.* (emphasis in original). Specifically, the court dismissed Asmus’s case because he had not filed his complaint or paid filing fees. In other words, and as this court found, the dismissal was based on Asmus’s failure to exercise reasonable diligence and not, as Ryland contends, because “plaintiff had completely failed to establish the essential elements of his claims.” (Resp.’s br. at 18). And it is because court-management issues

were the reason for the district court's dismissal in *Asmus* that this court held that the appropriate rule to apply was 41.02, and not Rule 56.03.

In contrast, the basis of the court's grant of summary judgment here was most certainly a decision on the legal merits of Ryland's claim. The court analyzed in detail the professional-malpractice claim that Ryland was asserting, the necessary elements to establish that claim — duty, breach, causation and damages — and the need to have expert support to establish that claim. The lower court unequivocally determined that Ryland did not come forward at the time of the summary judgment motion with evidence establishing the essential elements of its case against Pioneer, noting repeatedly that Ryland did not establish that Pioneer had the complained-of duties, that it departed from the appropriate standard of care, or that any action or inaction by Pioneer caused plaintiff's damages.

Because this was a decision on the merits, the district court erred when it dismissed those claims without prejudice. The Minnesota Supreme Court has so held. *See Lampert Lumber v. Joyce*, 405 N.W.2d 423, 426-27 (Minn. 1987) (holding that dismissals for failure to prosecute or to follow court rules maybe with or without prejudice, but that dismissals for failure to establish the substantive legitimacy of a case require a dismissal with prejudice); *Burma v. Stransky*, 357 N.W.2d 82, 89 (Minn. 1984) (holding that court erred by dismissing case without prejudice after granting defendants **summary judgment** on the merits of the case). Contrary to what Ryland's contends, *Asmus* is entirely consistent with *Lampert* and *Burma* because this court, like the Minnesota Supreme Court, distinguished between cases dismissed on technical or

procedural grounds and those dismissed because plaintiff failed to establish essential elements of the case. *Asmus* did not hold that the district court should have entered a summary judgment without prejudice; instead, this court construed the motion as one to dismiss for failure to prosecute under Rule 41.02. There is no such thing as summary judgment without prejudice, and *Asmus* is proof of that. Indeed, this court in *Asmus* reversed the judgment for defendant and sent the case back to the district court where a dismissal *without* prejudice would then be entered, presumably leaving plaintiff was free to re-serve and file his action against defendant.

Ryland's contention that there can be a judgment without prejudice is not even consistent with the definition of judgment — “[a] court’s final determination of the rights and obligations of the parties in a case.” *Black’s Law Dictionary* 858 (8th ed. 2004). Thus when Rule 56.03 directs that “[j]udgment *shall* be rendered forthwith” “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,” it is directing the court to enter its “*final*” determination of the rights and obligations of the parties. A directive to enter judgment forthwith is not an invitation to the plaintiff to take a second bite at the apple in a subsequent action. In fact, it is the finality of a judgment that gives rise to the application of res judicata. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn.2004). “Fundamental to the doctrine of res judicata ‘is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies * * * .’”

Rucker v. Schmidt, 768 N.W.2d 408, 412 (Minn. App. 2009) (quoting *Hauschildt*, 686 N.W.2d at 837). “Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories.” *Hauschildt*, 686 N.W.2d at 837. Here, the district court determined that Ryland failed to establish its prima facie case of professional negligence against Pioneer. That was a decision on the merits, and it demanded that judgment in favor of Pioneer be entered forthwith. Ryland should be precluded from getting a second opportunity to prove its case against Pioneer.

Nor should this court be swayed by Ryland’s contention that the district court simply determined that Pioneer’s motion was premature. First, the court made no such finding with regard to Ryland’s claim against Pioneer. Rather, the court noted in a footnote that Ryland had an independent pending claim against Janco, the entity that assigned its interest in the Pond Hollow property to Ryland. Pioneer was not a party to that assignment agreement, and any claim that Ryland may have against Janco is separate from its need to establish its professional-negligence claim against Pioneer. Nor was Pioneer even a party in the Janco action at the time of the court’s summary-judgment order.

Second, the time for Ryland to come forward with evidence establishing its prima facie case against Pioneer in *this* action 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). No genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a

metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997). And when, as here, the nonmoving party bears the ultimate burden of proof on an issue at trial, that party must do more than simply raise doubts as to the material facts when opposing a motion for summary judgment:

"[T]he plain language of Rule 56 mandates the entry of summary judgment, 'after adequate time for discovery and upon motion, against the party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. **In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.**'"

Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App.1989) (quoting *Celotex*, 477 U.S. at 322-23).

Ryland was obligated to come forward with that evidence "'at the time the motion is made * * * .'" *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)). But because the lower court determined that Ryland did not do that, it was plain error to apply Rule 41.02 or to enter judgment without prejudice. *Lampert*, 405 N.W.2d at 425 (holding that Rule 41.02(a) "permits dismissal for trial management issues, not for lack of substantive merits of a claim"). Because the district court interpreted Rule 41.02 as allowing for a dismissal without prejudice after determining that Ryland had failed to establish its prima facie case and because it did not interpret

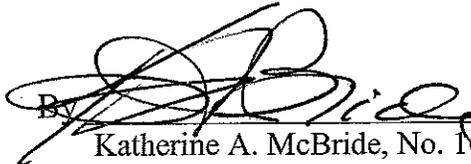
Rule 56.03 as requiring it to direct entry of judgment forthwith, its order constitutes an error of law and demands reversal by this court with instructions for entry of judgment with prejudice.

CONCLUSION

Because Ryland failed to establish the essential elements of its professional-negligence claim against Pioneer, the district court properly determined that Pioneer was entitled to summary judgment. The district court erred nonetheless by then entering a dismissal without prejudice. The law requires a dismissal with prejudice when, as here, the decision to dismiss is based on the substantive merits of plaintiff's claims. As such, Pioneer respectfully requests that this court reverse the district court's without prejudice dismissal and that it remand the matter for entry of judgment in favor of Pioneer.

Respectfully submitted,

Dated: September 10, 2009

By  _____

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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 5,342.

Dated: September 10, 2009



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