

Nos. A10-1242, A10-1243, A10-1246 and A10-1247

14

State of Minnesota
In Court of Appeals

Rick Glorvigen, as Trustee for the next-of-kin of
 decedent James Kosak,

Respondent (A10-1242, A10-1246),

Thomas M. Gartland, as trustee for the next-of-kin of
 decedent Gary R. Prokop,

Respondent (A10-1243, A10-1247),

vs.

Cirrus Design Corporation,

Respondent (A10-1242, A10-1243),

Appellant (A10-1246, A10-1247),

Estate of Gary Prokop, by and through Katherine Prokop
 as Personal Representative,

Respondent (A10-1242, A10-1246),

University of North Dakota Aerospace Foundation,

Appellant (A10-1242, A10-1243),

Respondent (A10-1246, A10-1247).

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LEGAL ISSUES

1. **Are the claims in this case alleging negligent flight training barred by the educational malpractice doctrine in *Alsides v. Brown Institute*, 592 N.W.2d 468 (Minn. Ct. App. 1999)?**

The district court determined Plaintiffs' claims were not barred and ruled the flight trainers owed duties of care to the pilot as well as the pilot's passenger.

Alsides v. Brown Inst., 592 N.W.2d 468 (Minn. Ct. App. 1999).

Page v. Klein Tools, Inc., 610 N.W.2d 900 (Mich. 2000).

Sheesley v. Cessna Aircraft Co., Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) (A96.)

Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696, 701 (Mo. Ct. App. 2008).

2. **Does Minnesota law recognize claims for “negligent performance of contract” in the flight-training context?**

After post-trial arguments, the district court determined sua sponte that Plaintiffs had “properly framed” their cause of action as “negligent performance of contract” even though the cause of action was not pleaded and the issue was not litigated.

Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983).

Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815 (Minn. Ct. App. 1988).

3. **If such claims are recognized, do flight trainers owe a duty of care to an aircraft passenger who was neither a student nor a party to a training “contract”?**

The district court did not address the issue in its sua sponte creation of a duty.

Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007).

Moss Rehab v. White, 692 A.2d 902 (Del. 1997).

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

4. **Did Plaintiffs provide any legally competent evidence to support the claims that training-related negligence regarding an autopilot caused the crash?**

The district court ruled the jury could have found omitted training caused the crash.

Langeslag v. KYMN Inc., 664 N.W.2d 860 (Minn. 2003).

Gerster v. Wedin, 294 Minn. 155, 160, 199 N.W.2d 633, 636 (1972).

Rochester Wood Specialties, Inc. v. Rions, 286 Minn. 503, 176 N.W.2d 548 (1970).

Huseby v. Carlson, 306 Minn. 559, 238 N.W.2d 589 (1975) (per curiam).

5. **Can a flight school that intervened in the case be held liable to Plaintiffs who asserted no direct claim against the school and affirmatively denied seeking damages from it?**

The district court ruled judgment was properly entered against the University of North Dakota Aerospace Foundation.

Minn. R. Civ. P. 3.01.

Minn. R. Civ. P. 24.01.

Avery v. Campbell, 279 Minn. 383, 157 N.W.2d 42 (1968).

Konen Constr. Co v. U.S. Fid. & Guar. Co., 401 P.2d 48 (Or. 1965).

STATEMENT OF THE CASE

These two wrongful death negligence actions arose out of the January 18, 2003 crash of a Cirrus Design Corporation (“Cirrus”) SR-22 airplane near Hill City, Minnesota. The pilot, Gary R. Prokop, and his lone passenger, James Kosak, died. In 2005, Mr. Kosak’s wrongful death trustee, Plaintiff Rick Glorvigen, commenced an action in Itasca County District Court against Cirrus and Mr. Prokop’s estate. (A1.)¹ Mr. Prokop’s wrongful death trustee, Plaintiff Thomas Gartland, also commenced an Itasca County action against Cirrus. (A9.)

Neither Plaintiff ever asserted any claim against Appellant University of North Dakota Aerospace Foundation (“UNDAF”), Cirrus’ flight-school subcontractor. UNDAF entered the case by filing a Notice of Intervention on September 11, 2008 on grounds the case’s disposition “may impair or impede UNDAF’s ability to protect its interest in this matter.” (A14 ¶ 6.) After no party objected to UNDAF’s basis for intervention within 30 days, *see* Minn. R. Civ. P. 24.03, the district court, the Honorable Jon A. Maturi, granted intervention. (A43.)

The actions were tried together, the Honorable David J. Ten Eyck presiding by designation. Plaintiffs made Prokop’s flight training the focus of their negligence claims against Cirrus. At the close of Plaintiffs’ cases in chief, UNDAF and Cirrus moved for judgment as a matter of law (“JAML”) on several grounds, including that defendants owed no legal duty because the negligence claims were barred by the “educational

¹ UNDAF’s Appendix will be cited as “A __,” Addendum as “Add. __,” and Trial Transcript as “Tr. __.”

malpractice” doctrine of *Alsidis v. Brown Institute*, 592 N.W.2d 468 (Minn. Ct. App. 1999). (Tr. 1392:17-22, 1395:4-7.) UNDAF and Cirrus additionally asserted Plaintiffs had failed to provide any non-speculative evidence that lack of training caused the crash. (Tr. 1392:17-22, 1395:1-4.) The court denied the motions. (Tr. 1422:12-1423:19.)

On June 4, 2009 the jury returned a verdict finding Prokop 25% negligent and Cirrus and UNDAF each 37.5% negligent. (A74.) UNDAF and Cirrus renewed their JAML motions. (Tr. 2015:14-2016:10.) The court denied the motions. (Tr. 2016:11-14.) The court’s order for judgment made UNDAF liable to Plaintiffs. (Add. 91-92.)

Post-trial, UNDAF renewed its JAML motions based on lack of duty and lack of competent evidence on causation. (A76-77.) Additionally UNDAF moved for JAML on the ground it could not be liable to Plaintiffs because neither Plaintiff had asserted a claim against UNDAF. (A77.) UNDAF also moved for a new trial, and specifically joined Cirrus’ new-trial motion with respect to Plaintiffs’ improper closing argument. (A78-79.) By Order of May 20, 2010, the district court denied UNDAF’s motions and issued an amended finding that there was no just reason for delay of entry of judgment pursuant to Minn. R. Civ. P. 54.02. (Add. 83-84.)

STATEMENT OF THE FACTS

The crash occurred in the dark, early hours of January 18, 2003. The purpose of Prokop and Kosak's 6:30 a.m. flight from Grand Rapids to St. Cloud was to attend their sons' 7:15 a.m. hockey game. (Tr. 433:8-12, 1305:20-1306:24.)

Prokop had been a licensed pilot since 2000 and had logged about 225 hours of flight time, mostly in a Cessna 172 that unlike the SR-22 had no autopilot. (Tr. 230:5-18, 231:6-9.) Prokop was a "VFR"-rated pilot; he was not licensed to fly "in the clouds," *i.e.* in "IFR" or "IMC" conditions² that require flight instruments for navigation. (Tr. 444:20-445:2, 593:1-2, 849:22-850:5.) Prokop was working with a non-UNDAF flight instructor to attain his instrument rating, but until he attained that rating he was required under the federal aviation regulations to avoid IMC conditions. (Tr. 850:6-13.) He had been trained by this instructor and tested by a Federal Aviation Administration ("FAA") inspector on a maneuver all VFR-only pilots are required to know if they inadvertently enter IMC conditions—"to fly wings level and to start a turn, [a] 180-degree turn to get out of the situation." (Tr. 440:19-441:8.) It was a procedure with which an autopilot could assist but for which one was not required. (Tr. 441:9-22.)

When Prokop purchased his SR-22 on December 6, 2002, the purchase price included training. (Tr. 1475:3-1476:19; Trial Exs. 17-18.) Training came from Cirrus via subcontract with UNDAF and with curriculum Cirrus provided to UNDAF. (Tr. 490:8-14; Trial Ex. 21.) The Cirrus Design Pilot Training Agreement stated "[n]either Cirrus,

² VFR, or Visual Flight Rules, refers to weather conditions when visibility is three miles or greater and the cloud "ceiling" 1,000 feet or greater. (Tr. 188:9-19.) IMC, or Instrument Meteorological Conditions, is anything not VFR. (Tr. 189:25-190:5.)

nor its training contractor, will be responsible for competency of Purchaser (or Purchaser's pilot) during or after training." (Trial Ex. 7.)

UNDAF employee Yuweng Shipek trained Prokop in Duluth December 9-12, 2002. (Tr. 789:14-790:9; Trial Ex. 4, at A86-94.) Because Prokop was already licensed, he received "transition training," which Shipek described as "custom tailored" to reflect Prokop's prior experience and to provide instruction on the SR-22's features including the autopilot. (Tr. 785:9-22.)

Shipek likened the SR-22's autopilot to a motor vehicle's "cruise control" because it contains an "altitude hold button" and "heading bug" to help the pilot fly a certain direction. (Tr. 846:1-847:23.) Shipek's supervisor, John Wahlberg, explained the autopilot was not a flight instrument responsive to verbal cues such as "get me out of here or take me here," but rather a device to assist pilots with accomplishing basic maneuvers. (Tr. 589:8-12.) Among those maneuvers was the VFR pilot's procedure for escaping IMC conditions. (Tr. 589:13-16.) As Wahlberg explained, a pilot with Prokop's experience escapes the conditions by making a 180-degree turn and "the autopilot just makes that easier." (Tr. 589:13-21, 591:10-12.) Prokop was not authorized to fly in or through clouds, with an autopilot or otherwise.

Autopilot instructions were included in the "pretraining packet" Prokop was expected to have reviewed before arriving at Cirrus. (Tr. 543:15-544:20, 545:9-12.) The transition training also included ground instruction on the autopilot. (Tr. 387:3-10.) The curriculum further included a series of in-flight lessons, three of which addressed the autopilot: Flight 1, "Introduction & Orientation Flight," including the item "Intro to

Autopilot operation”; Flight 4A, “IFR Flight (non-rated),” including the item “Recovery from VFR into IMC (auto-pilot assisted);” and Flight 5A, “Final Evaluation Flight (VFR),” including the item “Autopilot operations.” (Trial Ex. 4, at A87, 90, 92.) Prokop’s training syllabus was an exhibit at trial. It had checkmarks next to the autopilot lessons during Flights 1 and 5A, but not Flight 4A. (*Id.*)

On the day of the crash, Prokop knew from the outset the weather was marginal for a before-dawn flight. When Prokop contacted a flight service station at 4:55 a.m. to obtain a weather briefing, he began the conversation by telling the briefer “the clouds are kind of low right now in Grand Rapids.” (Tr. 328:8-10, 331:1-16.) The briefer stated a passing cold front had created a “potential for some IFR.” (Tr. 332:22-333:5.) Prokop also learned of gusty, strong winds and that clouds were “scattered” at 100 feet above the ground and had created “ceilings” at 1,300 and 2,900 feet—near the 1,000-foot limit that would have kept a VFR-rated pilot such as Prokop on the ground. (Tr. 333:9-335:23.)

At 5:40 a.m., Prokop called for a second briefing and remarked to the briefer that “it’s kind of marginal here at Grand Rapids,” said he was aware of “overcast” conditions and clouds at 2,800 feet, and stated “I’m hoping to, hoping to slide underneath it and then climb out.” (Tr. 336:25-337:21, 339:13-340:14; Trial Ex. 224.) Prokop was told about half the sky was obscured with clouds and there was a layer of a few clouds at 100 feet. (Tr. 344:2-10.)

Prokop and Kosak took off in darkness around 6:30 a.m. for their southerly flight over a sparsely populated area with few lights. (Tr. 215:7-8, 335:23-336:1, 347:9-11.) Plaintiffs’ expert, airline pilot James Walters, analyzed weather data and witness

statements to conclude Prokop entered “IMC-like” conditions near Hill City and decided to return to Grand Rapids. (Tr. 212:21-213:5, 222:14-20; Trial Ex. 55.) Based on his wreckage analysis, altitude data, and National Transportation Safety Board reports, Walters concluded the aircraft entered “an accelerated stall” and crashed. (Tr. 215:4-218:7, 221:19-222:6.) Walters and Cirrus’ expert, Dr. Robert C. Winn, agreed Prokop had hand-flown the aircraft. (Tr. 223:19-224:6, 1612:1-3.)

Walters identified three “root causes” of the crash: (1) Prokop “made a poor decision to go flying that day,” (2) Prokop lacked “tools” to appropriately assess aeronautical risks, and (3) Prokop lacked “the proper tools to be able to recover” from inadvertently encountering IMC-like conditions:

Q: Can you give me a summary of those opinions quickly and then go through them in detail?

Walters: I certainly can. There were approximately—well, there were three root causes. One is attached to the second one. **But number one, Mr. Prokop made a poor decision.** You know, you just have to accept that. He made a poor decision to go flying that day. However, and this is where the attachment comes in, it is my opinion that Mr. Prokop was not given the tools that he needed to make an appropriate decision. You have to be able to access [sic] the risks in anything that you do to decide whether or not it’s what you should be doing. So he wasn’t given the tools to do that and then finally when he got in a situation where he needed to recover from a bad place. Again, he wasn’t given the proper tools to be able to recover from that event. So any of those chains—the chain could have been broken in any of those places but it was not.

(Tr. 227:2-24 (emphasis added).)

Walters agreed Prokop received ground training on the autopilot. (Tr. 387:3-10.) He further assumed because Flight 4A’s “Recovery from VFR into IMC (auto-pilot assisted)” item was unchecked on Prokop’s training syllabus, the lesson must have been

“completely skipped” and Prokop “was not trained for proficiency” on the device. (Tr. 259:7-260:5.) Over UNDAF’s objection, Walters testified lack of autopilot training was “causally related” to the crash:

Q: Do you have an opinion as to whether that failure was causally related to this crash?

Walters: I do.

UNDAF counsel: Objection, calls for speculation.

Court: Overruled.

Walters: I do believe that it was causally related to the accident.

Q: Why is that?

Walters: Had Mr. Prokop been adequately trained in the use of the autopilot, I believe that he would have been able to recover from this situation by using the autopilot and the crash would not have occurred.

(Tr. 273:23-274:14.)

According to Walters, other “causally related” factors were (1) UNDAF’s lack of “management oversight” of training documentation; (2) the documentation’s lack of risk-assessment training, which would have taught Prokop to consider his “physical state” and “emotional state” before flying; and (3) lack of “scenario based training,” which Walters defined as “fly the way you train, train the way you fly,” and to which UNDAF objected on grounds Walters’ conclusion was speculative:

Q: Was the fact that the training given to Mr. Prokop was not scenario based causally related to this crash?

UNDAF counsel: Objection, speculation.

Court: Overruled. You can answer that.

Walters: Yes, I believe it was causally related.

Q: Why is that?

Walters: Had the 4-A flight, the recovery from IFR, VFR pilot that been [sic] conducted in an appropriate scenario based environment where the pilot actually gets to perform the maneuver while in the conditions that he's going to be in when he should accidentally find himself in that situation, he would be much more prepared. In fact, I believe that he would be able to recover from it after having done it in training.

(Tr. 276:21-277:9, 278:1-281:19, 288:17-289:19, 290:22-291:15.)

On cross-examination by Cirrus, Walters agreed a pilot's pressures to reach a destination are "always a consideration" and were a factor given Prokop's desire to attend his son's 7:15 a.m. hockey game. (Tr. 329:2-23.) Walters also agreed the weather, darkness, clouds, and flight route over sparsely populated areas were factors and "I would have recommended that he not take off." (Tr. 356:20-357:11.) Walters again agreed Prokop received ground instruction on the autopilot and that the "Intro to Autopilot Operation" item had been completed during Flight 1, but that because Walters had no access to a "complete syllabus" he had no knowledge of whether Prokop demonstrated autopilot proficiency during his final evaluation flight:

Q: So it's because you don't have a complete syllabus, correct, that you are assuming that he was not taught these things?

Walters: **I don't know what he was taught and what he was not taught.** I assume that part of Lesson 5A was completed and that part had to do with autopilot operations. What that means, I have no idea.

(Tr. 383:19-384:1, 387:3-10, 389:2-8 (emphasis added).) When questioned about his direct testimony that "Gary probably did not know how to use the autopilot," Walters

conceded it was based on a statement Prokop's friend, Patrick Bujold, had made while flying Walters along the flight path in an SR-22. (Tr. 394:7-14.)

On cross-examination by UNDAF, Walters agreed federal regulations did not require UNDAF to provide either autopilot instruction or a training syllabus. (Tr. 403:13-404:13.) Walters further agreed the training syllabus did not demonstrate whether or not Prokop knew how to use the autopilot, and he testified he was "assuming" Prokop's lack of proficiency on the device based on Lesson 4A's unchecked item. (Tr. 406:9-407:6.)

Significantly, Walters also admitted there was "absolutely" no way to know whether Prokop tried to use the autopilot. He agreed Prokop ultimately was responsible for knowing how to use it, and conceded a claim of "I wasn't trained properly" was unacceptable:

Q: And if Mr. Prokop didn't know how to use the autopilot, he had an obligation to take that into account before he ever took that off that day, right?

A: If he knew completely that he didn't know how to use it, absolutely, yes, sir.

Q: If he had any doubt about his ability to operate the autopilot, he needed to take that into consideration, that's part of the both pilot and the plane consideration, correct?

A: Correct.

Q: Because he's the pilot in command, right?

A: Correct, he is.

Q: His passenger doesn't know anything about that, right?

A: (Nodding affirmatively.)

* * *

Q: Would it be, under the pilot in command concept, wouldn't you agree with me that to take off without knowing how the plane operates with an excuse of "I wasn't trained properly" is not acceptable?

A: I would agree with you.

(Tr. 437:23-438:13, 438:22-439:2, 445:12-17.)

Walters agreed Prokop would have come to UNDAF and Cirrus already trained on what to do when a VFR-rated pilot such as himself inadvertently enters IMC-conditions with or without an autopilot—"to fly wings level and to start a turn, 180-degree turn to get out of the situation." (Tr. 440:19-441:8.) Walters further agreed that to receive a pilot's license Prokop was required to demonstrate proficiency on this procedure without using an autopilot. (Tr. 442:18-443:5.) Walters also agreed that before his Cirrus/UNDAF transition training Prokop would have attained "tools" from his non-UNDAF flight instructor about how to properly decide whether the weather is conducive to flight. (Tr. 414:23-415:8, 435:1-8.)

Prokop's friend Patrick Bujold, who owned a Cirrus aircraft, testified he had flown with Prokop four times in a Cirrus. (Tr. 985:9-12, 987:25.) On direct examination Bujold testified Prokop knew how to "engage the autopilot." (Tr. 988:17-20.) When asked how he knew that, Bujold explained: "Because I witnessed him do it several times. I instructed him on how to do and then I watched him do it." (Tr. 988:21-24.)

Prokop's other instructor, Steven Day, testified he had last flown with Prokop one day before the accident. (Tr. 1180:3-5.) Day described Prokop as an "average" student

when he first attained his license and as a “very good” student during the training to earn his instrument rating. (Tr. 1175:25-1176:6.) During cross-examination, Day testified he had provided Prokop with the bulk of his training and had not used a “formal syllabus,” which Day agreed was not required. (Tr. 1200:15-1201:21.) Day testified Prokop was proficient with the procedure a VFR-rated pilot uses to escape IMC conditions, and the instructor agreed he had trained Prokop on aeronautical decision-making including whether to fly in the dark. (Tr. 1201:22-1203:10.)

Shipek, the UNDAF instructor, testified he typically had students use the autopilot around 50% to 60% of the time during training, and he further testified he had instructed Prokop on what to do when inadvertently entering IMC conditions but that the procedure “was not documented.” (Tr. 792:13-18.) Shipek explained that subjecting Prokop to “actual IMC” conditions “would not be a safe decision on my part,” so he followed the industry standard and provided “under the hood” training whereby Prokop executed the 180-degree-turn procedure in good weather but with vision obscured. (Tr. 792:19-793:8.) Shipek reiterated the autopilot was no cure-all, but rather was a device that would hold a directional heading and with the press of a button “will hold the altitude that you are currently at, similar to a cruise control.” (Tr. 845:14-25, 847:16-18.)

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

The decision of the district court must be reversed for four independent reasons. First, Plaintiffs' negligence claims sounded in educational malpractice and are barred as a matter of law by *Alsides v. Brown Institute*, 592 N.W.2d 468 (Minn. Ct. App. 1999). Second, the district court's creation of a legal duty for "negligent performance" of contract is not supported by Minnesota law. Third, Plaintiffs failed to establish beyond speculation that lack of training caused the crash. Finally, UNDAF cannot be held liable to either Plaintiff because neither sued UNDAF.³

The existence of a legal duty is a question of law reviewed *de novo*. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). When a district court denies judgment as a matter of law premised on lack of causal connection, the Court considers the evidence in the light most favorable to the prevailing party, reviews the denial *de novo*, and reverses when there is no competent evidence reasonably tending to sustain the verdict. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864, 870 (Minn. 2003).

³ Alternatively, intervenor UNDAF joins Cirrus' request for a new trial so UNDAF's interests would not be impaired in any remanded proceedings. *See* Minn. R. Civ. P. 24.01. UNDAF specifically adopts Cirrus' argument that a new trial is required because of Plaintiffs' improper closing argument. (*See* A79 (demonstrating UNDAF joined in Cirrus' post-trial motion on this ground).) Additionally, because UNDAF had neither reason nor means to challenge the district court's *sua sponte* determination that Plaintiffs had "properly framed" their causes of action as "negligent performance of contract," UNDAF joins Cirrus' alternative request for a new trial should this Court create the new cause of action and remand for further proceedings.

II. THE EDUCATIONAL MALPRACTICE DOCTRINE BARS PLAINTIFFS' NEGLIGENCE CLAIMS

Alsides generally bars actions against educators as claims for educational malpractice. The only exceptions are claims for breach of contract, fraud, or misrepresentation alleging a failure to carry out specific aspects of an agreement. *Alsides* authorizes no negligence claims of any sort, particularly any involving a non-student airplane passenger such as Kosak. This Court relied on negligence cases to develop the *Alsides* bar, and other courts have applied this Court's precedent to bar negligence actions against educators *including a flight school*. And as courts in Delaware and Iowa explain, allowing claims such as those here will initiate a flood of litigation against educators ranging from driving schools to chiropractic schools.

A. *Alsides* Generally Bars Actions Against Educators and Permits Only Limited Breach of Contract, Fraud, or Misrepresentation Claims

The *Alsides* bar generally applies to any claim involving quality of instructors and/or education provided a student. 592 N.W.2d at 473. Claims for breach of contract, fraud, or misrepresentation fall outside the bar when a plaintiff alleges an educator "failed to deliver on specific promises and representations." *Id.* at 473-74. *Alsides* states no exception for allowing negligence claims. On the contrary, the decision cites concerns over standards of care and causation as among the public policy reasons why claims against educators are barred. Nor does *Alsides* authorize any claim where a non-student third party (such as an aircraft passenger) alleges educator negligence. Rather, the exception to the educational malpractice bar permits only claims that allege an educator failed to keep "specific promises" made to a student. *Id.* at 473. Such claims are allowed

on the theory that adjudicating the claims “would not involve an ‘inquiry into the nuances of educational processes and theories.’” *Id.* (quoting *Ryan v. Univ. of North Carolina Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998)).

Alsides arose out of lawsuits against Brown Institute, “a for-profit, proprietary trade school.” *Id.* at 470. The student plaintiffs sued Brown for fraud, misrepresentation, breach of contract, consumer fraud, and deceptive trade practices alleging the school failed to train them to install, repair, and administer computers. *Id.* at 470-71. The district court ruled all claims sounded in educational malpractice and granted summary judgment in favor of Brown. *Id.* at 471.

On appeal this Court noted that the educational malpractice doctrine was an issue of first impression in Minnesota. *Id.* at 472. In adopting the bar, the Court relied on case law of other jurisdictions characterizing the relationship between students and educators as “contractual in nature” and cited four primary public-policy considerations that had led courts to reject claims attacking the quality of education:

- (1) the lack of a satisfactory standard of care by which to evaluate an educator;
- (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment;
- (3) the potential for a flood of litigation against schools; and
- (4) the possibility that such claims will “embroil the courts into overseeing the day-to-day operations of schools.”

Id. (quoting *CenCor, Inc. v. Tolman*, 868 P.2d 396, 398 (Colo. 1994); *Ross v. Creighton Univ.*, 957 F.2d 414, 414 (7th Cir. 1992)).

As the Court explained, adjudicating claims for educational malpractice necessarily requires judicial evaluation of textbooks, pedagogical methods, and

administrative policies, and for that reason “courts have refused to become the ‘overseers of both the day-to-day operation of [the] educational process as well as the formulation of its governing policies.’” *Id.* (quoting *Andre v. Pace Univ.*, 170 Misc.2d 893, 655 N.Y.S. 777, 779-80 (N.Y. App. Term 1996); *Hunter v. Bd. of Educ.*, 439 A.2d 582, 585 (Md. 1982)).

But, the Court acknowledged “courts have recognized claims by students for breach of contract, fraud, or intentional wrongdoing that allege a private or public educational institution has failed to provide *specifically promised educational services*, such as the failure to offer classes in a particular subject or to provide a promised number of hours of instruction.” *Id.* (emphasis in original) (citing *CenCor*, 868 P.2d at 399; *Helbig v. City of New York*, 212 A.D.2d 506, 622 N.Y.S. 316, 318 (N.Y. App. Div. 1995); *Cavaliere v. Duff’s Bus. Inst.*, 605 A.2d 397, 404 (Pa. Super. 1992)).

The Court explained that those claims may survive the educational malpractice bar because “the essence of the plaintiff’s complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all.” *Id.* at 473 (quoting *Ross*, 957 F.2d at 417). Such inquiries would not involve the “nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.” *Id.* (quoting *Ross*, 957 F.2d at 417).

On this authority, the Court held public policy bars any claim requiring a court to engage in a “comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies.” *Id.* (quoting *Andre*, 655 N.Y.S.2d at 779). But the

Court joined a majority of courts to adopt the exception “that a student may bring an action against an educational institution *for breach of contract, fraud, or misrepresentation*, if it is alleged that the institution failed to perform on specific promises it made to the student and the claim would not involve an inquiry into the nuances of educational processes and theories.”⁴ *Id.* (emphasis added) (citing *Ryan*, 494 S.E.2d at 791) (internal quotations omitted).

In this case, Plaintiffs brought only negligence claims to a jury. But *Alsides* does not suggest that negligence claims, or any third-party claims of any sort, would survive the educational malpractice bar.⁵ Rather, *Alsides*’ four public-policy considerations plainly apply to such claims.

By identifying the first consideration as being a concern about “standards of care,” there is little question this Court intended the bar to apply to negligence cases. And the *Alsides* Court’s second articulated concern, involving causation, erases any doubt. *See also* § V, *infra* (addressing causation). Any other holding would lead to a “flood of

⁴ The Court found additional guidance from *Vilett v. Moler*, 82 Minn. 12, 84 N.W. 452 (1900) (holding trial properly submitted to jury a barber-school student’s claims that educator made “false and fraudulent statements”). *See Alsides*, 592 N.W.2d at 473.

⁵ Many unpublished decisions have applied *Alsides* to actions against educators involving breach of contract claims, negligent and fraudulent misrepresentation and/or consumer fraud. *See Clem v. St. Mary’s Univ. of Minn.*, 2010 WL 773596 (Minn. Ct. App. Mar. 9, 2010); *Smith v. Argosy Education Group*, No. A08-0222, 2008 WL 4977598 (Minn. Ct. App. Nov. 25, 2008); *NJR of Woodbury v. Woida*, No. A05-268, 2005 WL 3372625 (Minn. Ct. App. Dec. 13, 2005); *Redden v. Minneapolis C’mty & Tech. College*, No. A03-1202, 2004 WL 835768 (Minn. Ct. App. Apr. 20, 2004); *Gebremeskel v. Univ. of Minn.*, No. C9-02-183, 2002 WL 1611336 (Minn. Ct. App. July 23, 2002); *R.T. v. Univ. of Minn.*, No. C9-01-1596, 2002 WL 1275663 (Minn. Ct. App. June 11, 2002); *Aldrich v. N.W. Tech. College*, 2001 WL 799997 (Minn. Ct. App. Jul. 17, 2001).

litigation” as courts second-guess administrative policies (e.g., UNDAF’s “management oversight” of training documentation) and course syllabi (e.g., the Cirrus/UNDAF training checklist). This would effectively “embroil the courts into overseeing the day-to-day operations of schools.” *Alsides*, 592 N.W.2d at 472.

No appellate state court has ever created the type of duty the district court created here. See § II.B-.D *infra*. This Court cannot and should not be the first. Accordingly, following *Alsides*, the Court should hold UNDAF could not have breached any duty to pilot Prokop or passenger Kosak; reverse the district court; and remand with instructions to enter judgment for UNDAF.

B. Case Law This Court Relied On In *Alsides* Involved Barred Negligence Claims

Examination of authority on which *Alsides* was based further demonstrates why Plaintiffs’ claims fail. In nearly every case cited in *Alsides*, the plaintiffs pleaded negligence, and in each instance negligence claims were barred. See *Alsides*, 592 N.W.2d at 471-72 & nn.1-2 (citing *Ross*, 957 F.2d at 414, 416; *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499, 504 (1972); *CenCor, Inc.*, 868 P.2d at 398; *Blane v. Alabama Comm’l College, Inc.*, 585 So. 2d 866, 868 (Ala. 1991); *Hunter*, 439 A.2d at 585; *Swidryk v. Saint Michael’s Med. Ctr.*, 493 A.2d 641, 642 (N.J. Law Div. 1985); *Helbig v. City of New York*, 212 A.D.2d 506 (N.Y. App. Div. 1995); *Cavaliere*, 605 A.2d at 403 (Pa. Super. 1992)).

In *Ross* the Seventh Circuit Court of Appeals held although Illinois likely would recognize a student-athlete’s *contract* claim that the university had “effectively cut[] him

off from any participation in and benefit from the University's academic program," Illinois would recognize no *negligence* claim. 957 F.2d at 413-15, 417. The Seventh Circuit deemed the authority "compelling" and identified eleven jurisdictions barring claims against educators, Montana being the arguable sole exception.⁶ *Id.* at 414-15 & 414 n.2.

In *CenCor*, the Colorado Supreme Court held Colorado would recognize a *contract* cause of action for alleged breach of "specific contractual obligations." 868 P.2d at 399-400. However, it did not authorize negligence claims, and in fact did not disturb the Colorado Court of Appeals' holding in *CenCor* that the educational malpractice doctrine *barred negligence claims*. *Id.* at 398-400. As the Colorado Court of Appeals explained:

Since education is a collaborative and subjective process whose success is largely reliant on the student, and since the existence of such outside factors as a student's attitude and abilities render it impossible to establish any quality or curriculum deficiencies as a proximate cause to any injuries, we rule that there is no workable standard of care here and defendant would face an undue burden if forced to litigate its selection of curriculum and teaching methods. . . . Accordingly, as a matter of law, we decline to impose such a duty here and uphold the summary judgment refusing to recognize plaintiffs' tort claims premised on educational malpractice entered by the trial court.

Tolman v. CenCor Career Colleges, Inc., Div. of CenCor, Inc., 851 P.2d 203, 205 (Colo. Ct. App. 1992) (citing *Ross*, 957 F.2d at 414-16).

⁶ *B.M. by Burger v. State*, 649 P.2d 425 (Mont. 1982) (holding state constitutional provision ensuring right to "equality of educational opportunity" imposed duty on state to provide for special-education students); *but see Hayworth v. Sch. Dist. No. 19*, 795 P.2d 470, 473 (Mont. 1990) (effectively abrogating *B.M.* on immunity grounds).

And in *Cavaliere*, the Pennsylvania court held the educational malpractice bar applied whenever a claim is “framed in terms of tort or breach of contract” and equally to trade and business schools. 605 A.2d at 403. As the court explained, courts cannot micromanage training programs or second-guess “why a particular student failed to acquire certain skills”:

This court would be hard pressed to determine which of several alternative methods of teaching court reporting, or auto repair, or any other specialized business or trade skill was the appropriate one. Nor would it be an easy task to determine why a particular student failed to acquire certain skills after pursuing a course of instruction at teaching those skills.

Id. at 403-04; *accord Swidryk*, 493 A.2d at 642 (“the court concludes that there is no cause of action for educational malpractice [against a medical school] either on a tort or contract theory”).

Here, as in *Cavaliere*, a Minnesota court would be “hard pressed to determine” whether alternative methods, *e.g.*, “scenario-based training,” would have been more appropriate than what Cirrus and UNDAF provided. Prokop came to UNDAF as a fully licensed pilot and was working with another instructor unassociated with UNDAF to attain his instrument rating, so it would be no “easy task” and in fact was impossible to determine why Prokop lacked “tools” to fly. Importantly, it was Steven Day, the non-UNDAF instructor, who flew with Prokop just one day before the crash. (Tr. 1180:3-5.)

Further, it is undisputed Prokop received both documentation and ground training on the autopilot, bore ultimate responsibility for knowing how to use it, and had two discussions with weather briefers demonstrating his actual knowledge that weather was marginal for his 6:30 flight to see a 7:15 hockey game. (Tr. 437:23-438:13.) As even

Walters agreed, a pilot's pressures to reach a destination are "always a consideration." (Tr. 329:2-5.) And he further agreed that if Prokop would have begun driving from Grand Rapids at the time he sought his 4:30 a.m. weather briefing, he would have made it to St. Cloud in time for the game. (Tr. 329:21-24.) These "outside factors" involving a student's "attitude and abilities" are exactly the sort that make it "impossible to establish any quality or curriculum deficiencies as a proximate cause to any injuries." *CenCor*, 851 P.2d at 205.

C. Courts Citing *Alsides* and/or Its Rationale Bar Negligence Actions Against Training Schools Including Flight Schools

Courts in Michigan, South Dakota, and Missouri have cited *Alsides* and/or its public policy rationales to bar negligence claims against training schools *including flight schools*. These decisions, in turn, were based on *Moss Rehab v. White*, 692 A.2d 902 (Del. 1997) and *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986), where courts warned of a "flood of litigation" should claims against training programs be allowed. These cases conclusively demonstrate why the claims here are barred.

1. *Page v. Klein Tools, Inc.*

In *Page v. Klein Tools, Inc.*, 610 N.W.2d 900 (Mich. 2000), the Michigan Supreme Court barred a student's negligence claim against the school that trained him to climb utility poles. Applying the *Alsides* Court's public-policy considerations in the personal injury context, the court stressed the "inherent difficulty in attempting to define the applicable standard of care in these types of cases" and "declin[ed] to become

embroiled in the task of determining whether a trade school . . . should be held liable in tort for failing to teach specific methods of climbing.” *Id.* at 905-06.

These exact concerns are present here. Prokop came to UNDAF and Cirrus already trained on how to escape IMC-like conditions without an autopilot. Even Walters agreed the training syllabus demonstrated Shipek had instructed Prokop on “Intro to Autopilot operation” during the initial training flight, and it further demonstrated Shipek found Prokop proficient on “Autopilot operations” during the final evaluative flight. (Trial Ex. 4, at A87, 92.) Gauging the propriety or sufficiency of this training would embroil the court in the precise act of second-guessing that the educational malpractice bar forbids. And here as in *Page*, causation is a particular concern. The Michigan Supreme Court’s warning that “any connection between plaintiff’s injury and the alleged negligence on the part of [the school] is remote at best” applies in spades here, given that the plaintiff in *Page* survived to testify about the training but Prokop did not. *Id.* at 906-07.

Further, as in *Page*, Plaintiffs’ injuries were “far removed in time and place” from Prokop’s training. *Id.* at 906. The fact that flight instructor Day flew with Prokop one day before the accident confirms it. (Tr. 1180:3-5.) UNDAF was in no “position to ensure that plaintiff would make proper use of the instruction he received.” *Page*, 610 N.W.2d at 906. In such instances, “a jury could only speculate about whether such negligence was a proximate cause.” *Id.*

That is exactly what the jury did here—it speculated. *See also* § V, *infra* (regarding causation). For all of these reasons, the Court should follow the Michigan

Supreme Court's application of this Court's precedent to hold *Alsides* barred Plaintiffs' personal-injury negligence claims.

2. *Sheesley v. Cessna Aircraft Company*

In *Sheesley v. Cessna Aircraft Company*, a federal court in South Dakota cited *Page, Moss Rehab, and Moore* to reject negligence claims against a flight training school in a case where the pilot and two passengers died. *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) (A95.) The claims alleged FlightSafety International was negligent because its flight simulator did not replicate real-world conditions and its curriculum omitted procedures for what to do when an exhaust system fails. *Id.* at * 15-*17.

The court concluded the claims “encompass the traditional aspects of education” and therefore sounded in educational malpractice. *Id.* at *16 (quoting *Moss Rehab*, 692 A.2d at 905). The court further concluded that if the claims were recognized, pilot error and training would be “a consideration in many, if not most, plane crash litigation” and “virtually every future plane crash will raise the specter of a negligent training claim against the flight school or aviation training center.” *Id.* at *17 (citing *Moore*, 386 N.W.2d at 115). Judicial oversight of training activities was deemed particularly worrisome:

By recognizing educational malpractice, even if limited to cases involving physical injury, courts will end up running a large segment of higher education facilities. If the court here decides that FlightSafety should have taught a different curriculum, there is no principled basis to stop it from determining what curriculum should be taught at medical schools, paramedic schools, commercial truck driving schools, and innumerable

other technical and higher education facilities. Public policy suggests that schools, not courts, need to make curriculum decisions.

Id. at *18 (citing *Moore*, 386 N.W.2d at 115).

The *Sheesley* court's public-policy considerations parallel those in *Alsides* precisely. As in *Sheesley*, ground training was allegedly insufficient here, and Walters' testimony that UNDAF should have used "scenario-based" training is indistinguishable from the claim FlightSafety International should not have used a flight simulator. Further, as Shipek testified, he provided the industry standard of "under the hood training" to Prokop because subjecting the student pilot to "actual IMC" conditions would not have been a "safe decision." (Tr. 792:19-793:8.)

And the *Sheesley* claims involving lack of instruction on exhaust-system failure procedure are distinguishable from this case's autopilot-based claims in only one way: in *Sheesley* FlightSafety International omitted instruction on the procedure entirely, whereas here UNDAF gave four days of training and undisputedly provided both documentation and ground training on the autopilot. The training syllabus conclusively and undisputedly establishes Shipek assessed Prokop's autopilot proficiency during Flights 1 and 5A. (Trial Ex. 4, at A87, 92.) Accordingly, Plaintiffs cannot claim Cirrus/UNDAF totally omitted transition training in general or autopilot training in particular.

In addition, the allegedly omitted procedure here involved "auto-pilot *assisted*" training on a cruise-control-like device designed to *assist* Prokop with completing the 180-degree turn he was to make to escape IMC-like conditions. (Trial Ex. 4, at A90; Tr. 440:19-441:8, Tr. 847:16-18.) As Shipek's supervisor John Wahlberg testified, "the

autopilot just makes that easier.” (Tr. 589:13-21.) The SR-22’s autopilot was *not* a flight instrument designed to deliver Prokop and Kosak safely through the clouds, and could *not* respond to commands such as “get me out of here or take me here.” (Tr. 589:8-12.) The record supports no conclusion that operating the autopilot would have prevented the crash. And notably, Prokop’s friend Patrick Bujold testified Prokop knew how to “engage the autopilot” because he had witnessed him “do it several times.” (Tr. 988:17-24.)

Further, as the *Sheesley* court explained, differentiating between claims challenging “overall education” and “specific procedures” of flight training is a “distinction without a difference” in negligence cases because “[i]n both instances, the plaintiff is alleging that the school did not teach the student what he or she needed to know. *Id.* at *16 (citing *Page*, 610 N.W.2d at 905). This Court should follow the *Sheesley* court in affirming the “overwhelming majority rule” and refuse to recognize educational malpractice as a cause of action against a flight school, particularly where as here Cirrus/UNDAF offered substantial training on the very device that was the target of Plaintiffs’ claims. *Id.* at *18.

3. *Dallas Airmotive, Inc. v. FlightSafety International, Inc.*

More recently the Missouri Court of Appeals cited *Alsides* and *Page* to reject negligence claims against a flight school. *Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696, 701 (Mo. Ct. App. 2008), *mot. for reh’g and/or transfer to supreme ct. den.*, (Mo. Jan. 27, 2009); *application for transfer den.* (Mo. Mar. 31, 2009).

In doing so, the court provided persuasive reasoning for why the *Alsides* bar must apply to Plaintiffs' negligence claims.

The Piper turboprop crash killed the pilot and four passengers after the pilot had to shut down the left engine. Surviving family members sued aircraft-maintenance company Dallas Airmotive, Inc. The plaintiffs also made direct claims against Flight Safety International, which provided FAA-approved ground and simulator training to the pilot who, like Prokop, came already licensed. *Id.* at 698. As in *Sheesley*, the plaintiffs alleged FlightSafety International was negligent because its training was insufficient on a particular procedure (engine shutdown). Dallas Airmotive settled with the plaintiffs and then pursued its cross-claim seeking contribution from FlightSafety International. *Id.*

In affirming a summary judgment that barred the negligence-based cross-claim, the Missouri Court of Appeals cited *Page* to demonstrate the educational malpractice bar applies broadly to educators, and also found this Court's *Alsides* decision squarely on point in the flight-training context:

Actions of such alleged malpractice have been brought against public schools, institutions of higher learning, or private proprietary and trade schools. *Page v. Klein Tools, Inc.*, 461 Mich. 703, 610 N.W.2d 900, 905 (2000).

A claim of educational malpractice generally entails the review of the instructional materials and pedagogical method employed. *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999). It involves "a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of [teaching aids] was appropriate, or preferable." *Id.* The courts "have refused to become the 'overseers of both the day-to-day operation of [the] educational process as well as the formulation of its governing policies.'" *Id.* Thus, they have

found a lack of duty and held the claim of educational malpractice to be non-cognizable.

Dallas Airmotive, 277 S.W.3d at 699-700.

The Missouri court also cited two post-*Alsidis* holdings that demonstrate tort actions are barred when they raise “questions concerning the reasonableness of the educator’s conduct in providing educational services.” *Id.* at 700 (citing *Vogel v. Maimonides Acad. of W. Conn., Inc.*, 754 A.2d 824, 827 n.7 (Conn. Ct. App. 2000); *Christensen v. S. Normal Sch.*, 790 So. 2d 252, 255 (Ala. 2001)). The court then *explicitly* rejected the argument—the same one Plaintiffs maintained here—that the claim sounded not in educational malpractice but rather alleged breach of the common-law duty “not to cause physical injury by negligent conduct”:

This is not a case of an injury during the instruction. It is not a case in which an improperly maintained flight simulator malfunctioned, causing an electrical shock injury to the student. Nor does the case involve failure to properly maintain the premises of the instruction, causing a student to fall and suffer injury. *This is a case about the quality of the instruction.*

Id. at 700-01 (emphasis added).

Nor was this case about an *injury during instruction*. With respect to UNDAF, it was a case about the *quality of instruction*. Determining whether Prokop lacked “tools” to make decisions and to remove himself from IMC-like conditions would involve inquiry into not just Cirrus/UNDAF’s quality of “transition training” instruction, but also the quality of instruction from his flight instructor *unassociated with UNDAF*—the instructor who flew with Prokop just *one day* before the crash. And it bears repeating that Prokop did receive autopilot ground instruction and was expected to have reviewed

autopilot documentation in his “pretraining packet” even before arriving for Cirrus/UNDAF training. (Tr. 543:23-544:20, 545:9-12.)

The *Dallas Airmotive* court’s ruling barring inquiry into the propriety of ground and simulator training for engine-shutdown procedures is indistinguishable from inquiries here into the propriety of UNDAF’s FAA-approved “scenario-based” training and the ground training and written documentation on the autopilot. This training “encompass[es] the traditional aspects of education,” and “[p]ublic policy also suggests that schools, and their regulating, accrediting, and certifying agencies, not courts, need to make curriculum decisions.” *Id.* at 701 (quoting and citing *Moss Rehab*, 692 A.2d at 905; *Moore*, 386 N.W.2d at 115).

4. *Moss Rehab v. White* and *Moore v. Vanderloo*

Moss and *Moore* warn of dire consequences if educational malpractice claims were allowed. *Moss* involved a motor vehicle passenger’s wrongful death claims against motorists including the passenger’s driver. 692 A.2d at 904. As here, there were claims against the training school, Moss Rehab Driving School for the Disabled. *Id.* But unlike here, the decedent’s estate brought negligence claims *directly* against the school. *Id.*

Moss Rehab proceeded to verdict for the plaintiff, but the Delaware Supreme Court reversed outright to reject the plaintiff’s assertion the complaint sounded in “well-established common law.” *Id.* at 905, 909. As the court explained, “although the Plaintiffs’ complaint did not use the words ‘educational malpractice,’ it asserts such a cause of action,” and it cited decisions of ten jurisdictions rejecting such claims. *Id.* at 905 & 906 n.7. Here, too, Plaintiffs’ decisions not to plead the words “educational

malpractice” are irrelevant. *Moss Rehab* demonstrates why public policy bars all claims involving a flight school—particularly a non-student passenger’s claims.

A basis for the Delaware decision was that because driver competency is “extensively regulated by statute,” the legislature was “best able to address” public-policy ramifications of “recognizing a third-party claim for educational malpractice by a driving school.” *Id.* at 908-09. Here, similarly, flight safety and pilot training are regulated by the FAA, which approved UNDAF’s methods and curriculum and does not require either autopilot training or a training syllabus. (Tr. 400:20-401:21, 403:20-404:13.) *See, e.g., Sheesley*, 2006 WL 1084103, at *25 (ruling alternatively federal law preempted state-based negligence claims against flight school).

If this Court were to allow a negligence action involving UNDAF, it would do so without Congressional or FAA authorization. Minnesota schools that educate and train licensed professionals and tradespeople would be subjected to a broad range of claims never endorsed or anticipated by the legislature. *See Swidryk*, 493 A.2d at 644 (barring physician’s claim against medical school on public-policy grounds because state legislature empowers board of medical examiners to issue medical license).

Likewise, in *Moore*, the Iowa Supreme Court warned of the prospect of malpractice cases within malpractice cases, anticipating the “flood of litigation” that would result should Iowa allow a patient’s breach of warranty and negligence claims against a chiropractic school:

As [the chiropractic school] correctly notes, if a cause of action for educational malpractice is recognized in Iowa, *any malpractice case would have a malpractice action within it*. For example, a doctor or attorney sued

for malpractice by a patient or client might have an action for against his or her educational institution for failure to teach the doctor or attorney how to treat or handle the patient or client's problem. This would deplete a great amount of resources, both in terms of time and money spent by an institution, on litigation. Further, if an educational malpractice claim is allowed against a professional school, could we logically refuse to recognize such a cause of action against an institution offering training courses for certain trades? For example, would a homeowner damaged by faulty wiring have a cause of action against the electrical trade school?

Moore, 386 N.W.2d at 111, 114-15 (emphasis added); *see also Swidryk*, 493 A.2d at 645 (authorizing claims against medical schools "would call for a malpractice trial within a malpractice case").

The authority from Iowa and elsewhere demonstrates that if the district court were affirmed here, Minnesota law would countenance not only pilot and passenger claims against flight schools but also claims of motor-vehicle drivers and *passengers* against driving schools; doctors and *patients* against medical schools; lawyers and *clients* against law schools; and chefs and *diners* against cooking schools. This would gravely hinder the administration of justice and increase the burden on the courts system.

Further, requiring educators to cover every subject on a course syllabus would be a wholly unworkable standard. For example, in a legal malpractice case involving a missed statute of limitations, no court would authorize a claim against a law school premised on a professor's failure to provide a statute-of-limitations lesson listed on a course syllabus. It is the *lawyer* who has the duty to practice law in a reasonable and competent manner, in a way that anticipates statutes of limitations. And it is the *pilot* who has the duty to operate his aircraft safely, in a way that anticipates IFR conditions in light of the pilot's experience and licensure. Pilots, like lawyers, take exams to receive

licenses. (Tr. 442:25-443:5.) Walters agreed all pilots must demonstrate *specific* competency for escaping IFR conditions without instruments or an autopilot. (Tr. 444:12-17.) Prokop was no different, so if he did not know how to remove himself from IMC-like conditions without an autopilot it is impossible for Cirrus/UNDAF to be blamed.

The case is precisely the sort of situation where social policy militates against imposing a legal duty. *See, e.g., Foss*, 766 N.W.2d at 323 (refusing to impose duty on homeowner to protect child from falling bookcase); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 676 (Minn. 2001) (holding landlord owed no legal duty to protect tenant from killers); *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007) (holding Minnesota recognizes no cause of action for “negligent training” in employment context). “Where a party has no duty, there can be no breach.” *Safeco Ins. Co. of Am. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 873 (Minn. Ct. App. 1995). For these myriad reasons, the Court should reverse the decision of the district court and remand with instructions to enter judgment in favor of UNDAF.

III. THE DISTRICT COURT ERRED BY HOLDING THAT PLAINTIFFS HAD A CAUSE OF ACTION FOR “NEGLIGENT PERFORMANCE OF CONTRACT”

The district court distinguished this case from *Page*, *Dallas Airmotive*, and *Sheesley* on the theory that training that “was to be provided as part of UNDAF’s curriculum was not provided.” (Add. 18.) It appears this will be Plaintiffs’ theory for why the claims should not be barred. But the record undisputedly demonstrates Prokop received substantial air, ground, and documentation training—including on the autopilot.

Further, the plain language of the checklist for Flight 4A demonstrates the allegedly omitted training was for a device designed to “assist” Prokop with performing the 180-degree turn that any VFR-rated pilot is trained to perform upon encountering IMC-like conditions. (Trial Ex. 4, at A90.) The jury was neither instructed on these issues nor asked to issue a special verdict on them. (A49-75.) On this record, the district court’s conclusion that training “was not provided” is clear error.

That error in turn provided no proper basis for the district court’s *sua sponte* determination that Plaintiffs “properly framed” their claim as “negligent performance of contract.” (Add. 22) Plaintiffs never pleaded any such theory. (A1-11.) As important, Minnesota does not recognize such a claim, and the district court’s attempt to distinguish negligent “performance” from negligent “breach” of contract—which, as the district court accurately acknowledged, is not actionable in Minnesota—was based largely on selective citations of authority never cited or briefed by the parties. With respect, the district court’s legal conclusion that Minnesota recognizes a cause of action for “negligent performance” of contract is reversible error.

A. The District Court’s Assertion That Training “Was Not Provided” Was Error and Its Reliance on *CenCor* and *Ryan* Misplaced

The record is uncontroverted that UNDAF and Cirrus provided Prokop with substantial SR-22 training, specifically on the autopilot. Before arriving at Cirrus he was expected to have read instructional material on the autopilot, and Walters agreed Prokop received ground training on the device. Accordingly, there is no basis for the district court’s conclusion that specific training “was not provided.” Further, as the *Sheesley*

court explained, any attempt to differentiate between claims involving “overall education” and “specific procedures” is a “distinction without a difference” in negligence. 2006 WL 1084103, at *16.

Importantly, in likening this case to *Ryan* and *CenCor* (Add. 19), the district court did not explain that in those cases the claimants actually *sued for negligence* as well as breach of contract, and lower courts determined the educational malpractice doctrine *barred* negligence claims. In *CenCor*, the Colorado Supreme Court allowed a *contract* cause of action but did not disturb the Colorado Court of Appeals’ holding that the educational malpractice doctrine barred *negligence* claims against educators. See § II.B *supra* (citing *CenCor*, 868 P.2d at 398-400).

Similarly, in *Ryan*, the trial court granted Rule 12 dismissal of all claims including breach of contract and “educational malpractice,” but the plaintiff appealed only dismissal of the *contract* claim. 494 S.E.2d at 790. The North Carolina Court of Appeals reversed the dismissal but *only* with respect to *one* contract allegation while characterizing the rest of even the contract claims as involving impermissible “inquiry into the nuances of educational processes and theories.” *Id.* at 790-91 (quoting *Ross*, 957 F.2d at 417). The procedural contexts of *Ryan* and *CenCor* demonstrate the district court erred here by determining UNDAF owed a legal duty.

B. “Negligent Performance of Contract” Claims Are Allowed Only in the Construction Context

The district court cited *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) to conclude Plaintiffs properly framed their claims as “negligent performance of contract,”

which the court attempted *sua sponte* to distinguish from negligent “breach” of contract. (Add. 23, 29-31). But *Lesmeister* was a construction case that, like *Ryan* and *CenCor*, involved negligence *and* contract claims. 330 N.W.2d at 99. And in holding it was *error* to instruct the jury on negligence, the supreme court clarified that Minnesota recognizes no contract-based negligence claim and that “negligent breach” of contract was just one example of barred claims:

We did not intend in *Northern Petrochem* to recognize a new cause of action in negligence, *i.e.*, negligent breach of a contractual duty. We only announced a rule of damage apportionment applicable where two persons independently and unintentionally breach separate contracts to the same person.

The gravamen of this case in our view is contractual. Any duties between the parties arose out of contracts, about which there was opportunity to bargain and allocate risks and duties. This was not a situation in which parties were fortuitously brought together, as in an automobile accident. We conclude, therefore, that it was error to submit the theory of “negligent breach” of contract to the jury, or to allow apportionment of fault either based on the pure contract or the “negligent breach” cause of action.

Lesmeister, 330 N.W.2d at 102 (emphasis added) (citing *Northern Petrochem Co. v.*

Thorsen & Thorshov, Inc., 297 Minn. 118, 211 N.W.2d 159 (1973)).

Lesmeister’s progeny demonstrates the court below erred by attempting to distinguish between negligent “performance” and “breach.” See *Overbee v. Herzog*, No. C1-92-2460, 1993 WL 328747, at *2 (Minn. Ct. App. Aug. 31, 1993) (citing *Lesmeister* to order Rule 12 dismissal of “negligent performance of a contract” claim) (A132); *United States v. Johnson*, 853 F.2d 619, 622 (8th Cir. 1988) (citing *Lesmeister* to hold Minnesota law permits no negligence action when duties arise under contract); *Am. Home*

Assur. Co. v. Major Tool & Mach., Inc., 767 F.2d 446, 448 (8th Cir.1985) (holding cause of action for not using “due care in performing the contract . . . was recently rejected in *Lesmeister v. Dilly*”); *Mies Equipment, Inc. v. NCI Bldg. Sys., L.P.*, 167 F. Supp. 2d 1077, 1086 (D. Minn. 2001) (“the court is unconvinced that negligent performance of contract even exists as a viable cause of action in Minnesota” (citing *Lesmeister*)); see also *City of East Grand Forks v. Steele*, 121 Minn. 296, 299, 141 N.W. 181, 182 (1913) (“where the gist of the action is the breach of the contract, either by misfeasance or nonfeasance . . . [t]he foundation of the action is the contract”).

This Court has held that “negligent performance of contract” claims arise only concerning “obligations of contractors in building homes or other projects for the landowners.” *Lee v. Metropolitan Airport Comm’n*, 428 N.W.2d 815, 822-23 (Minn. Ct. App. 1988). Outside the construction context, there is “no merit” to an allegation that a defendant “negligently performed its contractual obligations.” *Id.* at 822 This is because “negligent construction cases are more similar to warranty cases than to breach of employment contracts cases.” *Id.* at 823. Here no warranty claim went to verdict, and in fact the federal district court dismissed Plaintiffs’ warranty claims before UNDAF intervened in this action. *Glorvigen v. Cirrus Design Corp.*, No. 06-2661, 2008 WL 398814, at *5-*6 (D. Minn. Feb. 11, 2008). (A136.) Further, most of the state district court’s cited authority arose in the construction law context (*see* Add. 22-26), which, as this Court explained in *Lee*, is *sui generis*.

The district court also attempted to distinguish UNDAF from professionals such as doctors, engineers, attorneys, and accountants and went on to claim the educational

malpractice bar does not apply when a plaintiff alleges an educator “totally omit[ted] services.” (Add. at 26-30.) But as explained *supra*, see § II.A, this Court held in *Alsides* that the exception applies only to claims for breach of contract, fraud, and misrepresentation—none of which was pleaded here. 592 N.W.2d at 473. Further, to the degree professional negligence cases would be relevant at all, they demonstrate that claims against professionals require expert testimony, and expert testimony “cannot create a duty where none exists,” and no such claim was pleaded here. *Safeco Ins. Co. of Am.*, 531 N.W.2d at 873. For these numerous reasons the Court should reverse the district court’s determination that Plaintiffs “properly framed” their claims as “negligent performance of contract.” No such cause of action exists, and no such claim was pleaded here.

IV. ALTERNATIVELY, UNDAF OWED NO DUTY TO PASSENGER KOSAK

Alternatively, the Court should hold UNDAF can owe no duty a passenger such as Kosak who was neither a UNDAF student nor a party to a purported “contract” with UNDAF. A common carrier owes a duty to protect a passenger because a “special relationship” exists between them. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) (citing Restatement (Second) of Torts § 314A (1965)). But UNDAF is not a common carrier, and Plaintiff Glorvigen has articulated *no* relationship between UNDAF and Kosak, let alone a special one. As the courts in *Sheesley*, *Dallas Airmotive*, and *Moss Rehab* noted, the educational malpractice doctrine bars passengers’ negligence claims against flight and driving schools, and creating such a duty would initiate the

staggering flood of litigation forewarned in *Moore*. See § II.C-.D *supra*. Accordingly, even if the Court were to determine that UNDAF owed a duty to pilot Prokop, it must reverse with respect to a duty involving passenger Kosak.

V. IN THE ABSENCE OF ANY COMPETENT EVIDENCE THAT TRAINING-RELATED NEGLIGENCE CAUSED THE CRASH, JUDGMENT IN FAVOR OF UNDAF IS REQUIRED

Even if the Court were to determine that UNDAF owed a legal duty and that Plaintiffs satisfied their burden of proof as to breach, the judgment still cannot stand, because the evidence on causation is insufficient as a matter of law. The Court should examine the sufficiency of the evidence *de novo* and hold it was error to submit claims of training-related negligence to the jury because there was no competent evidence reasonably tending to sustain the verdict on causation. *Langeslag v. KYMN, Inc.* 664 N.W.2d 860, 864, 870 (Minn. 2003) (ordering judgment where evidence did not sustain causation verdict). Evidence is reviewed in the light most favorable to Plaintiffs, and reversal and judgment in favor of UNDAF are required if the verdict is manifestly against the entire evidence, and despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Id.*

Reversal is required here because UNDAF was indeed entitled to judgment as a matter of law. Walters' "assumptions" that Prokop did not know how to use the autopilot, and his concession that he had no idea whether Prokop ever even *tried* to use the device, as a matter of law cannot constitute competent evidence reasonably tending to sustain the verdict. *Langeslag*, 664 N.W.2d at 864; *Gerster v. Wedin*, 294 Minn. 155, 160, 199 N.W.2d 633, 636 (1972) (affirming judgment notwithstanding the verdict where

fire investigator did not know what caused fire); *Rochester Wood Specialties, Inc. v. Rions*, 286 Minn. 503, 509, 176 N.W.2d 548, 552 (1970) (affirming judgment notwithstanding the verdict where experts' conclusions were "based on assumptions which were not established by the evidence"); *Huseby v. Carlson*, 306 Minn. 559, 561, 238 N.W.2d 589, 590 (1975) (per curiam) (affirming directed verdict where expert's opinion was "based upon assumptions").

Further, Walters' testimony about purported lack of scenario-based and risk-assessment training falls squarely within causation-based policies underlying the educational malpractice bar. *See Alsidis*, 592 N.W.2d at 472 (identifying "inherent uncertainties about causation" and "such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment" as primary reasons for educational malpractice bar). Walters' legally insufficient testimony on causation constituted the sole evidence on that issue. Accordingly, even if the Court were to determine UNDAF could owe a legal duty, the Court should still reverse and remand with instruction to enter judgment in favor of UNDAF for lack of any competent evidence on causation. *See Langeslag*, 664 N.W.2d at 870 (reversing and remanding with order for judgment for lack of legally sufficient evidence on causation).

A. Plaintiffs' Chain of Causation Was Based on Walters' Speculative Opinions

Plaintiffs' chain of evidence for how training caused the crash began with Walters' belief that, because items on the Flight 4A checklist were left unchecked, the "Recovery from VFR into IMC (auto-pilot assisted)" item must not have been addressed. (Tr.

258:24-259:16.) Walters freely admitted he had no firsthand knowledge to support this belief because he was not present for Prokop's flight training. (Tr. 407:13-408:1.) Nevertheless this belief, along with Walters' conversations with Prokop's other flight instructor Steven Day and Prokop's friend Patrick Bujold, provided the sole basis for what Walters described as his "opinion" that Prokop was not "trained for proficiency" on the autopilot. (Tr. 260:1-12.) And that opinion, in turn, was the only basis for Walters to testify during direct examination that lack of autopilot training *caused* the crash—testimony to which UNDAF objected on speculation grounds:

Q: I believe that it was your opinion that Mr. Prokop was not trained to proficiency in the use of the autopilot, correct?

A: That's correct.

Q: Do you have an opinion as to whether that failure was causally related to this crash?

A: I do.

Q: What is that opinion?

UNDAF counsel: Objection, calls for speculation.

Court: Overruled.

A: I do believe that it was causally related to the accident.

Q: Why is that?

A: Had Mr. Prokop been adequately trained in the use of the autopilot, I believe that he would have been able to recover from this situation by using the autopilot and the crash would not have occurred.

(Tr. 273:19-274:14.)

Then, during cross-examination by UNDAF, Walters admitted the completed checklist for final evaluation Flight 5A had a checkmark indicating autopilot operations *were* taught. Importantly, Walters also conceded he had merely “assumed” Prokop did not know how to use the device:

Q: [T]here is an indication there that as part of the final evaluation they looked at autopilot operations, correct?

A: Correct.

Q: And I think you said, although that shows autopilot operations were taught, it doesn't tell us what was taught, right?

A: Exactly.

Q: And so you're saying that because it doesn't give a full description of what was taught, you can't conclude that Mr. Prokop knew how to use the autopilot?

A: Well, in this situation IMC, flying from VFR into IMC.

Q: Well, I think your actual line was, it doesn't tell you whether he knew how to use the autopilot or whether he didn't you just don't know. Is that a fair statement?

A: That's a fair statement.

Q: So you're assuming that he didn't, right?

A: Based on the flight, I am assuming that, correct.

(Tr. 406:9-407:4 (emphasis added).)

Further, Walters went on to concede that he lacked any knowledge about whether Prokop ever even tried to use the autopilot:

Q: You have no idea whether he attempted to use it, do you?

A: I don't.

Q: The fact of the matter is here it is discussed and checked off, correct?

A: Yes, it is.

Q: And there were only two people who would have been there who would know what was discussed, correct?

A: Correct.

Q: There were only two people who would know at that time whether he was proficient in the autopilot, right?

A: Correct.

(Tr. 407:13-408:1 (emphasis added).)

B. Walters' Conclusions Regarding Lack of Autopilot Proficiency Are Not Legally Sufficient to Support the Jury Verdict

Three Minnesota Supreme Court decisions resulting from fire investigations—*Gerster v. Wedin*, *Rions v. Rochester Wood Specialties, Inc.*, and *Huseby v. Carlson*—demonstrate why Walters' testimony on causation was legally insufficient to send this claim to the jury. In all three cases, the expert conceded—as did Walters here—that they had speculated and lacked knowledge about what caused the fires. And in all three cases the trial courts granted judgment as a matter of law even amid circumstantial evidence tending to support the plaintiffs' theories. The same result should have followed here, in a situation lacking even the barest circumstantial evidence to support Plaintiffs' theory on causation.

In *Gerster*, a careless smoking case, the legally insufficient testimony on causation was indistinguishable from that of Walters:

Q (on redirect): You indicated in your response to counsel's cross-examination that the exact cause was unknown, am I correct?

A: Right.

Q: You mean by that, that you don't know exactly or precisely what Mr. Wedin did?

A: Right.

Q: All right, your opinion is, however, that the probable cause was smoker's carelessness?

A: Yes.

Q: All right, thank you.

Q: (on recross): Your opinion, Mr. Braun, is that you don't know what caused the fire, isn't that true? You don't know what caused that fire?

* * *

A: No, I don't know.

Q: All right, a possible cause was a cigarette?

A: Right.

Q: Among many possible causes, isn't that right?

A: Yes. I eliminated a lot of the possibilities, but this one I couldn't eliminate.

Q: Some you can't eliminate?

A: Right.

294 Minn. at 159, 199 N.W.2d at 635-36.

The similarities between this testimony and Walters' testimony here are striking, and the supreme court's lengthy excerpt provided an exemplar for why judgment as a

matter of law was required here. Walters' admission that he had no idea whether Prokop attempted to use the autopilot is indistinguishable from the *Gerster* expert's testimony that "No, I don't know" what caused the fire. As in *Gerster*, the lack of survivors made it impossible to know "exactly or precisely" what Prokop did. As in *Gerster*, Walters agreed there were "many possible causes" of the crash.

But in *Gerster* there was at least some circumstantial evidence tending to suggest careless smoking caused the fire. For example, the evidence was "uncontradicted" that the decedent had smoked cigarettes and was in a "sedated" condition given his blood alcohol level of .08 percent, and the expert testified he had ruled out an electrical short, various appliances, and a third person as being the causes. *Id.* at 157, 199 N.W.2d at 634. But even against that circumstantial evidence, the supreme court affirmed judgment notwithstanding the verdict in favor of the defendant.

Here, by contrast, there is simply no competent circumstantial evidence suggesting that training-related negligence caused the crash. Further, Walters did not meaningfully rule out Prokop's other non-UNDAF flight instruction or the poor weather itself. The friend who purportedly told Walters that Prokop did not know how to use the autopilot went on to testify during direct examination that Prokop *did* know how to engage the device and "I watched him do it." (Tr. 988:17-24.) The chain of causation is substantially weaker here than in *Gerster*, and the district court erred by not granting UNDAF's motions for judgment as a matter of law.

This conclusion is also supported by the decision in *Rions*. Even though three experts blamed a faulty exhaust fan for a fire, the supreme court affirmed the trial court's

grant of judgment notwithstanding the verdict. In doing so, the court explained liability “must be based upon inferences reasonably supported by the evidence and not upon speculation based solely on the occurrence of the fire” and characterized the experts’ opinions as “based on assumptions which were not established by the evidence.” 286 Minn. at 509, 176 N.W.2d at 552. Here, even when examined in the light most favorable to Plaintiffs, the record as a whole supports neither Walters’ assumptions nor his ultimate conclusion that Cirrus/UNDAF training caused the crash. His conclusions—and accordingly the jury’s verdict—were based on sheer speculation.

The *per curiam* opinion in *Huseby* simply drives this point home. In that case, the supreme court held the trial court had properly directed a defense verdict where a fire warden admitted he did not check the heating system, examine the mattress, talk to tenants, or find evidence of cigarette butts in the room. 306 Minn. at 560, 238 N.W.2d at 590. Here, similarly, Walters never examined the crash site and readily conceded there was no way to ascertain whether Prokop tried to use the autopilot. As in *Huseby*, there was no “adequate foundation” for the expert’s opinion as to Prokop’s purported lack of proficiency on the autopilot, an opinion “based upon assumptions not established by the evidence.” *Id.* at 560-61, N.W.2d at 590 (citing *Rions*, 286 Minn. at 509, 176 N.W.2d at 552; *Gerster*, 294 Minn. at 160, 199 N.W.2d at 636).

Based on this substantial authority, the district court should have granted UNDAF’s motions for judgment as a matter of law on Plaintiffs’ theory that lack of autopilot training caused the crash. Accordingly, if the Court determines UNDAF owed

a duty, it must reverse and remand with instruction to enter judgment in favor of UNDAF. *See Langeslag*, 664 N.W.2d at 870.

VI. UNDAF CANNOT BE HELD LIABLE TO EITHER PLAINTIFF

Finally, even if the Court were to find a legal basis for imposing a duty on UNDAF and furthermore to determine that Plaintiffs provided legally sufficient evidence on causation, UNDAF still cannot be liable to Plaintiffs because neither Plaintiff sued UNDAF. In fact, they both stated they did not intend to seek damages from UNDAF.

For a defendant intervenor to be held liable, a plaintiff must serve a summons and complaint on the intervenor. Minn. R. Civ. P. 3.01; *Avery v. Campbell*, 279 Minn. 383, 386-88, 157 N.W.2d 42, 44-45 (1968) (injured aircraft passenger maintained direct claims against intervenor aircraft owner); *see also Konen Constr. Co v. U.S. Fid. & Guar. Co.*, 382 P.2d 858, 859 (Or. 1963) (remanding to trial court to determine whether judgment could be taken against intervening defendant where intervenor answered plaintiff's complaint but "plaintiff did not file a pleading in response thereto"). Intervention itself does not give rise to liability.⁷ The only requirement for intervention is that the applicant be "so situated that the disposition of the action *may* as a practical matter impair or impede the applicant's ability to protect [an] interest, unless the

⁷ By submitting an answer and cross-claims (*see* A17-29), UNDAF was merely complying with Rules of Civil Procedure requiring intervenor applicants to submit those pleadings, which here addressed claims *only* against Cirrus. *See* Minn. R. Civ. P. 24.03 (notice of intervention is "accompanied by a pleading setting forth the nature and extent of every claim or defense as to which intervention is sought and the reasons for the claim of entitlement to intervention"); Form 18, Minn. R. Civ. P. Appx. of Forms (specifying that intervening party file an "Intervener's Answer").

applicant's ability is adequately represented by existing parties." Minn. R. Civ. P. 24.01 (emphasis added).

Rule 24.01 was amended in 1968 to make it clear that intervenors need *not* face the possibility of direct liability to intervene. Before the amendment, intervenors had to establish they would "gain or lose by the *direct legal effect* of the judgment therein whether or not he were a party to the action." *Sister Elizabeth Kenny Found. v. Nat'l Found.*, 267 Minn. 352, 357-58, 126 N.W.2d 640, 643-44 (1964). But the amendment effectuated a "change in Minnesota law" to parallel Fed. R. Civ. P. 24(a) to permit intervention when direct liability was "possible" but not "necessary." Minn. R. Civ. P. 24.01 Advisory C'mte Note; *see also Kan. Pub. Employees Retirement Sys. v. Reimer & Koger Assocs.*, 60 F.3d 1304, 1307-08 (8th Cir. 1995) (explaining Fed. R. Civ. P. 24 amendments). As Wright & Miller explain, "[i]t has been clear to *all courts* that the principal purpose of the amendment was to eliminate the old reading that a would-be intervenor *must be legally bound*, and that instead the court is to view the effect on the intervenor's interest with a practical eye." 20 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 80 (3d ed. 2004) (emphasis added).

UNDAF relied on Rule 24.01 in its Notice of Intervention where it stated it was entering the case because disposition "may impair or impede UNDAF's ability to protect its interest in this matter." (A14 ¶ 6.) No party objected to this basis within the required 30 days, *see* Minn. R. Civ. P. 24.03. In fact, Plaintiffs specifically denied asserting claims against UNDAF. As Plaintiff Glorvigen stated: "as you know, we didn't sue UND, we sued Cirrus." (Pre-Trial Tr. of Apr. 20, 2009 107:7-8.) As Plaintiff Gartland

stated: "it's important to note that we only sued Cirrus." (Tr. 1717:2-3.) In light of these representations, judgment against UNDAF cannot stand.

On this point the decisions in *Konen Construction Company v. United States Fidelity & Guarantee Company* are instructive. In that litigation, as here, the intervening defendants answered the plaintiff's complaint but the plaintiff never sued the intervenor afterward. 382 P.2d at 859. Because the record provided no basis for a judgment against the intervenor, the Oregon Supreme Court remanded for a determination of whether judgment could be directly taken. *Id.* at 860. And after the trial court dismissed the claim and the case reached the supreme court a second time, the court affirmed the dismissal on grounds the plaintiff "deliberately" decided not to file an amended pleading, apparently in an attempt to recover attorney's fees from the defendant it did sue directly. *Konen Constr. Co. v. U.S. Fid. & Guar. Co.*, 401 P.2d 48, 50 (Or. 1965). For that reason, the supreme court held the plaintiff was in "no position" to request a judgment "which up to this time it had seemed to regard with disdain," and went on to characterize the plaintiff's tactics as "a kind of trifling with the judicial process which courts frown upon." *Id.* at 50-51.

So too here. For tactical reasons Plaintiffs elected not to target UNDAF. Rather, Plaintiffs deliberately stated they "didn't sue UND" and "only sued Cirrus." Only after the verdict came down did Plaintiffs change their tune. This sort of "trifling with the judicial process" provides no basis for UNDAF to be held liable when the pleadings include no summons and complaint that Plaintiffs served on UNDAF. Accordingly, even if the Court holds UNDAF could owe a duty and that the Plaintiffs established that a

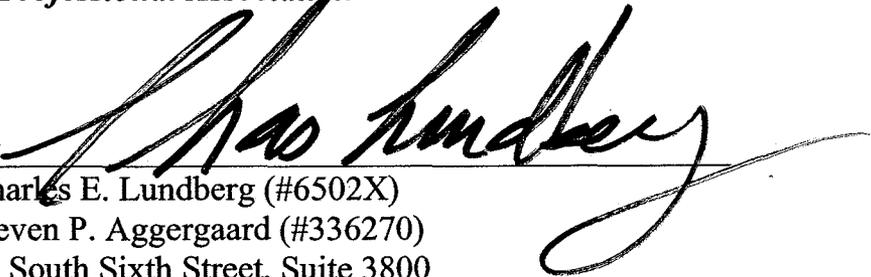
breach of duty caused harm, the Court must hold UNDAF cannot be held liable to Plaintiffs.

CONCLUSION

The district court's decision must be reversed with respect to UNDAF for four independent reasons. First, Plaintiffs' claims were classic examples of educational malpractice, which are legally barred by *Alsides v. Brown Institute* and its public policy rationales. Second, Minnesota recognizes no cause of action for negligent "performance" of contract in this context. Third, the plaintiffs failed to provide any competent evidence that UNDAF caused the crash. Finally, UNDAF cannot be directly liable because neither plaintiff sued UNDAF. Accordingly, this Court must reverse the decision of the district court and remand with instructions to enter judgment in favor of UNDAF.

BASSFORD REMELE
A Professional Association

Dated: September 24, 2010

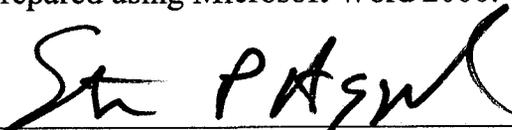
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Proportional serif font, 13 point or larger. The length of this brief is 12,885 words. This brief was prepared using Microsoft Word 2000.

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