

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.

RESPONDENT THE RYLAND GROUP, INC.'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 THE ISSUES

- 1. Whether the District Court erred in granting Appellant Pioneer Engineering, Inc.'s ("Pioneer") Motion for Summary Judgment because the record establishes that there are genuine issues of material fact regarding Respondent The Ryland Group, Inc.'s ("Ryland") indemnity and contribution claims against Pioneer for Pioneer's negligent work on the Pond Hollow subdivision project.**

The District Court granted Pioneer's Motion for Summary Judgment against Ryland, ruling that Ryland's expert affidavit and evidence contained "conclusory statements" that did not create a genuine issue of material fact.

Most Apposite Authority:

City of Eveleth v. Ruble, 302 Minn. 249, 225 N.W.2d 521 (1974).

- 2. Alternatively, if it was proper for the District Court to grant Pioneer's Motion for Summary Judgment, which it was not, whether the District Court abused its discretion by dismissing Ryland's claims against Pioneer without prejudice.**

The District Court dismissed Ryland's claims against Pioneer without prejudice when it granted Pioneer's Motion for Summary Judgment.

Most Apposite Authority:

Asmus v. Ourada, 410 N.W.2d 432 (Minn. Ct. App. 1987).

Wessin v. Archives Corp., 592 N.W.2d 460 (Minn. 1999).

STATEMENT OF THE CASE AND THE FACTS

This case arises out of a lawsuit brought by Plaintiff Pond Hollow Homeowners' Association against Respondent/Defendant/Third-Party Plaintiff The Ryland Group, Inc. ("Ryland") regarding the construction of 59 single-family homes in the Pond Hollow Subdivision in Maple Grove, Minnesota. Appellant/Third-Party Defendant Pioneer Engineering, Inc. ("Pioneer") brought this appeal after the District Court granted Pioneer's Motion for Summary Judgment against Ryland on Ryland's indemnity and contribution claims against Pioneer arising out of Pioneer's negligent work performed on the Pond Hollow Subdivision and dismissed Ryland's claims without prejudice. On appeal, Pioneer claims the District Court was required, as a matter of law, to dismiss Ryland's claims with prejudice, rather than without prejudice. Ryland has filed a Notice of Review, arguing that the District Court erred in granting Pioneer's Motion for Summary Judgment because the record shows that there are genuine issues of material fact regarding Pioneer's negligent work, precluding summary judgment on Ryland's indemnity and contribution claims against Pioneer.

On May 4, 1998, Janco, Inc., ("Janco") purchased an interest in certain undeveloped real property in Maple Grove, Minnesota, from Thomas R. and Ann L. Schlangen. (R-APP016-028.)¹ The real property purchased by Janco is now known as the Pond Hollow Residential Subdivision (hereinafter "Pond Hollow" or "the Property") and the development of Pond Hollow is referred to as the Pond Hollow Project.

¹ "R-APP" refers to pages in Respondent's Appendix. "APP" refers to pages in Appellant's Addendum. "A" refers to pages in Appellant's Appendix.

Janco hired Pioneer to design, engineer and survey the site where the residential subdivision was to be built. (R-APP014.) Pioneer's first work was to perform a boundary survey and topographical survey of the site in its original condition to assist Pioneer in determining the site elevations and delineating the wetlands. (Pioneer's Memorandum in Support of its Motion for Summary Judgment ("Pioneer Memo"), p. 6.) Pioneer next drew a sketch plan, which is a preliminary layout of the lots, streets, and ponds on the site. (Pioneer Memo p. 6.) Pioneer also prepared a preliminary site plan of the undeveloped property for Janco and provided a copy of it to Braun Intertec ("Braun") in May, 1998. (A66.) Pioneer surveyed the locations of delineated wetlands and the soil borings that had been placed by Braun at locations designated by Janco. (R-APP014.) Pioneer also prepared the preliminary plat, preliminary grading plan, final plat, final plans (including building pad minimum elevations, and wetland filling and mitigation areas), specifications for grading, and provided the construction staking for grading operations. (R-APP014.) Pioneer and Braun also evaluated the water table, soils and drainage during their site preparation process. (R-APP014.) As the District Court summarized, "Pioneer was hired to locate delineated wetlands, stake soil borings, prepare sketch plans, a grading sketch, preliminary grading plan, final plat, final plans and specifications for grading, and provide staking for grading and as-builts for ponds and mitigation areas." (ADD 3.)

Janco hired Braun to perform a geotechnical evaluation of the property, including five soil borings which were completed between May 5 and 7, 1998. (A66-90.) Braun's geotechnical evaluation of the undeveloped property was done to assist Pioneer in

evaluating the subsurface soil and ground water conditions with regard to the site grading for building pads and streets, as well as foundations in support of single-family homes. (A66.)

Pioneer was provided with Braun's geotechnical report, which assisted Pioneer in determining that there was suitable soil on the site for development, assisted Pioneer in setting the site elevations for the building pads and streets, and assisted Pioneer in providing information to the developer regarding costs. (Pioneer Memo at pp. 6-7.) Braun's geotechnical evaluation report shows groundwater on the property at a depth one-foot in one soil boring and one-and-a-half to two-and-a-half feet in three other borings. (A71) Soil borings completed by Braun show the shallow soils at the development are predominantly clay in nature. (R-APP014.) Clay soils can retain large amounts of water and drain slowly. (R-APP014.)

The preliminary plat and final plat prepared by Pioneer include, among other things, wetland delineation and the final building pad elevations for the homes. (R-APP014.) Specifications for Grading the Property were prepared by Pioneer for Janco and are dated July 14, 1998. (A43B-43Q.) The Grading and Erosion Control Plan for the Property was prepared by Pioneer for Janco and is dated July 16, 1998. (A44-45.)

On July 17, 1998, the City of Maple Grove issued to Janco Grading Permit 98-08 for the Property. (R-APP029-031.) On July 20, 1998 the City of Maple Grove approved the preliminary plat for Pond Hollow. (A46-48.) On September 8, 1998 the Maple Grove City Council approved the Pond Hollow final plat for Janco. (A49-A53.)

After September 8, 1998, Ryland was the general contractor for the construction of the 59 single-family homes at Pond Hollow. In Minnesota, Ryland does not perform engineering services on its own, but instead relies on the professional expertise, opinions, and work done by independent contractors and subcontractors for engineering services. (R-APP048.)

For the Pond Hollow Project, Ryland relied upon the professional expertise, opinions, recommendations, and work done by, among others, Pioneer and Braun Intertec in developing the property for Janco. (R-APP048.) Specifically, Ryland relied upon the professional expertise, opinions, recommendations and all work done by Pioneer, including, but not limited to, designing the plat, including setting minimum building pad elevations, preparing the grading and erosion control plan, and delineating the wetlands. (R-APP048.)

On October 5, 2005, Plaintiff Pond Hollow Homeowners Association served a summons and complaint on Ryland, alleging various claimed defects in the design, installation and construction of the units and buildings comprising the Pond Hollow residential subdivision. (A1-6.) The Plaintiff's claims stem from homeowner complaints of heaving of sun porch footings, constantly running sump pumps, heaving of patio slabs, heaving and settling of sidewalks, settling of driveways, and movement of foundations. (A1-6.) As the District Court noted, there were two main complaints by the homeowners: "1) issues with drainage or water table levels and related heaving; and 2) the construction of the homes of the Association." (ADD2-3).

The engineer hired by the Pond Hollow Homeowners Association, Geoffrey Jillson, P.E., opined that the homeowners' claims stem from "excessively high water." (R-APP044.) Mr. Jillson also opined that the high water is due to poorly draining clay soils, the proximity of the foundations to the pond levels, and inadequate drainage. (R-APP044.) Mr. Jillson further opined that the "high water table appears to result from both design and construction conditions." (R-APP044.) Mr. Jillson also explained that, in his opinion, "the outlet for the pond at the southwest quadrant of the [Pond Hollow subdivision] is located at an elevation above foundations of structures in the area of the ponds. Therefore, the water table in areas outside of the ponds will be higher than the outlet level." (R-APP044.) To the extent any or all of these conditions exist on the Property, they were caused by the acts or negligence of Janco, Pioneer and/or Braun Intertec that occurred before Ryland had an interest in the Property. (R-APP014-015.)

Ryland's expert, Steven Klein, P.E., opined that Pioneer failed to properly recognize and evaluate the water table when setting the minimum building pad elevations. (R-APP015.) Mr. Klein also opined that Pioneer failed to recognize that the combination of the elevation of the homes in relation to the water table, together with the predominantly clay soils at the development, created the potential for heaving of sun porch footings due to adfreezing. (R-APP015.) In addition, Mr. Klein opined that Pioneer should have anticipated the potential for heaving due to adfreezing and should have advised real property developer Janco of the same. (R-APP015.)

On October 17, 2008, Pioneer brought a Motion for Summary Judgment against Ryland, arguing that Pioneer's scope of work was limited such that it was not responsible

for any of the negligently constructed portions of the homes, that Pioneer's scope of work did not include the adfreezing, Ryland's expert disclosure did not meet the requirements of Minn. Stat. § 544.42, and that Pioneer's work on the project did not deviate from acceptable engineering standards. (Pioneer Memo.) In response, Ryland submitted various evidence, including Mr. Klein's and Mr. Jillson's expert affidavits opining that the homeowners' claims stem from allegations of excessively high water caused due to poorly draining clay soils, proximity of foundations to pond levels and inadequate drainage. Mr. Klein opined that these conditions were caused by Pioneer's negligence in failing to properly recognize and evaluate the water table when determining the minimum building pad elevations, failing 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, failing to anticipate the potential for heaving due to adfreezing and failing to advise Janco of these potential problems. (R-APP014-015.) Mr. Klein also opined that Pioneer's failure to take these actions fell below the standard of care for engineers. (R-APP015.)

The District Court granted Pioneer's Motion for Summary Judgment, ruling Mr. Klein's affidavit was too "conclusory" by failing to provide a sufficient basis for his opinions, failing to define the appropriate standard of care and failing to detail Pioneer's negligent work. (ADD 6-13.) The District Court concluded that Ryland "failed to produce any evidence supporting its assertion that Pioneer departed from an appropriate standard of care in allegedly failing to recognize and evaluate the water table." (ADD 8.) The District Court next concluded that "Pioneer had no duty to recognize the potential for

heaving of sun porch footings due to adfreezing.” (ADD 10.) The District Court also concluded that Pioneer had no duty to “anticipate the potential for heaving due to adfreezing.” (ADD 11.)

The District Court dismissed Ryland’s claims against Pioneer without prejudice. (ADD 13.) The District Court explained its reasoning as follows: “Ryland’s action against Pioneer is one for indemnity and contribution. The motion for summary judgment is granted without prejudice because of the separate Janco litigation, the relationship between Ryland and Janco which has not yet been adjudicated, and to preserve arguments and claims that Ryland might have after a full trial in this case.” (ADD 13, n. 2.)

SUMMARY OF ARGUMENT

The District Court erred in granting Pioneer's motion for summary judgment because the record establishes that there are genuine issues of material fact regarding Ryland's indemnity and contribution claims against Pioneer for Pioneer's negligent work on the Pond Hollow Project. Contrary to the District Court's conclusions, the record establishes genuine issues of material fact regarding the following key facts: Pioneer was provided with Braun's geotechnical report which assisted Pioneer in setting the site evaluations for the building pads, Pioneer was solely responsible for setting the site evaluations for the building pads and Pioneer negligently set those site evaluations and building pads, resulting in damage to Ryland. These facts are more than sufficient to show that Pioneer owed duties to Ryland, that Pioneer breached those duties, and that those breaches caused Ryland to suffer damages. *See, generally, City of Eveleth v. Ruble*, 302 Minn. 249, 257-55, 225 N.W.2d 521, 525 (1974) (setting forth the elements of professional negligence claim against an engineer).

Second, and alternatively, if it was proper for the District Court to grant Pioneer's motion for summary judgment (which Ryland does not concede), then the District Court did not abuse its discretion by dismissing Ryland's claims against Pioneer without prejudice. Contrary to Pioneer's arguments, nothing in the applicable Rules or case law requires the District Court to dismiss Ryland's claims with prejudice. The District Court was acting within its discretion in dismissing Ryland's claims without prejudice.

ARGUMENT

I. Standard of Review.

This Court reviews the District Court's grant of motion for summary judgment de novo. *Zip Sort, Inc. v. Comm'r of Revenue*, 567 N.W.2d 34, 37 (Minn. 1997). Summary judgment should be granted only when the moving party has established a right to judgment with such clarity as to leave no room for doubt, and only when the non-moving party is not entitled to recover under any circumstances. *Drager by Gutzman v. Aluminum Industries, Corp.*, 495 N.W.2d 879, 882 (Minn. Ct. App. 1993). The burden of proof is on the party moving for summary judgment, in this case Pioneer. *Miller & Schroeder, Inc. v. Gearman*, 413 N.W.2d 194, 197 (Minn. Ct. App. 1987). The evidence is viewed in the light most favorable to the non-moving party, Ryland. *Ostendorf v. Kenyon*, 374 N.W.2d, 834, 836 (Minn. Ct. App. 1984). Accordingly, if reasonable persons might draw different conclusions from the evidence that is presented, summary judgment should be denied. *Anderson v. Twin City Rapid Transit, Co.*, 250 Minn. 167, 186, 84 N.W.2d, 593, 605 (1957).

A district court's decision to dismiss a party's claims without prejudice is normally reviewed by this Court for an abuse of discretion. *See, e.g., Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999). This Court has previously reviewed arguments that a district court improperly dismissed claims with prejudice, rather than without prejudice, under the abuse of discretion standard of review. *See, e.g., Minnesota Humane Society v. Minnesota Federated Humane Societies*, 611 N.W.2d 587, 590 (Minn. Ct. App. 2000).

II. The District Court Erred in Granting Pioneer's Motion for Summary Judgment Because there are Genuine Issues of Material Fact Regarding Ryland's Indemnity and Contribution Claims Against Pioneer.

The District Court erred in granting Pioneer's Motion for Summary Judgment because there are genuine issues of material fact regarding Ryland's indemnity and contribution claims against Pioneer arising out of Pioneer's negligent provision of engineering services on the Pond Hollow Project. In particular, the following key facts, opined on by Ryland's expert witness, Mr. Klein, show that there are several issues of material fact precluding summary judgment. Pioneer had a duty to properly recognize and evaluate the water table and soil when setting the site evaluations and determining the minimum building pad elevations for the Pond Hollow Project. However, Pioneer failed to properly recognize and evaluate the water table and soil when determining the minimum pad elevations, and this failure caused Ryland to suffer damages from the lawsuit brought by Plaintiff Pond Hollow Homeowners' Association based on the damages allegedly caused by the "excessively high water," and the "high water table." (R-APP014-015, 044.) These facts, taken together, establish genuine issues of material fact regarding each of the elements of Ryland's negligent engineering claim against Pioneer. *See City of Eveleth* 302 Minn. at 257-55, 225 N.W.2d at 525 (essential elements of claim include the standard of care, breach of the standard of care, and damage caused by the breach).

Initially, it is clear that Mr. Klein is qualified to provide expert testimony regarding the standard of care for engineers and Pioneer's failure to meet that standard of care in performing its work on the Pond Hollow Project. Mr. Klein is a civil engineer

registered in the States of Florida, Indiana, Michigan, Minnesota, Nebraska, South Dakota, Wisconsin, Arizona, Kansas, Idaho and Ohio. (R-APP012.) Mr. Klein is also a hydrologist and vice-president of Barr Engineering. (R-APP012.) Mr. Klein has a bachelor's degree and a master's degree in civil engineering from the University of Minnesota. (R-APP012.) Mr. Klein's 34 years of professional experience emphasizes water resources management, storm water management, hydrologic and hydraulic analysis, ground water studies, hazardous waste cleanup, and forensic engineering relative to wet basements, building flooding, and foundation problems. (R-APP012-013.) Prior to arriving at his opinions in this case, Mr. Klein visited the Pond Hollow development on two occasions. (R-APP013.) During his first visit, Mr. Klein spent approximately four hours walking through the entire development and visually inspecting the residences, yards, sump discharges, wetlands, patios, driveways, and four-season porch footings. (R-APP013.) During the second visit, Mr. Klein inspected the interiors of five residences and five four-season porch footings on different homes that were unearthed to determine both their depth and shape. (R-APP013.) Mr. Klein also reviewed numerous documents relating to the Pond Hollow Project. (R-APP013.)

In the District Court, Pioneer admitted that it was solely responsible for setting the site evaluations for the building pads for the Pond Hollow Project. Pioneer failed to recognize and evaluate the water table at the Pond Hollow Project in determining the minimum building pad elevations, and that this failure was negligent and caused damage to Ryland resulting from the "excessively high water" and "high water table" described by Mr. Jillson. Pioneer surveyed the locations of the delineated wetlands and the soil

borings that had been placed by Braun at the locations designated by Janco. (R-APP014.) Indeed, Pioneer specifically prepared final plans which included building pad minimum elevations in wetland filling and mitigation areas. (R-APP014.) Pioneer also prepared the specifications for grading, and provided the construction staking for grading operations. (R-APP014.) Thus, Pioneer was responsible for and performed the key work in setting the building pad elevations.

Braun's geotechnical evaluation of the undeveloped property was performed to assist Pioneer in evaluating the subsurface soil and groundwater conditions regarding the site grading for the building pads, as well as for foundations in support of single-family homes. (R-APP014.) In Mr. Klein's opinion, prior to designing the plat that included the final building pad elevations for the single-family homes, Pioneer reviewed, or should have reviewed, Braun's soil borings reports. (R-APP015.) Braun's soil boring reports show the shallow soils at the development are predominantly clay in nature. Because clay soils can retain large amounts of water and drain slowly, which Pioneer should have known as engineers, Mr. Klein opined that Pioneer deviated from the standard of care applicable to engineers in that it failed to properly recognize and evaluate the water table when determining the minimum building pad elevations. (R-APP015.)

In turn, this failure to properly recognize and evaluate the water table when determining the minimum building pad elevations led directly to many of the problems claimed to be suffered by the Plaintiff homeowners based on the damages allegedly caused by the "excessively high water" and the "high water table" set forth in Mr. Jillson's report. (R-APP044.)

The District Court ruled that Mr. Klein's opinion did not preclude summary judgment because Mr. Klein did "not state the basis for his opinion [nor] did he define the appropriate standard of care applicable to engineers, or how Pioneer fell short." (ADD 6.) The District Court was incorrect. A fair reading of Mr. Klein's affidavit, together with the opinions expressed by Mr. Jillson on behalf of the Plaintiff, establish that Pioneer deviated from the standard of care by failing to determine the proper minimum building pad elevations for the Pond Hollow Project. Pioneer incorrectly set the minimum building pad elevations by failing to properly consider the high water level and high water table problems that would result from the predominantly clay, shallow soils disclosed in Braun's soil boring reports. In short, reading Mr. Klein's affidavit together with Mr. Jillson's report provides a sufficient factual basis for Mr. Klein's expert opinion such that it should not have been dismissed as a "conclusory" affidavit.

In erroneously concluding that the affidavit was "conclusory," the District Court improperly relied upon *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188 (Minn. 1990), a case addressing the sufficiency of an expert affidavit in a medical malpractice case in evaluating whether there were genuine issues of material fact in this negligent engineering case. *Sorenson* has no application here because the requirements of the medical malpractice affidavit statute, Minn. Stat. § 145.682, do not apply to Ryland's negligent engineering claims. Also, the District Court itself recognized that its order "involved a summary judgment motion" and not a "motion to dismiss an action under Minn. Stat. § 544.42" (setting requirements for professional negligence expert affidavit) based upon claimed deficiencies of an expert affidavit. (A137.) Thus, it would

also be improper to rely upon a requirement for Mr. Klein's expert affidavit under Minn. Stat. § 544.42 in concluding that the affidavit was too "conclusory."

Moreover, the paragraph in the Special Provisions for Grading relied on by Pioneer in seeking to limit any duty it owed to Ryland does not excuse Pioneer from its duty to properly recognize and evaluate the water table when determining the minimum building pad elevations. The relevant paragraph from the Special Provisions states:

The Contractor is reminded that Section 5 of the General Conditions places the responsibility for determining all surface and subsurface 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.

(A43J.) Under the Special Provisions, "Owner" is specifically defined as Janco and "Owner's representative as engineer for the project" is identified as Pioneer. (A43I.) "Contractor" is that entity who agrees to perform and execute all the provisions of the Plans and Specifications prepared by Pioneer. (A43H.) Here, the "Contractor" was Enebak Construction. The quoted paragraph simply placed the burden on Enebak to bear the responsibility for determining all surface and subsurface conditions that may have an influence on its work under the Plans and Specifications for Grading. Thus, this paragraph did not relieve Pioneer of its obligation to properly recognize and evaluate the water table when determining the minimum building pad elevations.

Further, the fact that Janco was aware of the site conditions through receipt of Braun's geotechnical report does not relieve Pioneer of all responsibility with respect to advising anyone about any adfreezing. Initially, if Janco was aware of the site conditions

through receipt of Braun's geotechnical report, then Pioneer was likewise aware of the site conditions, having conceded it also received Braun's geotechnical report. Despite its purported awareness of the site conditions, Pioneer went forward and set the minimum building pad elevations, but it did so negligently in failing to recognize the water table. This negligence lead directly to the homeowner complaints outlined in Mr. Jillson's report stemming from alleged "excessively high water," and the "high water table."

Accordingly, Pioneer had a duty to properly recognize and evaluate the water table when setting the site evaluations and determining the minimum building pad elevations for the Pond Hollow Project, but Pioneer failed to do so. This breach of its duty of care by Pioneer caused Ryland to suffer damages from the lawsuit brought by Plaintiff Pond Hollow Homeowners' Association based on the damages allegedly caused by the "excessively high water" and the "high water table," as detailed in Mr. Jillson's report. Therefore, the District Court erred in granting summary judgment to Pioneer, and this Court should reverse and remand this case for further proceedings on Ryland's claims against Pioneer.

III. Alternatively, if it was proper for the District Court to Grant Pioneer's Motion for Summary Judgment, the District Court Did Not Abuse Its Discretion in Dismissing Ryland's Claims Without Prejudice.

Alternatively, if it was proper for the District Court to grant Pioneer's motion for summary judgment (which it was not, for the reasons set forth above), then the District Court did not abuse its discretion in dismissing Ryland's claims against Pioneer without prejudice.

Pioneer's argument, in essence, is that once the District Court decided it would grant Pioneer's motion for summary judgment, it was then required, as a matter of law, to dismiss Ryland's claims with prejudice and it retained none of its usual discretion to dismiss claims with or without prejudice. In attempting to support this novel theory, however, Pioneer does not cite a single rule or case that squarely holds that a district court must dismiss all claims with prejudice upon the grant of a motion for summary judgment.

In contrast, this Court has previously *reversed* a trial court's dismissal of a party's claims *with prejudice* after the trial court granted the defendant's motion for summary judgment, even though there was no genuine issue of material fact, because the dismissal with prejudice was premature. *See Asmus v. Ourada*, 410 N.W.2d 432 (Minn. Ct. App. 1997). In *Asmus*, the district court granted defendant's motion for summary judgment and dismissed plaintiff's claims with prejudice, explaining it was granting the motion because the plaintiff failed to file his complaint and pay the required filing fee. *Id.* at 435. On appeal, this Court stated it was "clear that no genuine issue of material fact was established by [plaintiff] in opposition to [defendant's] motion." *Id.* at 434. Indeed, the plaintiff's "position was unsupported" by any evidence in the record. *Id.* Thus, plaintiff had completely failed to establish any of the required elements supporting his claims against the defendant. Rather than affirm the District Court based on the plaintiff's failure to establish any of the essential elements of his case, this Court instead reversed the District Court's grant of summary judgment dismissing plaintiff's claims with prejudice. *Id.* at 435. This Court ruled that the trial court erred in granting summary

judgment dismissing plaintiff's claims with prejudice because the trial court had relied on the plaintiff's failure to file his complaint and pay the filing fee as the reasons for the dismissal. *Id.* at 435.

Thus, in *Asmus*, this Court held that the trial court erred in dismissing the plaintiff's claims with prejudice after granting the defendant's motion for summary judgment, even though the record showed there were no genuine issues of material fact and even though the plaintiff had completely failed to establish any of the essential elements of his claims. *Id.* This result in *Asmus* is contrary to Pioneer's argument that a district court must dismiss a party's claims with prejudice after a motion for summary judgment if the party fails to establish the essential elements of its claims. Accordingly, this Court should reject Pioneer's argument as contrary to the logic and result of *Asmus*.

Pioneer also claims that the District Court was "implicitly" applying Minnesota Rule of Civil Procedure 41.02 when it dismissed Ryland's claims without prejudice. (Appellant's Br. at 9.) The District Court, however, never cited to Rule 41.02 when it dismissed Ryland's claims without prejudice. Instead, the District Court explained its reasoning as follows: "Ryland's action against Pioneer is one for indemnity and contribution. The motion for summary judgment is granted without prejudice because of the separate Janco litigation, the relationship between Ryland and Janco which has not yet been adjudicated, and to preserve arguments and claims that Ryland might have after a full trial in this case." (ADD. 13.) Thus, if anything, the District Court "implicitly" decided to dismiss Ryland's claims without prejudice because it believed it was premature to dismiss Ryland's claims with prejudice because of the separate Janco

litigation, because of the relationship between Ryland and Janco (the previous purchaser of the property) had not yet been adjudicated, and because additional evidence after a full trial could affect the merits of Ryland's claims against Pioneer. In other words, the District Court sought to preserve its ability to revisit Ryland's claims against Pioneer after these further developments—developments that would affect the merits of Ryland's claims against Pioneer.

In addition, even if Rule 41.02 is the correct rule to examine to determine if the District Court abused its discretion in dismissing Ryland's claims without prejudice, Rule 41.02(c) expressly allows a district court to dismiss claims without prejudice if it designates the dismissal is without prejudice. Rule 41.02(c) states: "*Unless the court specifies otherwise in its order, a dismissal pursuant to this Rule and any dismissal not provided for in this Rule or in Rule 41.01, other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.*" Minn. R. Civ. R. 41.02(c). Thus, Rule 41.02(c) expressly allows the District Court to specify in its order a dismissal without prejudice. And nothing in the text of the rule requires a dismissal with prejudice upon the grant of a motion for summary judgment.

Likewise, nothing in Minnesota Rule of Civil Procedure 56, which governs motions for summary judgment, expressly requires that the district court dismiss a claim with prejudice upon the granting of a motion for summary judgment. Pioneer's claim that "the language in Rule 56.03 demands a finding that summary judgment is by its very nature *with* prejudice," (Appellant's Br. at 14) (emphasis in original) is belied by the

actual language of the Rule and by the result in *Asmus*. Rule 56.03 merely directs that “[j]udgment shall be rendered forthwith.” Minn. R. Civ. P. 56.03. The Rule says nothing about dismissal of claims with or without prejudice. And the *Asmus* Court held a dismissal of claims without prejudice was the proper result, even though the plaintiff had failed to produce evidence supporting the essential elements of his claims.

Pioneer’s claim that *Lampert Lumber v. Joyce*, 405 N.W.2d 423 (Minn. 1987), requires that this Court reverse the District Court’s dismissal of Ryland’s claims without prejudice is incorrect. *Lampert* is not even a summary judgment case; instead, the Minnesota Supreme Court addressed a trial court’s dismissal of a cross-claim “on its own motion and after final submission of the case” following a two day bench trial. 405 N.W.2d at 424-25. Thus, the actual holding of the Court in *Lampert*—that the trial court “erred in dismissing” the claims “without prejudice” because the case had been “finally submitted” following the bench trial—is not applicable here. Further, the Minnesota Supreme Court ordered the case “remanded to the trial court for an adjudication on the merits.” *Id.* at 427. Thus, the relief granted was *not* to order the claims dismissed with prejudice, but instead to decide the claims after further proceedings in the district court. This relief is inconsistent with Pioneer’s request that this Court reverse the District Court’s dismissal without prejudice and order Ryland’s claims dismissed with prejudice.

Pioneer’s reliance upon *Lombardo v. Seydow-Weber*, 529 N.W.2d 702 (Minn. Ct. App. 1995), is also misplaced. In *Lombardo*, this Court held that the medical malpractice affidavit statute, Minn. Stat. § 145.682, required the district court to dismiss the plaintiff’s claims with prejudice, rather than allowing the plaintiff to voluntarily dismiss

the claims without prejudice under Rule 41.01(b). 529 N.W.2d at 705. But the medical malpractice affidavit statute has no application in this appeal—an appeal involving Ryland’s claims arising out of the negligent provision of engineering services. Further, in *Lombardo*, this Court did not rely upon Rule 56, Rule 41 or any other authority that could arguably apply in this appeal by Pioneer; instead, this Court relied on the language of the statute in determining that the dismissal must be with prejudice. Thus, *Lombardo* stands for the proposition that, if the plaintiff fails to comply with the requirements of the medical malpractice affidavit statute, a trial court must dismiss the plaintiff’s claims with prejudice because the medical malpractice statute requires the dismissal be with prejudice. *Lombardo* does not apply to dismissal of claims following motions for summary judgment that are not based on the medical malpractice statute.

Accordingly, the District Court did not abuse its discretion in dismissing Ryland’s claims against Pioneer without prejudice, and this Court should reject Pioneer’s arguments to the contrary.

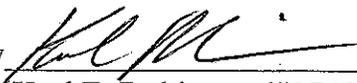
CONCLUSION

For the reasons set forth above, Ryland requests that this Court reverse the District Court's grant of summary judgment to Pioneer and remand this case to the District Court for further proceedings on Ryland's claims against Pioneer. Alternatively, Ryland requests that this Court affirm the District Court's dismissal of Ryland's claims against Pioneer without prejudice.

Respectfully submitted,

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,405 words. This brief was prepared using Microsoft Word 2002.

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