

NO. A06-0691

State of Minnesota
In Court of Appeals

Robert and Virginia Carlson,

Respondents,

v.

SALA Architects, Inc.,

Appellant.

BRIEF OF APPELLANT SALA ARCHITECTS, INC.

Keith S. Moheban (#216380)
Liz Kramer (#325089)
LEONARD, STREET AND
DEINARD, PA
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500

Attorney: for Respondent
Robert and Virginia Carlson

William M. Hart (#150526)
Michael D. Hutchens (#167812)
Damon L. Highly (#0300044)
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Attorneys for Appellant
SALA Architects, Inc.

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STATEMENT OF LEGAL ISSUES

1. Did the district court commit errors of law when it ruled that the appropriate award for SALA's alleged professional malpractice — allegedly holding out David Wagner as a licensed/registered architect — was disgorgement of all amounts that SALA billed and that the Carlsons paid?

The district court, sua sponte, ordered disgorgement of all fees.

Apposite authority:

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982)
City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978)
Minn. Stat. § 326.14 (2004)

2. When granting summary judgment, a court may not weigh evidence or make factual determinations, but must view evidence in the light most favorable to the nonmoving party, and if any issue of material fact exists, summary judgment is not appropriate. Where issues of material fact exist as to whether appellant SALA held out David Wagner as a licensed architect to respondents Robert and Virginia Carlson, did the district court err as a matter of law by ordering summary judgment, sua sponte, in favor of the Carlsons?

The district court, sua sponte, ordered summary judgment in favor of the Carlsons.

Apposite authority:

Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006)
Schafer v. JLC Food Sys., Inc., 695 N.W.2d 570 (Minn. 2005)
Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (Minn. 2002)
Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588 (1975)

3. Where issues of material fact exist as to whether Dale Mulfinger failed to take responsible charge of the Carlson project, did the district court err as a matter of law by ordering summary judgment, sua sponte, in favor of the Carlsons?

The district court, sua sponte, ordered summary judgment in favor of the Carlsons.

Apposite authority:

Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006)
Schafer v. JLC Food Sys., Inc., 695 N.W.2d 570 (Minn. 2005)

Teffeteller v. Univ. of Minn., 645 N.W.2d 420 (Minn. 2002)
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4. Alternatively, where the district court ordered summary judgment, sua sponte, without notice to SALA and without giving SALA an opportunity to fully respond, is remand necessary to permit SALA to marshal evidence showing the existence of material facts as to whether it held out Wagner as a licensed architect?

The district court, sua sponte, ordered summary judgment in favor of the Carlsons.

Apposite authority:

Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414 (Minn. App. 2003)
Doe v. Brainerd Int'l. Raceway, Inc., 514 N.W.2d 811 (Minn. App. 1994), *reversed on other grounds*, 533 N.W.2d 617 (Minn. 1995).

STATEMENT OF THE CASE

This appeal arises out of a dispute over architectural design plans for a residential home. In August 2000, respondents Robert and Virginia Carlson hired architect Dale Mulfinger and his architectural firm, appellant SALA Architects, Inc., to design an 8,000-square foot home on the Carlsons' Eden Prairie lakefront property. Construction was to begin in less than eight months. Because of the project's large size and short timeframe, the Carlsons understood that other SALA employees would assist Mulfinger, and Mulfinger chose SALA draftsman David Wagner to assist him. Wagner had two architecture degrees and six-years of experience. But because Wagner was not yet licensed, SALA gave him the title of draftsperson, and he worked under Mulfinger's supervision. SALA's monthly invoices to the Carlsons reflected Wagner's status, identifying him as "Draftsperson" and billing him out at a draftsperson's rate. The Carlsons promptly paid, and presumably reviewed, all of SALA's invoices.

During 2000-2001, Mulfinger and Wagner met with the Carlsons at numerous design meetings, wherein the Carlsons gave piecemeal approval of the SALA design stages. Mulfinger and Wagner testified that in late 2000, the Carlsons approved of SALA design drawings and a model showing the house exterior. The Carlsons, however, claim that they did not see the drawings or model until 2001, and that they did not approve the designs. They also testified that they did not know what the exterior would look like until summer 2001, and that the designs were not what they wanted. Therefore, they stopped the project in September 2001 and fired SALA two years later in August 2003.

In 2004, the Carlsons brought this action against SALA alleging breach of contract and professional negligence for failure to design a house consistent with their requests. As damages, they sought the nearly \$300,000 in architectural fees they had paid. SALA moved for summary judgment on the basis that no facts supported their claims because the Carlsons had approved SALA's exterior designs. At the same time, the Carlsons moved to amend their complaint to add a claim for violations of Minnesota Chapter 326, based on their belief that SALA had held unlicensed Wagner out as a licensed architect, and on their belief that Mulfinger had not taken "responsible charge" of the project.

The Hennepin County District Court, the Honorable Charles A. Porter presiding, heard both motions in July 2005. On August 30, 2005, the district court denied SALA's motion for summary judgment, granted the Carlson's motion to amend, and then simultaneously ordered — sua sponte — summary judgment in favor of the Carlsons. On its own accord, the court determined that, as a matter of law, SALA held out Wagner as a licensed architect, and that Mulfinger did not take responsible charge of the Carlson

project. Pursuant to *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), the court ordered SALA to disgorge the architectural fees that the Carlsons had paid, based on the notion that “[t]he application of *Perl* to the instant case begins with the idea that an architect owes fiduciary duties to its clients.” (A.31).¹

Afterwards, SALA moved for reconsideration. On October 27, 2005, the district court issued an order upholding its earlier decision. SALA now appeals.

STATEMENT OF FACTS

This case arises out of a dispute over appellant’s design plans for a home that respondents were planning to build. In 1999, respondents Robert and Virginia Carlson bought a parcel of lakeshore property on Bryant Lake in Eden Prairie, intending to design and build a home on the land. (A.62). The Carlsons bought the property through their general contractor Steven Streeter. (A.62,158). At the time, the Carlsons owned a sprawling 15,700-square-foot home in the Indian Hills neighborhood of Edina. (A.54-56,84). They also owned two other homes — one in Aspen, Colorado and one in Naples, Florida. (*Id.*).

After buying the property, the Carlsons hired Streeter and his construction company to be the builders for their future home, and the Carlsons planned that construction would begin in early 2001. (A.62,111). The Carlsons later hired interior designer Talla Skogmo of the firm Gunkelman Interior Design to decorate and provide interior-design services for their future home. (A.64,85,140).

¹ “A.#” refers to appellant SALA’s separately bound appendix.

The Carlsons asked Skogmo to recommend an architect. (A.83,140). Skogmo suggested appellant SALA Architects, Inc., particularly architect Dale Mulfinger — the owner and chief architect of SALA. (A.64,83,140). Skogmo had known Mulfinger — a licensed architect in both Minnesota and Wisconsin — for roughly 12 years, and he had designed her mother's home. (A.83,140,174).

1. The Carlsons meet with Dale Mulfinger of appellant SALA Architects, Inc.

In the summer of 2000, the Carlsons interviewed prospective architects. (A.54,147). Virginia Carlson interviewed Dale Mulfinger in July 2000 and recommended that the Carlsons retain him and his firm. (A.54). A few days later in August 2000, Robert Carlson interviewed Dale Mulfinger at Carlson's office. (A.54). This was not Robert Carlson's first interaction with an architect. (A.54,57). Robert Carlson hails from the Carlson family, made wealthy by the success of the Carlson Companies, and he has had significant business experience in dealing with architects on a variety of major construction projects, including designing factories in France and Singapore. (A.54,57,130).

During the August 2000 interview, Carlson and Mulfinger discussed the fact that the Carlsons wanted the house to be approximately 8,000 square feet — half the size of the enormous Edina home they then owned. (A.84,132,258). They also discussed the Carlsons' desire to begin construction in March or April 2001 — only eight months later. (A.111).

Robert Carlson also told Dale Mulfinger that the Carlsons wanted a low-maintenance home, with an abundance of exterior stone and substantial rear-facing glass

to take advantage of the lake view. (A.63-64,106,128,131). Although the Carlsons wanted very little wood on the exterior, on the interior they wanted ample wood and vaulted ceilings with exposed wood beams. (A.64,131,250).

Robert Carlson also told Mulfinger that he and Virginia did not want the house to resemble their Edina home, which was a flat, “boxy,” ultra-modern house with a “Miami Vice” look. (A.54,82,158). The Carlsons’ distaste for their Edina home stemmed less from its style than from their inability to sell it. (A.82). Earlier in 2000, the Carlsons had put the home on the market for \$5.3 million. (A.55-56). They wanted to sell the home because they did not want to have two homes in Minnesota. (A.54-56,62,82,130). This was the second time they had put their Edina home up for sale; they had unsuccessfully attempted to sell it back in the early 1990s. (A.54-55). According to Virginia Carlson, the Carlsons were not going to build their Bryant Lake home until they sold their Edina home. (A.85).²

2. Dale Mulfinger and Robert Carlson agree that other SALA employees will assist Mulfinger on the Carlson project.

During the interview, Dale Mulfinger agreed that SALA would accept the Carlson project. (A.100). But because the project was of considerable size and on a short timetable, Mulfinger advised Robert Carlson that others at SALA would also work on the project to ensure timely completion. (A.57,111). Robert Carlson not only agreed, he specifically asked Mulfinger to have others work on the project with him. (A.111). Carlson explained that he had previously worked with a designer in Florida who had been killed in an auto accident, leaving Mr. Carlson without a completed project. (A.111)

² The Carlsons’ Edina home did not sell until 2003. (A.55).

Indeed, as one experienced in dealing with architectural firms, Robert Carlson expected that other SALA employees would work under Mulfinger's supervision. (A.54,57,111,130). He knew it was "common practice" among all architects to delegate work to "draftsmen" and other junior employees in working on a project. (A.54,57). So at the time that the Carlsons hired SALA, they understood that Dale Mulfinger would not work alone on the Carlson project, and that he would delegate tasks to assistants and any number of employees. (*See* A.57). Indeed, the Carlsons demanded as much. (A.111).

3. The parties sign a standard architectural contract chosen by the Carlsons.

After the Carlsons hired SALA in August 2000, the parties signed a short architectural contract. (A.48). The Carlsons' attorney suggested that the parties use this standard contract, prepared by the American Institute of Architects. (A.114). The contract set forth two phases: a "Design Phase" and a "Construction Phase." (A.49,114). The "Design Phase" is the only phase at issue in this case. During the design phase, the contract obligated SALA to describe the project requirements for the Carlsons' approval; to develop a design based on the approved project requirements; and to prepare construction documents based on the approved design. (A.49). Nothing in the contract required written approval. (A.48-52).

The Carlsons were to pay SALA on an hourly basis, at the standard architectural rates determined by SALA. (A.50). Robert Carlson, a sophisticated consumer of such services, suggested a "cost-plus" fee arrangement, as opposed to a percentage-based fee. (A.103-104). Mulfinger and Robert Carlson discussed hourly rates that SALA would charge for general staff and Mulfinger's services. (A.104).

4. Mulfinger has SALA draftsman David Wagner assist on the Carlson project.

Dale Mulfinger testified that he was committed to being actively involved in the Carlson project, even though he had other design projects and taught a few architectural courses. (A.112). Nevertheless, given the project's substantial scale and tight schedule, he also knew that he would need an assistant to work with him on the project, as discussed with Robert Carlson. (A.57,111-12). Mulfinger enlisted the assistance of David Wagner, a SALA employee whom he had hired in 2000. (A.101,111). Mulfinger considered Wagner well suited and uniquely qualified for the Carlson project because of his background and design experience with stone, glass, and wood — materials that the Carlsons wanted to use in building their Bryant Lake home. (A.64,101,111-12,128,131).

Although Wagner was not yet a licensed architect, he had earned two degrees in architecture from Washington State University: a bachelor of science in architecture in 1992, and a bachelor of arts in architecture in 1993. (A.120). Even though the Carlson project was Wagner's first significant project at SALA, he had six years of architectural experience at an architectural firm in Seattle, Washington from 1994 until 2000, where his work included designing a house on the famed Bill and Melinda Gates estate (of Microsoft renown). (A.119-21,124).

When SALA hired Wagner in 2000, it knew that he was not yet a licensed architect. (A.102).³ Mulfinger testified that a "licensed" or "registered" architect is

³ At the time, Wagner had started his exams in Washington, and he completed and passed all of his exams — thereby becoming a licensed architect in Washington — in 2003. (A.102,119,174-76). Mulfinger explained that after completing architect exams in another state, an individual can become registered here merely by seeking reciprocity with Minnesota. (A.102).

someone who is licensed as an architect somewhere in the world. (A.98). Mulfinger recognized that unless an employee is licensed (or registered) as an architect in Minnesota, an architectural firm “cannot go out into the public and claim [someone is an] architect[] unless [he or she is] registered in the State of Minnesota.” (A.98).

5. Because Wagner is not licensed, SALA gives him the title of “draftsperson.”

Because Wagner was not a licensed architect, SALA did not hire him as, or give him the title of, “associate,” — a position comparable to associate attorney at a law firm. (A.102; *see* A.174-76) Mulfinger testified that employees who have undergone architectural training but have not yet become licensed architects are called “draftsman” (draftsperson), “intern,” or “assistant” depending on the circumstances. (A.116). Under no circumstances would SALA refer to an unregistered employee as an “architect”; Mulfinger testified that SALA was vigilant about “not going out into the public world and describing these [unlicensed employees] as architects.” (A.116, *see* 174-76). Consistent with this practice, SALA hired Wagner as an intern architect and gave him the title of “draftsman” or “intern.” (A.102,116,174-76).

Similarly, Mulfinger stated under oath that SALA labels and bills out unlicensed employees like Wagner as “draftsperson,” “intern,” or “assistant” — not architect. (A.174). Mulfinger testified that SALA would never hold out an unlicensed person as an architect. (A.116). Mulfinger further explained that SALA instructs its unlicensed employees not to hold themselves out as architects to the public. (A.174-75). Moreover, Mulfinger testified that when a SALA draftsman, intern, or other unlicensed employee works on a project, that individual works under a licensed architect’s supervision.

(A.115). David Wagner stated under oath that licensed architect Mulfinger supervised his work on the Carlson project. (A.176).

The Carlsons contend that neither Mulfinger nor Wagner “disclosed” the fact that Wagner was not a licensed architect. (A.228). The Carlsons contend that they discovered that Wagner was not a licensed architect only after commencing this lawsuit against SALA. (A.228). Mulfinger testified that he could not remember whether he specifically discussed with the Carlsons the fact that Wagner was not licensed as an architect in Minnesota. (A.108). Mulfinger and Wagner also acknowledged that Wagner was not a licensed architect during the time that he worked under Mulfinger on the Carlson project. (*See* A.174-76). Nevertheless, Mulfinger stated under oath that at no time during the Carlson project did SALA ever hold out David Wagner as a licensed architect. (A.175). Likewise, Wagner swore under oath that he never held himself out as a licensed architect on the Carlson project, or any other project for that matter. (A.176). Wagner also stated in his affidavit that SALA never held him out to the Carlsons as a licensed architect. (A.176). Although the Carlsons take a counter position, (A.228), they provide no testimony that Mulfinger or Wagner ever verbally identified Wagner as an architect.

Consistent with SALA’s practice of giving Wagner the title of “draftsman” (draftsperson) — not architect — SALA billed him out as a “draftsperson” on its monthly invoices to the Carlsons. (A.174-76). These invoices, which the Carlsons promptly paid and presumably reviewed, consistently identify Wagner as “Draftsperson.” (A.60,174-76,190-95,212-17). Conversely, these same invoices, which began in August 2000,

identify Dale Mulfinger as the “Project Manager” and/or “Principal.” (A.174-76,190-95,212-17). And as these invoices show, Wagner’s billing rate represented the billing rate of a draftsman — not an architect. (A.174,190-95,212-17). For example, SALA’s billing rate for Wagner, as a “Draftsman,” was substantially lower than SALA’s billing rate for Mulfinger as a “Principal” architect. (A.190-92,212-17). Moreover, these invoices showed Wagner’s “Draftsman” billing rate was also lower than that of licensed architect Marcelo Valdes, designated as “Associate.” (A.190-92).

A number of later invoices list all the SALA employees on the Carlson project under the broad category of “Architectural Services,” without assigning the employee a title. (A.196-211). Not surprisingly, the list includes licensed architects like Mulfinger and Marcelo Valdes, as well as non-architects such as draftsmen like Wagner, Lilian Simon, and Dan Wallace, as well as computer-aided design (CAD) operators, and miscellaneous support staff. (*Compare* A.190-95 and A.212-217 with A.196-211). Nevertheless, all invoices identified Dale Mulfinger as the project manager. (A.190-217).

6. Between August 2000 and March 2001, the Carlsons host over 20 design-team meetings, during which they give approval of SALA’s design.

After the Carlsons hired SALA in August 2000, they had assembled their “design team” for their future home. (A.158,58). The design team consisted of Robert and Virginia Carlson, building-contractor Steven Streeter, interior designer Talla Skogmo and her assistant Renae Keller, and SALA architect Mulfinger and draftsman Wagner. (A.58,85,158; *see* A.178,147). Beginning that same month, the team began to meet regularly to design the Carlson home. (A.61-62,85,112).

Between August 2000 and March 2001, the Carlsons hosted approximately 13 meetings, scheduled bi-weekly, plus roughly nine additional informal meetings, product shopping trips, and teleconferences. (A.61-63,65,92). The Carlsons' held a majority of these meetings at their Edina home, but others took place at Robert Carlson's Quadion Corporation building. (A.141,137,105-106).

Over the course of these meetings, during which Virginia Carlson was the driving force behind the style of home that the Carlsons were going to build (A.158), the Carlsons continued to express their desire to create a low-maintenance home that incorporated a stone exterior with a substantial amount of glass facing the lake, and with an extensive amount of wood on the inside. (A.63-64,128). Mulfinger testified that the Carlsons actively participated in the design meetings and viewed SALA's design drawings and models. (A.117). Streeter testified that Talla Skogmo made sure that the Carlsons were heard on their design issues. (A.159).

As part of the design process, at each of the meetings the Carlsons would give SALA feedback as to whether they liked or disliked the design or needed additional information, and it was during this collaborative design process that the Carlsons gave step-by-step approval of the SALA design. (A.107,129-30). The Carlsons contend that it was during these meetings that SALA failed to obtain their approval in developing the design of their house. (A.44). But Mulfinger testified that at each of these meetings the Carlsons gave them "incremental approvals of pieces as we [the design team] went along" in the design process, which consisted of a series of "evolutionary decisions." (A.107; *see* A.129-30). Mulfinger testified that Robert Carlson would end each design

meeting by asking, "Are we all in agreement?," to confirm that the design team had reached a consensus on that stage of the design process, and that they were on the proverbial 'same page'. (A.117). Similarly, Streeter testified that at the end of each meeting leading up to March 2001, the design team would reach a consensus on the design process of the house. (A.159).

7. The Carlsons hold a groundbreaking ceremony in March 2001, but do not begin construction because their Edina home had not yet sold.

In early March 2001, the Carlsons organized a groundbreaking ceremony at the Bryant Lake property. (A.158,169,141,108,134). Robert and Virginia Carlson posed for pictures wearing hardhats and holding shovels provided by Streeter, while Skogmo provided champagne for the occasion. (A.141,173). The photograph also shows the Carlsons holding construction drawings that Mulfinger and Wagner gave to them on that day. (A.141,108-109,135). These construction drawings included a complete set of "exterior elevations" — drawings of the exterior design of the house. (A.135).

This "groundbreaking," however, proved to be purely ceremonial because the Carlsons did not begin actual construction a week later as planned. (A.109-110,132-34). The Carlsons contend that they postponed construction because at the time they had "no idea" what the outside of the house would look like, and it was only later in June 2001 that they saw SALA's designs of the outside house and realized it was not the design that they wanted. (A.66,90). Streeter, however, testified that by March 2001, the Carlsons and the design team had formulated and agreed on the exterior shape and style of the house. (A.159-60). And Wagner testified that at a meeting a week after the groundbreaking, the Carlsons told SALA that they were postponing construction because

their Edina home had not yet sold, (A.134), which is consistent with Virginia Carlson's testimony that they were not going to build their Bryant Lake home until they sold their Edina home. (A.85).

8. The Carlsons claim that the SALA designs were not what they wanted, and that they did not discover this until June 2001.

According to the Carlsons, it was not until June 2001 that they saw SALA's drawings and model of the home's exterior design. (A.66,90-91). The Carlsons testified that it was only then that they realized that SALA had failed to design the exterior of the house the way they wanted. (A.41-42,220-21,66). But Wagner and Mulfinger testified that in approximately December 2000, they presented the Carlsons with exterior color drawings of the front and back of the house, as well as a cardboard model, at a meeting in a conference room at the Carlsons' Quadion Corporation building. (A.105-06,137-38,172). Mulfinger was certain of this because "by the time of the [March 8, 2001] groundbreaking ceremony we had pretty much finished all of the exterior questions." (A.106; *see* A.159-60).

The Carlsons assert that they were dissatisfied with SALA's design of the house's exterior, asserting that it was too cold and contemporary. (A.89-91). Robert Carlson contends that he told Mulfinger that they did not want a contemporary house, and that they were "not going to use the C word," meaning "contemporary." (A.54). Mulfinger testified, however, that the Carlsons never said anything about a contemporary design or the "C word." (A.105). Similarly, Wagner testified that the Carlsons never told him that they did not want a contemporary house. (A.131,133). Also, Mulfinger testified that the Carlsons approved of the design as shown by the model. (A.108). And Wagner stated

that the Carlsons liked the design as depicted in the drawing. (A.172). According to Wagner, there was nothing in the drawings that the Carlsons wanted changed. (A.138).

9. The Carlsons put the design project on hold in August-September 2001.

Notwithstanding the Carlsons' claimed disappointment in SALA's design, they continued to have SALA work on designing the home, and they hosted roughly nine design meetings between June 2001 and August 2001. (A.65,110). In August 2001, the Carlsons notified SALA that they were putting the project on hold. (A.60,65,85,110,132). The testimony conflicts as to whether it was because the Carlsons could not sell their Edina home (and their Colorado home), or because the Carlsons could not sell their homes and they did not get the design from SALA that they wanted. (*Id.*). Design meetings continued, however, until the 9/11 terrorist attacks; at that point, the project became dormant, allegedly because of the financial repercussions of 9/11. (A.66,110). From August 2000 until September 2001, the Carlsons paid all monthly invoices they received from SALA. (A.60,117).

10. The Carlsons terminate SALA in August 2003.

Two years later, in August 2003, the Carlsons terminated SALA. (A.66). The Carlsons claim that the 9/11 terrorist attacks caused the two-year delay. (*Id.*). SALA maintains that it was unaware that the Carlsons were dissatisfied with SALA's design until March 2003. (A.260). After the Carlsons terminated SALA, they hired a different architectural firm to finish designing their home. (A.43,231). Streeter's construction company built the Carlsons' Bryant Lake home where they now live. (A.62).

11. The Carlsons bring this action against SALA in 2004.

In August 2004, the Carlsons brought this action against SALA, alleging breach of contract and professional negligence. (A.37-47). The Carlsons asserted that SALA breached the parties' contract by failing to obtain their approval of the house design, and by not creating the design they expected. (A.43-45). The Carlsons claimed malpractice based on their belief that SALA had breached a duty of care. (A.45). They sought damages of \$291,957.42, which represented the amount of architectural fees the Carlsons had paid to SALA. (A.46).

12. SALA moves for summary judgment and the Carlsons move to amend.

In summer 2005, SALA moved for summary judgment on the grounds that no evidence supported the Carlsons' claim that SALA breached the parties' contract or that SALA negligently breached any standard of care in providing architectural services. (A.3-22).

Shortly after, the Carlsons moved to amend their complaint to include a third count alleging violation of Minnesota Chapter 326, based on their contention that SALA held out Wagner as a licensed architect. (A.3-22; A.218-227). They also sought to add a statutory claim that SALA had failed to properly supervise Wagner and that Mulfinger had failed to take responsible charge of the project, in violation of Minn. Stat. § 326.14. (*Id.*).⁴

The district court heard both parties' motions on July 21, 2005. (A.3). On August 30, 2005, the district court denied SALA's motion for summary judgment. (*Id.*). At the

⁴ The Carlsons also sought to amend their professional-malpractice count to include a claim for SALA's alleged failure to substantiate its billing records. (*See* A.223).

same time, and without any motion, the district court ordered summary judgment, sua sponte, in favor of the Carlsons. (A.3-22). On its own accord, the district court determined, as a matter of law, that SALA held David Wagner out as a licensed architect in violation of the statute. (A.15-18,22; A.26-29). Pursuant to *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), the court determined that the appropriate remedy was disgorgement of all architectural fees. (A.18-19). The court concluded that “[t]he application of *Perl* to the instant case begins with the idea that an architect owes fiduciary duties to its clients” (A.31), and that SALA breached this purported fiduciary duty per the district court’s sua sponte determination that SALA held out Wagner as a licensed architect. (A.15-19; A.30-36). Because the theory upon which the district court ordered summary judgment was not even in the Carlsons’ complaint — nor was it the subject of a motion for summary judgment — the district court also granted the Carlsons’ motion to amend their complaint to add the holding-out-as-architect theory. (A.19-22).

After, SALA moved the district court to reconsider. On October 27, 2005, however, the district court upheld summary judgment in favor of the Carlsons, ruling that no fact issue existed as to whether SALA held out Wagner as a licensed architect. (A.23-26). SALA now appeals.

ARGUMENT

I. This court applies a de novo standard of review to a grant of summary judgment.

Whether summary judgment was properly ordered is a question of law, which this court reviews de novo. *In re Estate of Kotowski*, 704 N.W.2d 522, 526 (Minn. App. 2005), *review denied* (Minn. Dec. 21, 2005). On appeal from summary judgment, a

reviewing court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005); see Minn. R. Civ. P. 56.03. A reviewing court must examine the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A reviewing court is not bound by, and need not give deference to, a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

To obtain reversal, the party against whom summary judgment was granted need only show that fact issues exist. *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 355 n.4 (Minn. 2000). "A party need not show substantial evidence to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party * * * presents sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006); see *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) ("[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented.").

II. The district court erred as a matter of law in ordering summary judgment and awarding disgorgement of fees.

Although a district court has inherent authority to grant summary judgment on its own motion, this is only proper where there are no genuine issues of material fact and one of the parties is entitled to judgment as a matter of law. *Franklin Auto Body Co. v. Wicker*, 414 N.W.2d 509, 512 (Minn. App. 1987). Where a district court grants summary

judgment sua sponte, “[t]he same conditions must exist as would justify a summary judgment on motion of a party.” *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 280, 230 N.W.2d 588, 591-92 (1975). “In a summary judgment motion, a court may not weigh the evidence or make factual determinations, but is required to view the evidence in the light most favorable to the nonmoving party.” *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 432 (Minn. 2002).

Here, the district court did exactly the opposite. By granting summary judgment in favor of the Carlsons, SALA and the Carlsons switched places. The Carlsons effectively became the moving party, even though they did not move for summary judgment, whereas SALA became the non-moving party, even though it was the only party that actually moved for summary judgment. But despite this role reversal, as demonstrated below the district court mistakenly viewed the evidence in the light most favorable to the Carlsons — the party for whom the court ordered summary judgment: “In this case, [SALA] is the moving party and [the Carlsons] are the nonmoving party for whom summary judgment is now granted.” (A.11). Moreover, the district court improperly weighed evidence and made fact determinations. Most importantly, however, the district court misapplied *Rice v. Perl*.

A. The district court committed an error of law when it ruled that disgorgement under *Rice v. Perl*, 320 N.W.2d 407 is the proper remedy.

Based entirely on *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), the district court ordered disgorgement of all fees as the appropriate remedy for SALA’s alleged holding out of David Wagner as a licensed architect:

[T]his Court found that [SALA] was professionally negligent because it held out a non-licensed architect as a licensed architect; the ordered remedy was disgorgement of all fees paid on that project. *The application of Perl to the instant case begins with the idea that an architect owes fiduciary duties to its clients.*

(A.31) (emphasis added) (referring to August 30 order). The Carlsons never raised *Perl* as grounds for disgorgement and, therefore, the district court — purely on its own accord — invoked *Perl* to order disgorgement.

1. Disgorgement under *Perl* applies only to a fiduciary's wrongful conduct.

In *Perl*, the supreme court held that an attorney, Norman Perl, and his law firm breached their fiduciary duty to their client, and thereby forfeited their attorney fees, for failing to disclose a business relationship they had with a claims adjuster who was also employed by the insurance company defending the party Perl's firm was suing on the client's behalf. *Perl*, 320 N.W.2d at 408. While working for the insurer, the claims adjuster also worked part-time for the Perl firm as a consultant on unrelated cases. *Id.* at 408-410. The Perl attorney-defendants failed to disclose their relationship with the claims adjuster to their client. *Id.*

Because the Perl firm failed to disclose to their client that it was paying the claims adjuster responsible for handling her claim, the trial court ruled that they breached their fiduciary duty. *Id.* at 410-11. Therefore, the trial court granted summary judgment and ordered that the Perl firm disgorge the attorney fees the client had paid. *Id.*

On appeal, the supreme court upheld the trial court's ruling. *Id.* The court held that the undisclosed relationship between the Perl firm and the claims adjuster "created, at the very least, a substantial appearance of impropriety * * * and a serious conflict of

interest.” *Id.* at 411. The failure to disclose this blatant conflict of interest constituted a breach of fiduciary duty, which mandated forfeiture of fees: “an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation.” *Id.*

As shown in detail below, the district court misapplied *Perl* for two reasons. First, *Perl* applies only to a fiduciary relationship, and Minnesota does not impose a fiduciary relationship between architects and project owners. Second, even if SALA owed the Carlsons a fiduciary duty — and it did not — *Perl*’s remedy of disgorgement also requires wrongful conduct, and here SALA has done nothing wrong. Because the district court erred as a matter of law in applying *Perl* to award disgorgement, this court must vacate that award.

2. Because Minnesota does not recognize a fiduciary relationship between an architect and a project owner, the district court erred as a matter of law by awarding disgorgement pursuant to *Perl*.

“Under Minnesota law, a fiduciary relationship exists ‘when confidence is reposed on one side and there is resulting superiority and influence on the other * * * .’” *Minnesota Timber Producers Ass’ns. v. Am. Mut. Ins. Co.*, 766 F.2d 1261, 1268 (8th Cir. 1985) (quoting *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985)); see *Flynn v. Am. Home Prods Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001) (same). “Thus, the fiduciary relationship has two characteristics: superiority of knowledge of one party and confidence reposed by the other.” *Vacinek v. First Nat’l Bank*, 416 N.W.2d 795, 799 (Minn. App. 1987). “The relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.” *Minnesota Timber*, 766 F.2d at 1268 (quoting *Toombs*, 361 N.W.2d at 809). “Other factors, such as disparity in business

experience and greater access to facts and legal resources, may also, when combined with a confidential relationship, give rise to a fiduciary relationship.” *Minnesota Timber*, 766 F.2d at 1268 (citing *Toombs*, 361 N.W.2d at 809). “Fiduciary duty is the highest standard of duty implied by law.” *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997). Also, “[a] fiduciary’s duty must be defined with reference to the experience and intelligence of the person to whom the duty is owed.” *Midland Nat’l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980). Besides attorneys and their clients, other examples of confidential, fiduciary relationships in Minnesota include those between shareholders in a close corporation, *Berremann v. West Pub. Co.*, 615 N.W.2d 362, 367 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000), and between the personal representative of a trustor and trust beneficiaries. *May v. First Nat’l Bank of Grand Forks*, 427 N.W.2d 285, 289 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988).

“Ordinarily, the existence of a fiduciary relationship would be a question for the trier of fact and summary judgment would be erroneous.” *Northernair Productions, Inc. v. County of Crow Wing*, 309 Minn. 386, 389, 244 N.W.2d 279, 282 (1976); *see Toombs*, 361 N.W.2d at 809 (“The existence of a fiduciary relationship is a question of fact.”). *But see Laska v. Anoka County*, 696 N.W.2d 133, 138 (Minn. App. 2005) (recognizing that the existence of a legal duty is a question of law), *review denied* (Minn. Aug. 16, 2005). “[A]lthough the existence of a fiduciary relationship is a question of fact and normally for the jury,” a court may “conclude as a matter of law that no such relationship exist[s].” *Minnesota Timber*, 766 F.2d at 1268 (citing *Murphy v. Country House, Inc.*, 307 Minn.

344, 240 N.W.2d 507, 512 (1976)); see *Northernair*, 309 Minn. 386, 389, 244 N.W.2d 279 (1976) (recognizing that while the existence of a fiduciary relationship is generally a question of fact, the court is not precluded from resolving the issue, as a matter of law, if the undisputed facts establish that no fiduciary relationship existed).

Here, the facts preclude the existence of a fiduciary relationship. Together, Robert and Virginia Carlson are wealthy, intelligent, experienced, and sophisticated consumers of architectural services; in fact they had worked previously with architects in both personal and business settings. So it can hardly be said — much less as a matter of law — that the Carlsons had invested such confidence in SALA that it rendered them vulnerable, or that SALA was in a position of superiority over the Carlsons. See *Minnesota Timber*, 766 F.2d at 1268 (“Other factors, such as disparity in business experience and greater access to facts and legal resources, may also, when combined with a confidential relationship, give rise to a fiduciary relationship.”); *Midland*, 299 N.W.2d at 413 (“A fiduciary’s duty must be defined with reference to the experience and intelligence of the person to whom the duty is owed.”). In fact, just the opposite is true, given the fact that the Carlsons had organized their own design team, organized design meetings, and had Talla Skogmo and Steven Streeter at their beck and call, all in support of constructing a multi-million-dollar lakefront home for which Virginia Carlson was devoting her full-time energy. In short, the facts in the record do not remotely support the idea that SALA and the Carlsons shared a fiduciary relationship.

Moreover, the district court’s orders are devoid of legal authority to support the proposition that a fiduciary relationship exists in Minnesota between an architect and a

project owner. Without any legal citation, the district court's conclusion that architects in Minnesota owe fiduciary duties to employers simply materializes out of thin air. Indeed, SALA is not aware of any Minnesota case law imposing a fiduciary duty on architects to their employers. And other jurisdictions hold that no fiduciary relationship exists between architects and owners. *See, e.g., Cinque v. Schieferstein*, 292 A.D.2d 197, 198 (N.Y. App. Div. 2002) (holding plaintiff failed to show "that defendant architect owed him a fiduciary duty separate from and extraneous to the parties' contractually defined relationship, or even that there was a fiduciary relationship") (citation omitted); *Routh v. Preusch*, No. CV030197042, 2004 Conn. Super. LEXIS 2469, at *4-6 (Conn. Super. Ct. Sept. 1, 2004), (A.276) (holding no fiduciary relationship between architect and owner: "The relationship of client and architect does not impose on the defendant the unique level of loyalty or trust which characterizes a fiduciary relationship. This is a breach of contract case, or one of professional negligence, which the plaintiff is attempting to enlarge into a case involving fiduciary duties without the requisite loyalty and trust that such a relationship requires."); *Will & Cosby & Assocs. v. Salomonsky*, 48 Va. Cir. 500, 508 (Va. Cir. Ct. 1999) ("Other than a reference to the general regulations of the Board of Architects, however, plaintiff does not state how a fiduciary duty arose between plaintiff and defendants. * * * Whatever obligations existed, whether those obligations were to look after the interests of another party or otherwise, are contained in the contracts.").

The only Minnesota court to have addressed this issue concluded that "[n]o Minnesota case has been found directly discussing whether and under what circumstances a[] * * * design professional [i.e., an architect] enters into a fiduciary

relationship with the project owner * * * .” *Todd County v. Barlow Projects, Inc.*, Civil No. 04-4218 ADM/RLE, Civil No. 04-4220 ADM/RLE, 2005 U.S. Dist. LEXIS 8648, at *28 (D. Minn. May 11, 2005). (A.267-68). Lacking Minnesota authority to the contrary, the Minnesota federal district court adopted the following reasoning from Indiana:

An architect does not owe a fiduciary duty to its employer; rather the architect’s duties to its employer depend upon the agreement it has entered into with that employer. An architect is bound to perform with reasonable care the obligations for which it contracted and is liable for failing to exercise professional skill and reasonable care in preparing plans and specifications according to it[s] contract.

Id. (emphasis added) (quoting *Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc.*, 538 N.E.2d 299, 303 (Ind. Ct. App. 1989)). In the case before it, the *Todd County* court held that there was no fiduciary relationship in Minnesota between the architect and the plaintiffs, and that the architect’s obligations arose solely from the contract with the plaintiffs. *Todd County v. Barlow Projects, Inc.*, 2005 U.S. Dist. LEXIS 8648, at *29. (A.268). Indeed, the above statement of Indiana law that the parties’ contract defines the scope of the architect’s liability, is consistent with Minnesota law. *See, e.g., City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 424-25 (Minn. 1978) (rejecting the notion that implied warranties exist in architect-owner relationships, while reaffirming the long-established rule that the architect’s duties are limited by the parties’ contract); *Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 443, 40 N.W.2d 73, 78 (1949) (“[T]he purpose of a written contract is to define and limit the duties, obligations, and liabilities of the contracting parties flowing therefrom.”) (citation omitted). *Cf. Getzschman v. Miller Chem. Co.*, 443

N.W.2d 260, 270 (Neb. 1989) (“If there is an express contract for architectural services, an architect’s duties are determined by the contract for the architect’s employment.”).

Similarly, here there can be no fiduciary relationship between SALA and the Carlsons; rather, SALA’s obligations to the Carlsons originated in the parties’ contract. At its core, this is a breach-of-contract case, or one of professional negligence, which the district court improperly enlarged into a case involving fiduciary duties, without the presence of the requisite loyalty and trust that characterizes a fiduciary relationship. *See, e.g.,* Black’s Law Dictionary, 544 (8th ed. 2004) (defining fiduciary duty as “a duty to act with the highest degree of honesty and loyalty toward another person”).

That a fiduciary duty would not exist between an architect and a project owner is not surprising, considering that Minnesota has refused to recognize fiduciary relationships in a variety of contexts, including between a doctor and a patient, *see, e.g., D.A.B. v. Brown*, 570 N.W.2d 168, 171-72 (Minn. App. 1997) (acknowledging the fiduciary duty imposed on an attorney to the client, but declining to classify a doctor’s failure to disclose the financial incentives he received from a drug manufacturer for prescribing its drugs as a breach of fiduciary duty), *review denied* (Minn. Feb. 19, 1998); *McDeid v. O’Keefe*, No. C0-03-177, 2003 WL 21525128, at *4 (Minn. App. July 8, 2003) (“There is no Minnesota case law holding that physicians or hospital staff members have a fiduciary duty towards their patients.”), *review denied* (Minn. Sept. 16, 2003) (A.274), between stockbrokers and clients, *see Rude v. Larson*, 296 Minn. 518, 519, 207 N.W.2d 709, 711 (1973) (recognizing that a fiduciary relationship is not created between stockbrokers and clients), and others, *see Cherne Contracting Corp. v. Wausau Ins. Cos.*,

572 N.W.2d 339, 341 (Minn. App. 1997) (declining to find a fiduciary relationship between workers' compensation insurer and its business client). It would be unreasonable to impose a fiduciary relationship between an architect and a project owner where no fiduciary relationship exists between a doctor and a patient. And the Carlsons can show no reason why or how the relationship between an architect and a project owner qualifies for fiduciary status over that of a relationship between a doctor and patient. See *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972) (holding that to make a prima facie showing of a fiduciary relationship, evidence must indicate defendant knew or ought to have known plaintiff was placing her trust and confidence in defendant and depended on defendant to look out for her interests). If a fiduciary relationship were created between architects and owners, the same could be said of the relationship between a *landscape* architect and an owner, between an interior designer and an owner, indeed between all manner of personal consultants and their clients. In a state where no fiduciary relationship exists between doctor and patient, these results are not just without support in the law, they are absurd.

Another reason Minnesota would never recognize a fiduciary relationship between an architect and a project owner is the widely held rule that during the design phase — undisputedly the only phase at issue in this case — the architect, “[i]n its role of preparing plans and specifications, acts as an independent contractor” to its employer. 2 Phillip L. Bruner & Patrick J. O’Connor, Jr., *Bruner & O’Connor on Construction Law* § 5:92, at 132 (2002) (citing 4.2.1 of the AIA Contract Documents). As an independent contractor, an architect merely translates spatial ideas and concepts into visual depictions

on paper for design and construction of a structure — here, a private residence. As such, the parties’ contract constituted an arm’s-length transaction for the design of a home. Consequently, there is no fiduciary duty. *See, e.g., Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953) (“[I]t is clear that the parties were dealing at arm’s length, and in such a situation a fiduciary relationship cannot be said to exist between the parties.”); *see also City of Mounds View*, 263 N.W.2d at 424-25 (reaffirming long-standing rule that architect’s duties are restricted to the parties’ contract); *Despatch Oven Co.*, 229 Minn. at 443, 40 N.W.2d at 78 (“[T]he purpose of a written contract is to define and limit the duties, obligations, and liabilities of the contracting parties flowing therefrom.”).

Furthermore, to the extent the Carlsons’ expert, Anthony Desnick, holds the “opinion” that SALA had fiduciary-type obligations to the Carlsons (A.9-10,17-19,31-33,232-247), such an opinion is utterly irrelevant. Expert witnesses do not make the law. *See Safeco Ins. Co. of Am. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995) (“An affidavit from an expert cannot create a duty where none exists.”), *review denied* (Minn. July 20, 1995); *see also Gabrielson v. Warnemunde*, 443 N.W.2d 540, 545 (Minn. 1989) (recognizing that an expert’s opinion about a standard of care does not alone establish a duty to provide that care). Consistent with this principle, “[a] defendant will not be bound to conform its conduct to a standard of care unless a legally recognized duty exists.” *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996). Relying heavily on the Carlsons’ Desnick expert disclosure, which refers to ethics codes of architects, the district court determined that a fiduciary relationship

existed between architect SALA and the Carlsons. (A.15-19,31-34). But while this may be relevant as to a standard of care, it does not establish a fiduciary duty. See *ServiceMaster*, 544 N.W.2d at 307 (stating “evidence of industry custom would be relevant as to a standard of care, but did not establish a duty”). An architect’s “opinion” no more could create a fiduciary duty here than a doctor’s affidavit could strike down the holding in *D.A.B. v. Brown* or than a lawyer’s affidavit could undo the holding in *Perl*. Fiduciary duties exist where the law so provides, not on an opinion-by-opinion basis of so-called experts.

In sum, *Perl* holds that disgorgement is proper only where a fiduciary relationship exists. 320 N.W.2d at 411. Absent a fiduciary relationship, there can be no breach, and thus, no disgorgement. See *Safeco*, 531 N.W.2d at 873 (“Where a party has no duty, there can be no breach.”). The idea that architect SALA and the Carlsons shared a fiduciary relationship finds support in neither Minnesota law nor the facts in the record. Because Minnesota does not recognize a fiduciary relationship between an architect and a project owner, the district court committed an error of law when it awarded disgorgement according to *Perl* and its progeny. Therefore, this court must vacate the district court’s award.

3. Because SALA did nothing wrong, *Perl* is inapposite, and therefore the district court committed legal error by awarding disgorgement based on *Perl*.

Moreover, disgorgement under *Perl* is improper here because SALA did nothing wrong — and wrongdoing is an essential constituent in awarding disgorgement under *Perl*. In *Perl*, the court grounded its decision to uphold disgorgement on the fact that the fiduciary-defendants wrongfully failed to disclose an improper relationship that created a

“substantial appearance of impropriety” and “a conflict of interest” for their client. *Perl*, 320 N.W.2d at 411. In other words, the failure to disclose the existence of a relationship was wrongdoing that created a blatant conflict of interest and constituted a breach of the fiduciary’s duty.

Conversely, SALA did absolutely nothing improper by having Wagner, although not yet a licensed architect, work on the Carlson project under Mulfinger’s supervision. To the contrary, SALA followed Minnesota law, which entitles unlicensed employees of an architectural firm to engage in architectural work, so long as under the supervision of a licensed architect:

A corporation, partnership or other firm may engage in work of an architectural or engineering character * * * in this state, provided the person or persons connected with such corporation, partnership or other firm in responsible charge of such work is or are licensed or certified as herein required for the practice of architecture * * * .

Minn. Stat. § 326.14 (2004). And that is exactly what SALA did. In his sworn affidavit, Wagner testified that licensed architect Dale Mulfinger supervised him on the Carlson project. (A.176). Likewise, Mulfinger testified that he was the project manager and principal architect of the Carlson project. (A.174-75). So in merely doing what it was legally entitled to do — have an unlicensed, albeit highly educated, employee assist on a project under the supervision of a licensed architect — SALA has committed no wrongdoing. And the Carlsons can hardly argue otherwise. Robert Carlson openly admitted that he expected SALA to use a draftsman because it is “common practice” for “all architects” to “utilize” draftsmen or other assistants, because senior architects like Dale Mulfinger need to delegate tasks to other employees when they sit “at the top of the

food chain.” (A.57). Indeed, the Carlsons effectively demanded that SALA use draftspersons like Wagner because of Robert Carlson’s insistence that SALA sufficiently staff the project.

Furthermore, it is irrelevant whether Mulfinger had a specific conversation with the Carlsons regarding Wagner’s licensure status, because SALA had the legal right to use Wagner as such, so long as Mulfinger supervised him. And the Carlsons had no right of “disclosure” of this fact when nothing in the statute requires SALA to do so; section 326.14 does not obligate SALA to “disclose” anything about the employees it uses, so long as SALA uses them consistent with the statute. Under the law, SALA did nothing wrong either in using Wagner on the project, or in not “disclosing” to the Carlsons the fact that Wagner was a draftsman, not an architect.

Not surprisingly, the type of arrangement contemplated by section 326.14 is standard practice in a variety of professional settings. Unlicensed employees routinely engage in a professional practice under the supervision of a licensed practitioner. Wagner’s involvement on the Carlson project under the supervision of architect Mulfinger is no different than unlicensed medical residents engaging in the practice of medicine under the supervision of staff physicians. Or, for example, unlicensed accountants collaborating with CPAs. Certainly, doctors and CPAs need not disgorge their fees under such circumstances, and neither must SALA. To hold otherwise would not only punish SALA for following the law, but it would impair the ability of professional associations to deliver services at a reasonable cost and to effectively mentor junior members of the professional association. And the mere fact that SALA cannot

recall affirmatively informing the Carlsons that it was doing something fully within its legal right does not transform this into wrongful conduct.

Indeed, it is impossible under these circumstances for there to be wrongful conduct because Chapter 326 expressly allows unlicensed persons to design a single-family home, regardless of whether they are a licensed architect. *See* Minn. Stat. § 326.03, subd. 2(a) (2004) (“Nothing contained in sections 326.02 to 326.15 shall prevent persons from * * * making plans and specifications for * * * [d]wellings for single families * * * .”). Hence, even if Wagner had worked alone in designing the Carlsons’ house (and he did not), this fact by itself could never constitute wrongful conduct under the law. In short, absent this key element of wrongdoing, the disgorgement remedy under *Perl* cannot apply. Therefore, the district court committed an error of law by awarding disgorgement, and this court must vacate that award.

Likely, the Carlsons will argue that fee disgorgement under *Perl* is not contingent on wrongful conduct. Granted, the *Perl* court rejected the notion that fee disgorgement turned on “actual injury,” “damages,” or “overt wrongful conduct.” But *Perl* nevertheless held that the conduct must be wrongful in that it creates a potential for harm. 320 N.W.2d at 411 (upholding disgorgement on the basis that the conduct in question created both an appearance of impropriety and a conflict of interest). So while the client suffered no actual damages as a result of the conduct (the so-called non-adversarial relationship), the *Perl* court ruled that the conduct nevertheless had the effect of “creat[ing], at the very least, a substantial appearance of impropriety * * * and a serious

conflict of interest,” and therefore the *Perl* court upheld disgorgement. *Id.* Indeed, if wrongful conduct is not required under *Perl*, one wonders how a professional might ever earn a fee that would not be subject to disgorgement. *Perl* is obviously grounded in the wrongful failure to disclose an improper relationship. No such wrongful conduct is present here.

Specifically, there is no conflict of interest, appearance of impropriety, dishonesty, self-dealing, or anything of that nature — potential or otherwise. Indeed, the law expressly entitles SALA to use supervised unlicensed employees, including draftspersons like David Wagner. *See* Minn. Stat. § 326.14. Moreover, Robert Carlson even testified that he expected SALA to use and delegate tasks to draftspersons (A.57) — draftspersons who were obviously not licensed architects. In fact, Robert Carlson *demand*ed that SALA staff the project sufficiently (A.57,111), necessitating that SALA enlist draftspersons, CAD operators, and other employees to assist on the Carlson project. And SALA was no more required to “disclose” each item that a legally supervised non-licensed architect performed than a law firm is required to “disclose” which paragraphs in its brief were drafted by a law clerk under an attorney’s supervision, and which paragraphs were written by the attorney herself. Simply put, there is no wrongful conduct at the bottom of this case, and where there is no wrongdoing, disgorgement is not the proper remedy under *Perl*. Therefore, this court must vacate the district court’s disgorgement award.

B. Regardless of whether disgorgement was an appropriate remedy, summary judgment was improper in the first place because the question of whether SALA held out Wagner as a licensed architect raises a genuine issue of material fact.

Even if disgorgement were a viable remedy — and it is not — the Carlsons are not entitled to summary judgment in the first place because factual disputes exist as to whether SALA held David Wagner out as a licensed architect.

In Minnesota it is improper for an individual to hold himself or herself out as a licensed architect when he or she is not licensed to practice architecture:

It shall be unlawful for any person to practice * * * architecture * * * or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is an architect * * * unless such person is qualified by licensure * * * .

Minn. Stat. § 326.02, subd. 1; *see* Minn. Stat. § 326.02, subd. 2 (“Any person shall be deemed to be practicing architecture * * * who holds out as being able to perform or who does perform [the work of an architect]”).

Here, the district court ruled in its August 30 order that SALA “h[eld] out Wagner as a licensed architect,” which constituted both a violation of the above statute and professional malpractice, and therefore it ordered summary judgment in favor of the Carlsons. (A.19,22).⁵ On reconsideration, the district court clarified its ruling, explaining that “[t]he [August 30] Order found no material fact dispute * * * conclud[ing] [SALA] was professionally negligent for holding out David Wagner as a

⁵ In its order, the district court specifically stated that it based summary judgment on the fact of “[SALA]’s holding out Wagner as an architect and Mulfinger’s failure to take responsible charge of the project.” (A.22). The district court, however, did not address this second basis in either its August 30 or its October 27 orders, or provide any basis for how it reached that factual determination.

licensed architect to [the Carlsons], and [therefore] disgorged all fees billed and paid on the Carlsons account.” (A.25). Continuing this line of reasoning, the district court concluded that “a trier of fact could not reasonably conclude that [SALA] did not hold out Wagner as a licensed architect to [the Carlsons]” (A.27), and therefore, as a matter of law, SALA held out Wagner as a licensed architect:

The evidence firmly establishes that [SALA] held out Wagner as a licensed architect; there is no reasonable conclusion to the contrary. As such, there is no genuine issue of material fact on the licensure issue.

* * *

Because [SALA] has failed to raise a genuine issue of material fact on the licensure issue, the Court’s conclusion that [SALA] held out Wagner as a licensed architect to [the Carlsons] is appropriately made, and is supported by the record.

(A.29,36).

Factual inferences, credibility, and the weight of the evidence all constitute factual questions for a jury. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). To obtain reversal from this court, SALA need not prove that it did not hold out Wagner as a licensed architect — SALA need only point to record evidence that could lead reasonable minds to differ on whether SALA held out Wagner as a licensed architect. *See DLH, Inc.*, 566 N.W.2d at 69 (“[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented.”). As set forth below, the record is replete with such evidence, and therefore this court must reverse summary judgment.

To begin with, the Carlsons have never contended that SALA, Mulfinger, or Wagner ever told them that Wagner was an architect (licensed or otherwise). Indeed, they provide no affirmative evidence that SALA held out Wagner as a licensed architect. Instead, they rely on documents that purportedly hold out Wagner as the “project architect” (A.228), discussed below, and Robert Carlson’s own conclusory statement that SALA “led [them] to believe that Wagner was a licensed architect.” (A.228). But Carlson’s own testimony and the SALA invoices he reviewed and paid undermine his claim that they were led to believe that Wagner was an architect. Carlson testified that he understood that Mulfinger would not work alone on the project, and that Mulfinger would delegate tasks to assistants working at SALA. (*See* A.57). Carlson was a veteran when it came to working with architects, having worked extensively with them through his business dealings abroad, and with his residences here in the United States. (A.54,57,111,130). In fact, he and Virginia had worked closely with their architect in designing their Edina home. (A.54,82). Given his vast experience, Carlson further testified that he understood that it was “common practice” among “architects” to utilize and delegate to “draftsmen” and other employees when working on a project. (A.57). And Mulfinger notified him as much, explaining to Carlson that because of the project’s magnitude and short timeframe, he would have any number of SALA employees helping on it. (A.57,111). In fact, Carlson insisted that Mulfinger fully staff the project. (A.111). This is key for two reasons. First, it shows that the Carlsons were aware that architects use draftspersons, and that SALA would use draftspersons like Wagner on the project. Second, this is consistent with the fact that SALA identified Wagner as a

“draftsperson,” not as an architect, on all of the Carlsons’ invoices — invoices that they undisputedly paid and presumably reviewed.

The Carlson invoices from August 31, 2000, September 30, 2000, October 31, 2000, and August 31, 2001, all identified Dale Mulfinger as “Project Manager” and “Principal.” (A.174-76,190-217). By contrast, these invoices consistently identified David Wagner as merely “Draftsperson.” (A.174-76,190-95,212-17). Moreover, Wagner’s billing rate represented the billing rate of a draftsperson — not that of an architect. (*Id.*). As the invoices show, Mulfinger’s billing rate of \$120/hour, and the billing rate of SALA architect Marcelo Valdes — identified as an “Associate” — were both higher than Wagner’s draftsperson rate of \$75/hour. (A.174,190-92,212-17).

Likewise, in SALA correspondence to the Carlsons, Wagner does not appear on SALA’s letterhead. (A.184). Instead, only architects — “Principals” and “Associates” — appear on the SALA letterhead; Wagner is not listed. (A.184).

Consistent with this invoice and letterhead evidence is Mulfinger’s sworn testimony that SALA gave unlicensed Wagner the title of “draftsman” or “intern” — not “architect” or “associate” (i.e., associate architect). (A.102,116,174-75). Mulfinger also stated under oath that SALA instructs its employees who are not licensed architects to not hold themselves out as architects to the public. (A.174-75). He explained that SALA was careful about “not going out into the public world and describing these [unlicensed employees] as architects.” (A.116). And Wagner testified under oath that he never held himself out as a licensed architect on the Carlson project. (A.176). He further testified that SALA never held him out to the Carlsons as a licensed architect. (A.176).

Looking at this evidence in the light most favorable to the non-moving party, as the district court should have, at a minimum reasonable persons could draw different conclusions as to whether SALA held out Wagner as a licensed architect. *See Schroeder*, 708 N.W.2d at 507 (“A party need not show substantial evidence to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party * * * presents sufficient evidence to permit reasonable persons to draw different conclusions.”). And this is especially true given that the Carlsons were no strangers to working with architects, and Carlson himself implicitly understood a distinction between an architect and a non-architect draftsman. (A.54,57,111,130). But the district court weighed all the evidence against SALA and made factual determinations, thereby rendering its grant of summary judgment improper. *See Teffeteller*, 645 N.W.2d at 432 (“In a summary judgment motion, a court may not weigh the evidence or make factual determinations, but is required to view the evidence in the light most favorable to the nonmoving party.”).

In his affidavit, Robert Carlson further contends that SALA misled the Carlsons into believing that Wagner was an architect because “[h]is name was listed as ‘project architect’ on the plans [SALA] provided to us.” (A.228). The Carlsons’ expert, Anthony Desnick, also relies on these design plans and associated documents:

SALA held Wagner out as the “project architect” in discussions with the Carlsons and on numerous documents prepared by SALA, including a set of plans provided to the Carlsons by SALA (Mulfinger Depo. Ex. 3).

(A.242). But the plans they rely on identify the “project architect” as “DM,” which are the initials for Dale Mulfinger, not David Wagner. (A.183)(A.178-183 is labeled

Mulfinger Dep. Ex. 3). And the design plans (A.178-183) and the other documentary “evidence” that the Carlsons rely on (A.186-89) consist of nothing more than “contacts” lists. These contacts lists merely identify the members of the design team and their associated category in the design process — just like the design plans. (*compare* A.178 *with* A.186-189). In other words, they simply list the design category headings of General Contractor-Architectural Builder, Architect(s), Structural Engineer, Interior Design(er), Electronics, Landscape Architect(ure), and Lighting Designer. (A.178; A.186-189). And under each of these headings appear the names and contact information for those associated with the category.

For example, Talla Skogmo’s name and contact information appear under the firm name “Gunkelmans” for the “Interior Design(er)” heading. (A.178,186-89). The name and contact information of Talla’s assistant, Renae Keller, also appears on the contact list. (A.178,186-89). Although Talla described Ms. Keller as her “associate,” it is unclear from the record — and from the contacts sheets — whether she is Ms. Skogmo’s assistant or an interior designer like Ms. Skogmo. (A.147,178,186-89). The same is true under the “Architect(s)” heading, which lists SALA Architects as the architectural firm and includes the contact information for architect Dale Mulfinger and David Wagner, who was assisting him. (A.178,186-89). And more often, Dale Mulfinger is listed above David Wagner, and a common SALA address and phone and fax numbers listed for them jointly. (*Id.*).

In sum, all of this evidence, when viewed in the light most favorable to SALA, shows at a minimum that a genuine issue of material fact exists as to whether SALA held

out David Wagner as a licensed architect. This precludes summary judgment for the Carlsons. Therefore, this court must reverse the district court's sua sponte grant of summary judgment.

C. To the extent that the district court awarded summary judgment on the grounds that Mulfinger failed to take responsible charge of the project, this was improper because genuine issues of material fact exist as to this question.

In its August 30 order, the district court states that it also granted summary judgment because of "Mulfinger's failure to take responsible charge of the project." (A.22). Under Minnesota law, unlicensed employees of an architectural firm may engage in architectural work as long as a licensed architect has "responsible charge" over such work. See Minn. Stat. § 326.14 (permitting firm personnel to engage in architectural work so long as licensed architect has "responsible charge" over such work). The Minnesota Rules define "responsible charge" as follows:

A person in *responsible charge* of architectural * * * work as used in Minnesota Statutes, section 326.14 means the person who determines design policy, including technical questions, advises with the client, superintends subordinates during the course of the work and, in general, the person whose professional skill and judgment are embodied in the plans, designs, and advice involved in the work.

Minn. R. 1805.1600, subp. 1 (emphasis added).

Here, the district court's August 30 order contains no analysis or discussion of this issue, save for the observation that the Carlsons' expert "would testify it was professional malpractice * * * for Mulfinger to not take responsible charge of the project," and the statement that it is an allegedly "undisputed" and "objective fact" that "Wagner

performed the vast majority of the work on the project.” (A.21). The district court’s October 27 order makes no reference to this “responsible charge” issue. (See A.23-36).

Nevertheless, the same legal analysis that applies in the preceding section also applies here. Summary judgment is improper because whether Dale Mulfinger failed to take “responsible charge” of the project by allegedly handing the project over to Wagner, or by allegedly “failing to meaningfully supervise Wagner” (A.14), involves disputed questions of fact, thereby rendering summary judgment improper. This is because when the evidence is viewed in the light most favorable to SALA, reasonable persons could conclude that Mulfinger did not fail to take responsible charge over the Carlson project.

Here, Mulfinger testified that he would be “quite involved in this project” in terms of “set[ting] the scope,” and “set[ting] the character and design thoughts of the project.” (A.112). Also, it is undisputed that Mulfinger participated in numerous meetings with the Carlsons and the rest of the design team. And Wagner testified in his affidavit that Mulfinger supervised him on the Carlson project. (A.176). Furthermore, although the Carlsons assert that Mulfinger billed too few hours on the project some months, he billed 116.5 hours on the Carlson project in the first six months, demonstrating involvement. (A.206-217). Wagner also testified that Mulfinger and he collaborated on the design, and then Wagner would work on the drawing. (A.129). Because SALA has presented sufficient evidence to permit reasonable persons to draw different conclusions, the Carlsons cannot meet their burden of showing the absence of any issue of material fact to support the district court’s grant of summary judgment. *Fabio*, 504 N.W.2d at 761. So to the extent that the district court granted summary judgment on the grounds that

Mulfinger allegedly failed to take responsible charge of the Carlson project, this was inappropriate and requires reversal.

Furthermore, even if the Carlsons had convincing evidence that Mulfinger failed to supervise Wagner, that would not violate section 326.14 because chapter 326 contains a broad exception that permits individuals without an architectural license to design single-family homes:

Nothing contained in sections 326.02 to 326.15 shall prevent persons from advertising and performing services such as * * * making plans and specifications for * * * any of the following buildings:

(a) Dwellings for single families * * * .

Minn. Stat. § 326.03, subd. 2(a) (2004). So even assuming for the sake of argument that Mulfinger had failed to oversee Wagner, this would not run afoul of “responsible charge” because Wagner could lawfully design the Carlsons’ home even without an architect’s license.⁶

⁶ In any event, if this court were to conclude that no genuine issue of material fact exists that SALA held out Wagner as a licensed architect, reversal is necessary nevertheless. Because disgorgement is an improper measure of damages, the Carlsons still bear the burden of proof to establish actual damages — just like every other plaintiff who alleges professional negligence — and they have not done this. *See Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990) (“The basic elements for negligence claim are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff’s injury; and (4) that plaintiff did in fact suffer injury.”). For example, assuming they claim that the breach of the standard of care was SALA’s use of Wagner, but the Carlsons are unable to establish that they did not see and approve of the SALA designs during the design process, then they have no damage. The Carlsons cannot get their fees back simply by virtue of the fact that Wagner did not have a license. They must demonstrate a causal link between the alleged breach of the standard of care, if any, and what harm they suffered, if any. So at a minimum, even if it were true that SALA held out Wagner as a licensed architect, there is an issue of fact as how this caused damages, if any. Thus, remand is unavoidable.

D. In any event, SALA did not have an opportunity to respond to the district court's sua sponte grant of summary judgment, and this would require a remand.

Even if this court were to accept the notion that all the above evidence and testimony was not enough to raise a genuine issue of material fact as to whether SALA held out Wagner as a licensed architect, then this court must remand the case to afford SALA a full opportunity to demonstrate that material facts exist. This is because although the district court has authority to grant summary judgment sua sponte where “the absence of a formal motion creates no prejudice to the party against whom summary judgment is granted,” it “must afford the adverse party a meaningful opportunity to oppose such an action.” *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003).

Here, the district court improperly ordered summary judgment, sua sponte, on the same day that it granted the amendment that made the claim on which it granted summary judgment — that SALA held out Wagner as a licensed architect — part of the case. Whether SALA held out Wagner as a licensed architect was obviously not the subject of SALA's summary-judgment motion, and it was nothing other than a burgeoning claim as part of the Carlsons' motion to amend their complaint. Therefore, SALA was not on any reasonable notice that it would have to address a sua sponte summary judgment motion on such a nascent theory, and it was deprived of a full and fair opportunity to respond to this issue. *See id.* (holding district court erred in granting sua sponte summary judgment where no evidence in the record that indicated that appellant knew on the day of trial that he was expected to address a potential summary-judgment

motion on the length of time under a physician's care). So in the event that this court deems the record not to disclose the existence of a material fact, SALA must be given a fair chance to make that record. *See Doe v. Brainerd Int'l. Raceway, Inc.*, 514 N.W.2d 811, 822 (Minn. App. 1994) ("Prejudice is unavoidable when a trial court denies any opportunity to marshal evidence in opposition to a basis for summary judgment raised sua sponte."), *reversed on other grounds*, 533 N.W.2d 617 (Minn. 1995).

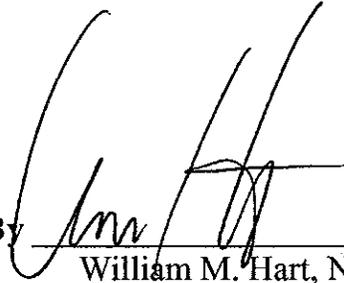
CONCLUSION

Viewing the evidence in the light most favorable to SALA, as a reviewing court must, record evidence supports SALA's position and raises an issue of material fact as to whether SALA held out draftsman David Wagner as a licensed architect to the Carlsons. Therefore, this court is compelled to reverse the district court's grant of summary judgment. Moreover, the district court's ordering SALA to disgorge its fees was based on an error of law, and therefore this court must vacate that award.

Respectfully submitted,

Dated: August 8, 2006

By

A handwritten signature in black ink, appearing to be 'W. M. Hart', written over a horizontal line.

William M. Hart, No. 150526
Michael D. Hutchens, No. 167812
Damon L. Highly, No. 0300044
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

Attorneys for Appellant
SALA Architects, 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) (with amendments effective July 1, 2007).