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

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);

and

Thomas M. Gartland, as Trustee for the
Next-of-Kin of Decedent Gary R. Prokop,
Respondent (A10-1243, A10-1247),

vs.

Cirrus Design Corporation,
Appellant (A10-1246, A10-1247),

Estate of Gary Prokop, by and through
Katherine Prokop as Personal Representative,
Respondent (A10-1242, A10-1246),

and

University of North Dakota Aerospace Foundation,
Appellant (A10-1242, A10-1243).

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

1. Should Minnesota create a new cause of action for negligent performance of contract with a new "total omission" standard of care for educators?

   Cirrus moved for JMOL on the issue of educational malpractice at the close of the evidence, A-299(Tr. 1392:17-1397:8), and for JMOL and a new trial based on this issue following the verdict. A-322-326(2/19/10 Tr. 4:20-16:14). The trial court denied both motions, and in its May 20, 2010 Order for the first time "extended" existing law to create the new cause of action. ADD-7-31.[1]

Most apposite cases

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

Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977)

Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006)

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

2. Because the trial court created the new cause of action in its posttrial ruling, the evidence and arguments at trial and the jury instructions did not reflect that theory. Is a new trial necessary to permit the parties to try and the jury to decide the case based on the new theory?

   Cirrus moved for a new trial on the issue of educational malpractice after the verdict. The trial court's Order creating the new cause of action denied the motion for new trial but did not address whether its adoption of that doctrine would require a new trial. ADD-69.

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[1] "ADD-__" references are to UNDAF's separately bound Addendum. "A-___" citations are to the Appellants' consecutively numbered Appendices; Cirrus's pages start at 143.

Most apposite cases

Kaiser-Bauer v. Mullan, 609 N.W.2d 905 (Minn. App. 2000)

Schroht v. Voll, 71 N.W.2d 843 (Minn. 1955)

3. Was the evidence legally sufficient to support the jury's conclusion that the negligence of Cirrus and UNDAF caused the plane crash?

Cirrus moved for JMOL on the issue of causation at the close of the evidence and for JMOL and a new trial on this ground after the verdict. The trial court denied both motions. ADD-48, 65-66.

Most apposite cases

Gerster v. Estate of Wedin, 199 N.W.2d 633 (Minn. 1972)

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

Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006)

4. In closing argument, one of Plaintiffs' attorneys invoked the Golden Rule, asked the jury to send a message to corporations, ridiculed Cirrus's corporate witness, and called Defendants' proposed damages figure "despicable" because they were less than the supposed cost of imprisoning terrorists. Do these comments entitle Cirrus to a new trial?

Cirrus timely objected and asked the court to instruct the jury to disregard these remarks. The trial court denied the request. A-317-318(Tr. 1974:14–1976:13; 1977:1–1978:2). Cirrus subsequently moved for a new trial on this ground, and the trial court denied that motion. ADD-82.

Most apposite cases

Wild v. Rarig, 234 N.W.2d 775, 786 (Minn. 1975)

Morrissey v. Welsh Co., 821 F.2d 1294, 1304 (8th Cir. 1987)

STATEMENT OF THE CASE

This case was tried in Itasca County District Court before the Honorable David J. Ten Eyck. Plaintiffs/trustees Rick Glorvigen and Thomas Gartland brought wrongful death negligence actions against Cirrus Design Corporation and (in Glorvigen) the Estate of Gary Prokop for damages resulting from the deaths of Gary Prokop and James Kosak in the crash of a plane piloted by Mr. Prokop. The University of North Dakota Aerospace Foundation ("UNDAF") later intervened in the case. At the close of the case, the jury found Prokop 25% negligent, Cirrus 37.5% negligent, and UNDAF 37.5% negligent, and awarded Glorvigen $7,400,000 and Gartland $12,000,000 in damages. After adding costs and offsetting for Mr. Prokop's fault where appropriate, the trial court entered judgments in favor of Plaintiffs Glorvigen and Gartland respectively. In its denial of Defendants' posttrial motions, the trial court created a new "negligent performance of contract" cause of action and retroactively applied it to sustain the jury's verdict.

STATEMENT OF FACTS

Mr. Prokop's Flying Experience

Gary Prokop, age 47, was a licensed pilot and held a private-pilot certificate with a single engine rating. A-290(Tr. 1170:13-19, 1213:8-1214:10); A-185(Exh. 3). Mr. Prokop had previously owned and trained in a Cessna 172 aircraft. A-290(Tr. 1171:2-19); A-185(Exh. 3). Mr. Prokop had accumulated over 240 hours of flight time, A-295(Tr. 1212:19–1216:13), and had received extensive ground and flight training on the risk management factors pilots must consider before every flight. A-257-261(Tr. 421:12–436:20, 439:3-7).

Mr. Prokop had only a VFR ("Visual Flight Rules") certificate. A-251(Tr. 369:13-16). As a consequence, he was prohibited from flying into clouds or other inclement conditions that might require reliance on instrument flying. A-251(Tr. 367:3-16; 369:6-23). Mr. Prokop had not yet obtained his instrument rating, which would have permitted him to fly in such instrument meteorological conditions ("IMC"). A-267, 277(Tr. 617:8-16; 849:22-850:9). He had, however, logged more than 60 hours of instrument flight instruction with an instructor unaffiliated with Defendants, A-294(Tr. 1200:25–1201:2), and fulfilled all requirements to take his instrument flight examination. A-291, 293, 296-297(Tr. 1180:9-10, 1195:5-9, 1214:6-1215:1, 1249:5-10).

The Transition Training Program

Mr. Prokop took delivery of a Cirrus SR22 aircraft on December 9, 2002. A-271, 276(Tr. 764:10-16, 841:22-24). Along with the aircraft, Mr. Prokop received two days of "transition training." A-266(Tr. 613:14-18); A-188(Exh. 7 at 19). UNDAF provided these two days of transition training, funded by Cirrus. A-208(Exh. 21 §§ 6.1–6.2). Mr. Prokop separately contracted with UNDAF for an additional one-and-one-half days of flight training. A-267-268, 287(Tr. 619:7-620:9, 931:21-23). No agreement between Mr. Prokop and Cirrus or UNDAF describes the precise maneuvers or topics that would be covered in transition training.

UNDAF provided its instructors with a syllabus for its transition training course, which Mr. Shipek used in instructing Mr. Prokop. A-265(Tr. 499:8–10); A-86-94. The syllabus details five sessions of ground training and complementary flight training. A-86-94. The flight training sessions in the syllabus list maneuvers alongside blank spaces,

which the instructor is to check based on the pilot student's performance rating for each maneuver. Id. The syllabus does not require that a student perform every maneuver, and states that maneuvers with which a student has trouble "may be discontinued and remain incomplete at the instructor's discretion." Id. In order to receive a UNDAF Completion Certificate, however, a student must complete all of the maneuvers in the Final Evaluation Flight with a grade of "S[atisfactory]" or "E[xcellent]." Id.

Mr. Prokop spent three and a half days, from December 9-12, completing training in the SR22 conducted by UNDAF. A-267-268, 286-287(Tr. 619:7-620:9; 913:2-12; 931:21-23). Mr. Prokop's course consisted of four flights (for a total of 12.5 hours of flight training) and 5.3 hours of ground instruction. A-288, 292(Tr. 987:23-988:8, 1182:25-1183:5). The training was performed by YuWeng Shipek, a certified flight instructor employed by UNDAF. A-275(Tr. 838:16-20).

Plaintiffs' claims here focused on training for autopilot-assisted recovery when a pilot strays into IMC conditions. Both the SR22 operating handbook and a separate autopilot manual explain how to use the autopilot on the SR22. A-253-254(Tr. 403:16-404:6); A-198, 217 (Exhs. 10, 210). The SR22 Training Manual and a PowerPoint presentation also explain how to use the autopilot. A-253-254(Tr. 403:17-404:1); A-197(Exh. 9); A-212-216(Exh. 88). Mr. Prokop received SR22 flight training entitled "Intro to Autopilot operation" as part of Flight 1. A-87. He also received two hours of ground instruction entitled, "VFR into IMC Procedures SR20/22," including the PowerPoint presentation. A-89; A-252(Tr. 387:6-23). Trainer Shipek testified that he also trained Mr. Prokop on each of the flight maneuvers listed under the syllabus's Flight

4a ("IFR Flight (non-rated)"), including recovery from inadvertent VFR flight into IMC conditions and use of the autopilot to exit IMC conditions. A-274, 280(Tr. 800:3-25, 871:12-872:1). Although the page of the syllabus for Flight 4a contains no checkmarks, A-90, the Final Flight Evaluation contains a check mark indicating that Mr. Prokop had completed both "Autopilot operations" and "Emergency procedures" in a "satisfactory" manner. A-92. Mr. Prokop received a completion certificate and signed the syllabus indicating that he agreed with this Final Evaluation. A-94.

The absence of checkmarks on Flight 4a is the only evidence suggesting that Mr. Prokop did not receive *in-flight* training on the autopilot-assisted recovery from VFR into IMC. It is undisputed that Mr. Prokop received ground training on that procedure and on operation of the autopilot.

The Accident

On the morning of the crash, January 18, 2003, pilot Prokop and passenger Kosak intended to go from Grand Rapids to St. Cloud to see their children play hockey in an early-morning tournament. A-260(Tr. 433:8-11). Mr. Prokop called FAA weather briefers twice. At 4:56 a.m., he was informed of some low clouds and "potential for some ifr." A-226(Exh. 225 at 2). At 5:45 a.m., he was informed of "marginal" conditions around Grand Rapids, and he told the briefer "I was hoping to slide underneath it and climb out." A-221(Exh. 224 at 3); A-302-303(Tr. 1592:25-1593:4). At approximately 6:30 a.m., pilot Prokop and passenger Kosak departed from Grand Rapids/Itasca County Airport to go to St. Cloud Airport. A-245-246, 248(Tr. 302:21-303:20; 329: 16-18). Minutes later, the aircraft struck the ground, killing both men. Id.

Plaintiffs' pilot and reconstruction expert, James Walters, testified that Prokop departed Grand Rapids in nighttime marginal weather conditions, became spatially disoriented, and crashed. A-234, 246, 249, 262(Tr. 222:14-20, 304:21-305:3, 347:16-349:4, 446:10-20). Both Walters and Steven Day (who provided Mr. Prokop's earlier training) testified that Prokop should not have taken off under those conditions. See, e.g., A-250, 255, 298(Tr. 357:10-11; Tr. 412:8-11; Tr. 1253: 8-11).

The Causation Evidence

According to Walters, Mr. Prokop was not trained to proficiency in the use of the autopilot. A-237(Tr. 260:1-4). Had Mr. Prokop had been adequately trained in the use of the autopilot, said Walters, he would have been able to recover and the crash would not have occurred. A-239-240(Tr. 274:23-275:14). Nonetheless, Walters testified that he could not tell whether Mr. Prokop attempted or even wanted to engage the autopilot:

> Q And you said [Prokop] was hand-flying the aircraft?
>
> A I believe he was hand-flying the aircraft.
>
> Q As we sit here today you cannot tell me whether he ever attempted to use the autopilot?
>
> A No, sir, I can't.
>
> Q You can't tell me if in his head he wanted to use the autopilot, can you?
>
> A I absolutely cannot.

A-262(Tr. 445:9–17). The record contains no evidence that Mr. Prokop tried to use the autopilot or wished to do so.

The Litigation

Plaintiffs Glorvigen and Gartland sued Cirrus, UNDAF, and (in Glorvigen's case) the Estate of Prokop alleging negligence, product liability, voluntary assumption of duty, and breach of warranty. By the time of trial, only the negligence claim remained, and the court submitted only negligence to the jury. The jury found all three Defendants negligent and allocated fault as follows:

Cirrus	37.5%
UNDAF	37.5%
Estate of Gary Prokop	25%
TOTAL	100%

Add-95. The jury awarded damages of $7,400,000 to Plaintiff Glorvigen and $12,000,000 to plaintiff Gartland. ADD-96.

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the trial court. First, the trial court improperly created a new cause of action for negligent performance of contract that merges contract and tort duties and redefines negligence to exclude reasonable care. This theory permits a third party injured by a student's conduct to recover in tort against the student's school based on the content of the school's instruction, creating a host of legal, analytical, and policy problems. Moreover, because the trial court adopted the new theory only *after* the jury's verdict, it is *not* the theory on which the case was tried or on which the jury was instructed.

In addition, Plaintiffs failed to offer legally sufficient evidence of causation. And again, the causation evidence presented at trial and the jury instructions on causation did

not contemplate the new cause of action, making any causation finding by the jury unsustainable.

Finally, in the alternative, the egregious and improper comments of Plaintiff Gartland's attorney in closing argument unfairly prejudiced Cirrus, requiring a new trial.

I. MINNESOTA LAW DOES NOT AND SHOULD NOT RECOGNIZE PLAINTIFFS' NEGLIGENCE CLAIMS

This Court should reverse the existing judgments and direct entry of judgment as a matter of law in Defendants'[2] favor.

A. Standard Of Review

This Court reviews a decision on a motion for JMOL *de novo*. See Longbehn v. Schoenrock, 727 N.W.2d 153, 159 (Minn. App. 2007). The court views the evidence in the light most favorable to the nonmoving party and considers "whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." Navarre v. S. Wash. County Sch., 652 N.W.2d 9, 18 (Minn. 2002).

B. Minnesota Law Does Not Recognize Educational Malpractice Claims Based On Negligence.

The jury based its verdict against Defendants on educational malpractice and negligent training, claims that Minnesota law does not recognize. This Court rejected

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[2] Although the estate of pilot Gary Prokop was also a defendant in the Glorvigen case, the estate aligned itself with Plaintiffs at trial. Thus, unless the context makes clear otherwise, the term "Defendants" in this brief refers *only* to Cirrus and UNDAF.

educational malpractice claims—in which a plaintiff seeks recovery from an educational institution based on the content of the institution's instruction—in Alsides v. Brown Inst., Ltd., 592 N.W.2d 468 (Minn. App. 1999):

> We find persuasive the analysis of those courts that have rejected, on public policy grounds, claims for educational malpractice; claims that would require the court to engage in a "comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies."

Id. at 473 (quoting Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996)). See also Redden v. Minneapolis Comm. and Tech. Coll., 2004 WL 835768 (Minn. App. Apr. 20, 2004) (citing Alsides, 592 N.W.2d at 473).[3] The Alsides court cited four public-policy grounds for its decision:

1. The lack of a satisfactory standard of care by which to evaluate an educator. 592 N.W.2d at 472. A claim for educational malpractice "necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen," an evaluation courts and juries are ill-equipped to make. Andre v. Pace Univ., 655 N.Y.S.2d 777, 779-80 (N.Y. App. Term 1996) (quoted by Alsides); see also Swidryk v Saint Michael's Medical Center, 493 A.2d 641, 643 (N.J. Super. 1985) ("The conflicting theories of the science of pedagogy prevented the construction of a workable rule of care.").

2. The inherent uncertainties about causation and damages in light of intervening

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[3] See also Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. App. 2007) ("[C]urrent Minnesota law does not recognize a cause of action for negligent training,") (citing M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. App. 1995)).

factors such as the student's attitude, motivation, temperament, past experience, and home environment. Alsides, 592 N.W.2d at 472. "[B]ecause both the educational process and the result are subjective, there exists a practical impossibility of proving whether the alleged malpractice caused the complained-of injury." Nalepa v. Plymouth-Canton Community School Dist, 525 N.W.2d 897, 904 (Mich. App. 1994).

3. The potential for a flood of litigation against schools and other educational and training institutions. Alsides, 592 N.W.2d at 472. Many lawsuits claim that a person who was trained in a particular skill—be it a doctor, a driver, an electrician, or a car mechanic—exercised that skill negligently. The Iowa Supreme Court focused on this problem in Moore v. Vanderloo, 386 N.W.2d 108, 114-15 (Iowa 1986):

> [I]f 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 over 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.

See also Swidryk, 493 A.2d at 645 ("To allow a physician to file suit for educational malpractice against his school and residence program each time he is sued for malpractice would call for a malpractice trial within a malpractice case.").

4. The possibility that such claims will embroil the courts in overseeing the day-to-day operations of schools. Alsides, 592 N.W.2d at 472; see also Hunter v. Board of Educ. of Montgomery County, 439 A.2d 582, 585 (Md. 1982) ("[T]o allow petitioners' asserted negligence claims to proceed would in effect position the courts of this State as overseers of both the day-to-day operation of our educational process as well as the formulation of its

governing policies.").

An additional policy concern comes into play where, as here, the training at issue involves a highly regulated field such as aviation or medicine, where the government sets standards and issues licenses. In such fields, courts have declined to substitute their own standards for those of the regulatory and licensing bodies. See Sheesley v. Cessna Aircraft Co., 2006 WL 1084103, at *23 (D.S.D. Apr. 20, 2006) (applying federal preemption law, "the court finds that federal aviation regulations, not a common law negligence standard, determine what emergency procedures FlightSafety must include in its course curriculum"); Swidryk, 493 A.2d at 645 (noting pervasive state regulation of both physicians and medical schools and holding that "[i]t would be against public policy for the court to usurp these functions and inquire into the day to day operation of a graduate medical education program").

These public-policy grounds have led the overwhelming majority of states addressing the issue to reject educational malpractice claims, including claims alleging the negligent training of pilots. See, e.g., Sheesley, 2006 WL 1084103, at *14-18 (rejecting wrongful death plaintiff's attempt to hold flight school liable for failing to include certain emergency procedures in curriculum, noting "if the court recognizes educational malpractice in this case, virtually every future plane crash will raise the specter of a negligent training claim"); Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696, 701 (Mo. App. 2008) (sustaining summary judgment on negligent training claims against flight school after pilot student crashed aircraft, stating that "recognition of liability, of course, would be a great invitation to speculation as to causation."); Hubbard v. Pac. Flight Servs., Inc., 2005 WL 2739818, at

*10 (noting that the "imposition of a duty of special training under these circumstances would open the door to a wide assortment of duties, potentially boundless in scope").[4]

Here, the trial record and the jury verdict form demonstrate that Plaintiffs pleaded and tried negligence claims based on the content of Defendants' training[5] and that the jury imposed liability on Defendants on those grounds. The federal court dismissed Plaintiffs' breach of warranty and strict liability claims before remand to state court, see A-176, and Plaintiffs offered no ground for Defendants' fault at trial other than the education and training provided to Mr. Prokop. Finally, the jury's verdict found Defendants liable based solely on findings of negligent training. ADD-95 ("Was [UNDAF] negligent in its training of Gary Prokop?"). Because Minnesota law bars such claims, Plaintiffs' claims against Cirrus fail as a matter of law, and this Court should reverse.

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[4] See also Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992); Blane v. Alabama Commercial College, Inc., 585 So. 2d 866 (Ala. 1991); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. 1976); Wickerstrom v. North Idaho College, 725 P.2d 155 (Idaho 1986); Finstad v. Washburn University of Topeka, 845 P.2d 685 (Kan. 1993) As far as Cirrus is aware, only Montana has recognized a variant of educational malpractice, in the much-criticized case of B.M. v. State, 649 P.2d 425 (Mont. 1982) (permitting claim for negligent placement of child in class for mentally retarded); but cf. Moore, 386 N.W.2d at 114 n.1 (criticizing B.M.), Brantley v. District of Columbia, 640 A.2d 181, 183 n.4 (D.C. App. 1994) (same).

[5] See, e.g., A-10(Gartland Complaint ¶ 5); A-17-18(Glorvigen Complaint ¶¶ 17-18).

C. Plaintiffs Do Not Assert Contract Or Fraud Claims Against Cirrus.

Although a plaintiff may avoid the bar on educational malpractice claims by pleading certain narrow contract and fraud claims, Plaintiffs' claims do not fall in that category. To avoid the educational malpractice bar, a plaintiff must:

(1) assert a claim for breach of contract or an intentional tort, Alsides, 592 N. W.2d at 473, *and*

(2) prove a failure by the defendant to perform a specific promise, id., *and*

(3) prove that the claims would not require analysis of "the method of instruction and choice of textbook" or the "effectiveness of the pedagogical method chosen." Id. at 472.

Plaintiffs' claims fail to meet any of the elements necessary to avoid the Alsides holding. First, and most obviously, Plaintiffs do not assert a claim for a breach of contract or an intentional tort. The only claims that Plaintiffs asserted against Cirrus, and the only claims that the Court submitted to the jury, were negligence claims, exactly the type of claims the education malpractice bar prohibits. Second, given the absence of any contract or misrepresentation claim, the jury's verdict could not possibly have reflected *any* breach of *any* promise by Cirrus, much less of the *specific* promise required by Alsides. Id. at 473. Finally, as discussed in detail in section I(D)(4)(d) below, Plaintiffs' claims unavoidably forced the Court and the jury to engage in "an inappropriate review of educational policy and procedures." Plaintiffs' claims cannot avoid Alsides' educational malpractice bar. See id. at 471.

D. The Court Should Reject The Trial Court's Attempt To Create A New Cause Of Action For Negligent Breach Of Contract.

Recognizing the absence of a contract claim, the trial court sought to avoid the Alsides bar and sustain the jury's verdict by retroactively "extending" (the court's word) existing law to create a new "negligence" cause of action for failure "to perform on specific promises [] made to the student." ADD-19-20. This new cause of action presents major legal, practical, and policy problems, and this Court should reject it.

1. The trial court's analysis.

A brief summary of the trial court's 23-page discussion of its creation of this new cause of action may be helpful. The trial court first agreed that Minnesota law bars educational malpractice claims that challenge the general quality of education, but permits contract claims for breach of specific promises to provide particular educational services. ADD-7-12. The court then considered whether it could create an analogous "negligence" cause of action to avoid the educational malpractice bar. ADD-12-18. Contrasting Sheesley and Dallas Airmotive, where "some sort of training **was provided**," ADD-17 (emphasis in original), the court found the circumstances here different:

> because here the claim of negligence is not in regards to **training that** was **provided** or training that **should have been included in the curriculum.** Rather, the claim here is that training that was **to be provided** as part of UNDAF's **curriculum,** was **not provided.**

ADD-18 (emphasis in original). The court acknowledged that it was creating new law:

> This Court is finding [sic] simply *extending* the Minnesota Court of Appeals holding 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'" *to cases sounding in negligence*. Alsides, 592 N.W.2d at 473.

ADD-19-20 (emphasis added).

The court then discussed the "reasonable care" standard applicable to other professionals, ADD-22-29, but crafted a "different standard" for educational institutions:

> Doctors, lawyers, accountants and other professionals are required to exercise the skill and judgment which can be reasonably expected from similarly situated professionals. In contrast, educational institutions are not held to the same standard, and will find liability only by totally omitting services which were a part of the curriculum.

ADD-30. Using this new definition, the court held that Plaintiffs' claims were not for educational malpractice but for "negligent performance of contract." ADD-30-31.

Cirrus has been unable to identify any court in any jurisdiction that has adopted either of the two key elements of the trial court's decision: (1) the creation of a "negligent performance of contract" cause of action in the educational context and (2) the redefining of negligence from a lack of "reasonable care" to a failure to comply with the terms of a contract.

The Court should reject this new cause of action for a number of reasons.

2. A trial court should not expand existing law.

As a threshold matter, Cirrus respectfully submits that the trial court here overstepped its proper role in creating a new cause of action to avoid the educational malpractice bar. "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App. 1987). If the extension of the law is beyond this Court's purview, it is *a*

fortiori beyond the role of the trial court. And the lower courts should certainly refuse to expand the law in an area where the supreme court has already specifically declined to do so. See Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983) ("We did not intend in Northern Petrochem to recognize a new cause of action in negligence, i.e., negligent breach of a contractual duty.").

3. The trial court's new cause of action for "negligent non-performance of contract" is not a negligence claim at all.

Turning to substance, the Court should reject the trial court's new "negligent performance of contract" claim and the unique redefinition of "negligence" that accompanies it. The trial court's ruling is—literally—unprecedented in American jurisprudence, its analysis is flawed, and its decision fundamentally alters the nature of negligence, the cornerstone of tort law.

a. Negligence rests on a duty imposed by law as a matter of public policy, not contract.

The trial court erred first by deriving a tort claim for negligence from a duty imposed by the terms of a contract between Mr. Prokop and Cirrus. As the supreme court has noted, tort and contract actions arise from different sources and serve different interests:

> Tort actions and contract actions protect different interests. Through a tort action, the duty of certain conduct is imposed by law and not necessarily by the will or intention of the parties. The duty may be owed to all those within the range of harm, or to a particular class of people. On the other hand, contract actions protect the interests in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific parties named in the contract. See W. Prosser, Handbook of the Law of Torts § 92 (4th ed. 1971).

80 South Eighth Street Ltd. P'ship v. Carey-Canada, Inc., 486 N.W.2d 393, 395-96 (Minn. 1992). Because of this distinction, Minnesota law permits a plaintiff to recover damages in tort *only* if the defendant had "some duty imposed by law, not merely one imposed by contract." D&A Dev. Co. v. Butler, 357 N.W.2d 156, 158 (Minn. App. 1984). Stated conversely, if the duty arises from the terms of a contract, there can be no claim for negligence. See Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983); United States v. Johnson, 853 F.2d 619, 622 (8th Cir. 1988). Here, Cirrus's duty undisputedly arose from the terms of the purchase contract; neither the trial court nor the Plaintiffs disputes that if Mr. Prokop had not purchased the plane from Cirrus, Cirrus would have had no duty to train him on use of the autopilot or anything else.

The fallacy of the trial court's approach becomes even more apparent with respect to the claims of passenger James Kosak. Even *assuming* that Cirrus had a tort-type duty to pilot Prokop based on the training agreement between them, where did the duty to passenger Kosak come from? The trial court did not address this question, and no answer is immediately apparent. Cirrus had no "special relationship" with Mr. Kosak, and thus had no duty to Mr. Kosak to prevent Mr. Prokop from flying the plane so as to injure him. See, e.g., Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993). Likewise, from a contractual perspective, Mr. Kosak was not a third-party beneficiary of the Cirrus-Prokop training agreement because nothing in the agreement shows any intention to benefit Mr. Kosak. See Hickman v. SAFECO Ins. Co. of Am., 695 N.W.2d 365, 369-70 (Minn. 2005) (quoting Restatement (Second) of Contracts § 302 (1979)). Minnesota law thus

offers no basis for imposing on Cirrus an "independent" duty to Mr. Kosak that implicates any "contractual relationship of the parties." ADD-24.

In sum, despite the trial court's effort to reframe them as tort claims, Plaintiffs' claims are in fact hornbook claims for breach of contract. A party breaches a contract when it totally or partially fails to perform its obligations under the contract. Associated Cinemas of Am. v. World Amusement Co., 276 N.W. 7, 10 (Minn. 1937). That is the claim here; as Plaintiff Glorvigen's attorney declared at the posttrial motion hearing: "The claim was, you didn't give Mr. Prokop what you promised to give to him." A-326(Tr. 21:16-17 (2/19/10 hrg)); see also A-320(Tr. 1995:3-9). The claimed duties arose solely from contract, and the trial court's effort to create a new independent tort duty to sustain the negligence verdict fails.

b. "Negligence" is the failure to use reasonable care, not the failure to attempt to perform a promise.

The trial court's new cause of action also fails because it would fundamentally redefine negligence. From the first day of law school, we learn that "[n]egligence is the failure to use reasonable care" and that "[r]easonable care is the care that a reasonable person would use in the same or similar circumstances." E.g., CIVJIG 25.10 (5th ed. 2006). The trial court's negligence standard, however, has nothing to do with reasonable care. Instead, as the trial court repeatedly stated, a defendant fulfills this new duty by making *any* effort—reasonable or not—to carry out the specific promise. The court held:

> The standard of care will be met...if any type of training or instruction occurs. Otherwise, inherently, the claim would sound in educational malpractice. The only time the standard of care may be violated is when there is a **total omission**...in providing specific instruction included in the curriculum.

ADD-20 (emphasis in original).

Indeed, the trial court's version of "negligence" not only does not *require* examination of whether a defendant used reasonable care, it *forbids* such an examination. Recognizing that applying a duty of reasonable care in the education context would unavoidably involve the court and the jury in making just the kind of educational evaluations that Alsides forbade, 592 N.W.2d at 473, the trial court tried to work around the limitation by simply jettisoning the whole "reasonable care" inquiry:

> If the specific training is **in any way provided**, this Court shall not examine its quality or propriety and shall not conjecture whether other training would have been preferable.

ADD-22 (emphasis in original); see also ADD-21 ("it is not this Court's place to evaluate the quality or type of training to be provided."); ADD-30 n.1 ("The Court will neither examine the propriety of provided training nor postulate whether alternate training would have been more appropriate."). But the fact that two established legal doctrines—the bar to educational malpractice and the reasonable care standard—do not fit together in a particular case does not entitle a court to simply amputate the inconvenient portions of those doctrines.

The trial court does not cite, and Cirrus has not discovered, any authority from any jurisdiction that defines negligence as the trial court does here, as a failure to attempt to perform a promised act. On the contrary, "failing to perform one's own promise" is the basic definition of a "breach of contract." Black's Law Dictionary at 182 (7th ed. 1999).

In sum, the trial court's redefinition of negligence is unprecedented, unnecessary, and unwise. This Court should reject it and the new cause of action that employs it.

4. Public policy weighs against the trial court's new cause of action in multiple ways.

Beyond the issues with the new contract-based tort and the redefinition of negligence, the trial court's decision threatens the very public policy problems that the Alsides court strove to avoid: an unsatisfactory standard of care, speculative causation, a flood of litigation, and judicial intrusion into educational decision-making. See 592 N.W.2d at 472.

a. The lack of a satisfactory standard of care

The trial court's decision raises the same problems the Alsides court recognized in finding a satisfactory standard of care. Id. The trial court's "total omission of promised services" standard (1) improperly permits a private party to define its own standard of care, (2) is internally inconsistent, and (3) produces illogical and unfair results.

First, the court creates a broad tort duty based, not on public policy, but on an educational institution's own curriculum decisions. ADD-30. The necessary corollary of this conclusion is that an institution may redefine its own legal duty of care simply by altering its curriculum. Minnesota law, however, rejects the notion that a defendant's own rules or policies define the legal duty it owes to other parties, either in negligence, see Gagnier v. Bendixen, 439 F.2d 57, 62 (8th Cir. 1971) ("the railroad's duty of due care is governed by law and not by its private practices"); Boland v. Garber, 257 N.W.2d 384, 386 (Minn. 1977), or in the student-educator relationship, see Abbariao v. Hamline Univ.

Sch. of Law, 258 N.W.2d 108, 113 (Minn. 1977) (holding school bulletin did not constitute contract between school and student requiring strict compliance with every provision). But that is what the trial court did here: it improperly defined a legally binding standard of care in negligence based solely on Defendants' own self-drafted curriculum.

This self-defined standard of negligence also produces glaringly inconsistent results for identical conduct, in effect punishing schools for producing detailed course outlines. For example, assume two different educational institutions offer the same course. Institution 1's course syllabus lists Task A as part of the course; Institution B's syllabus does not. Both institutions hire the same instructor, who teaches exactly the same content at both institutions and in each instance omits any training in Task A. If a student's failure to know how to perform Task A later caused injury, the trial court's new definition of negligence would permit the imposition of unlimited liability on Institution 1 but would completely insulate Institution 2 from any responsibility, despite that fact that the institutions provides exactly the same content. Such a result is neither logical nor just, and certainly does not reflect the application of a "satisfactory" standard of care. Alsides, 592 N.W.2d at 472. Indeed, the logical consequence of such a standard would be to discourage schools from creating a course syllabus at all, a result that would not benefit either public safety or the educational process.

Finally, the trial court's standard of care is inconsistent in the weight it gives educational judgment in different contexts. Acknowledging that "the educational institution, and not the courts, is the best arbiter of what should be taught and how it

ought to be taught," ADD-20, the trial court defers to an educational institution's curriculum decision to such an extreme that the court transforms the curriculum content into the institution's legal duty. Yet if an individual instructor makes the same kind of educational judgment in the context of a particular class or student and consequently emphasizes one item in that curriculum or omits another, the trial court not only fails to defer to that decision in any way, it actually treats that decision as a *breach* of the original duty.

This internal contradiction betrays the importance of individualized educational decisions. There can be little question that "[g]ood teaching method may vary with the needs of the individual student." Ross v. Creighton University, 740 F. Supp. 1319, 1328 (N.D. Ill. 1990), aff'd in part, rev'd in part on other grounds, 957 F.2d 410 (7th Cir. 1992). And the court's inconsistency is particularly troublesome where, as here, the syllabus itself specifically permits an instructor to depart from its content for a particular student at the instructor's discretion. The training syllabus here states:

> A maneuver in which a U [unsatisfactory] or M [marginal] grade is posted may be discontinued and remain incomplete at the instructor's discretion.

ADD-86. Teachers must have the discretion to vary the content of coursework to comport with the needs of individual students, yet the trial court's standard of care makes any deviation from a written curriculum actionable negligence.

b. The uncertainty of causation.

The trial court's approach also fails to solve "the inherent uncertainties about causation" cited by the Alsides court. The trial court dismisses the Alsides concern about

the "student's attitude, motivation, temperament, past experience, and home environment," concluding that these factors are irrelevant to whether the promised training had been provided. ADD-19. But that conclusion addresses only the issue of Defendants' breach of duty; it does not in any way address the causation problems raised in Alsides.

These student-specific factors may in fact bear on causation in several ways, including whether the student would have adequately learned the promised task and whether the student's lack of knowledge concerning the task actually caused the injury in question. Here, for example, the evidence showed many factors specific to Mr. Prokop that bore on the issue of causation, including his prior training, his experience in handling emergency conditions, A-288, 291(Tr. 987:23-988:24; 1179:9-1180:25), and his strong motivation to get to his son's hockey game, A-245-246, 248(Tr. 302:21-303:23; 329:10-20). As a result, the questions of how much and what training Mr. Prokop needed and of whether any lack of his training contributed to the crash pose the same uncertainties here that the educational malpractice bar was intended to avoid.

c. The threat of expanded litigation against schools

The trial court also erred in concluding that recognition of the new negligence claim "will also not lead to '... the potential for a flood of litigation against schools.'" ADD-19 (quoting Alsides). In fact, the trial court's adoption of the new cause of action and its redefinition of negligence represents a broad extension of potential liability for educators. It transforms the educator's obligation from a contractually limited duty to the student to perform specifically promised training into a broad, general duty to keep the

public safe from the misconduct of former students. Such a cause of action openly invites the joinder of educational institutions as defendants in any case in which the injury-causing conduct arguably falls within the scope of the institution's curriculum. See Moore, 386 N.W.2d at 114-15.

d. The intrusion on education decisions.

Finally, the trial court erred in concluding that evaluating an educator's decision to omit a particular lesson or otherwise alter the curriculum taught to a particular student will not interfere with educational judgments and pedagogical policy. See ADD-19. As one federal district court noted, basing a claim on an individual curriculum component instead of on the curriculum as a whole does not alter the character or the intrusiveness of the inquiry:

> [N]egligent failure to provide an overall education and negligent failure to train how to perform a specific procedure is a distinction without a difference. In both instances, the plaintiff is alleging that the school did not teach the student what he or she needed to know.

Sheesley, 2006 WL 1084103, at *17. Indeed, courts have rejected judicial micromanagement of on-the-ground educational decisions just as forcefully as they have resisted oversight of educational policy decisions. See Abbariao, 258 N.W.2d at 114 (noting that plaintiff's insistence on exact compliance with a student bulletin's representations "likely should be regarded as interfering beyond an acceptable degree in [the university's] discretion to manage its affairs.").

The trial court's linking of its new duty to contract obligations does not avoid pedagogical intrusion. However framed, the substance is the same: the court is taking

educational decisions out of the school and putting them into the courtroom. See Andre, 655 N.Y.S.2d at 779 ("The public policy considerations underlying judicial noninterference in tort-based educational malpractice claims is equally applicable when the action... is formulated in contract...."); Paladino v. Adelphi Univ., 89 A.D.2d 85, 90 (N.Y. App. Div. 1982).

In sum, the trial court's "negligent performance of contract" presents all the same public policy problems raised in Alsides, and this Court should reject it.

5. The trial court's jumble of tort and contract theory is unworkable.

Beyond the analytical and policy problems discussed above, the court's new "negligent performance of contract" cause of action is unworkable in a variety of ways.

a. Differing negligence definitions in same action.

The trial court's redefinition of negligence would require juries to apply *different* definitions of negligence to different parties in the *same* case. For example, the jury here was asked to evaluate "negligence" claims against three parties: Cirrus, UNDAF, and pilot Prokop. Under the trial court's approach, the "negligence" of Cirrus and UNDAF would be evaluated under the "total omission of promised services" standard, but the "negligence" of Mr. Prokop would be measured by the traditional "reasonable care" standard. Cirrus submits that no court should or would ask a jury to simultaneously understand, apply, and apportion two different versions of "negligence" that set different standards of care for different parties in the same case.

b. Contractual limitations on damages.

The trial court's recasting of a contract claim into a tort claim is also unworkable in the face of agreed contractual limitations on remedies and damages. Minnesota permits contracting parties to limit their obligations under a contract, and enforces provisions that protect parties from liability for their own negligence in contract performance. See, e.g., Ind. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co., 123 N.W.2d 793, 798 (Minn. 1963) ("It is well established that the parties could, by contract, without violation of public policy, protect themselves against liability resulting from their own negligence."); Morgan Co. v. Minnesota Min. & Mfg. Co., 246 N.W.2d 443, 448 (Minn. 1976).

The agreement between Cirrus and Mr. Prokop contains just such a provision, expressly providing that Defendants bears no responsibility for Mr. Prokop's post-training competency:

> Neither Cirrus, nor its training contractor [UNDAF], will be responsible for competency of purchaser [Mr. Prokop]...during or after the training. Cirrus does not warrant that this training will qualify Purchaser...for any license, certificate, or rating.

A-188(Exh. 7 at 19). Yet the trial court's recognition of a new "negligent performance of contract" claim effectively overrides these agreed disclaimers and imposes on Cirrus the very responsibility the parties disclaimed: Mr. Prokop's competency as a pilot. The trial court's new cause of action runs roughshod over the parties' agreement allocating post-training risks.

c. Duration of duty.

The trial court's decision also ignores another significant issue: how long would an educator be responsible for the consequences of not teaching the student something that was "specifically promised"? What if Mr. Prokop's accident had occurred five years after his training? 20 years? Would the "duty" still exist? At some point the pilot must become responsible for his or her own conduct, but the trial court's decision offers no discussion of the issue and no clue of when that might be.

In sum, the trial court's new cause of action is unworkable, and the Court should reject it.

II. EVEN IF MINNESOTA RECOGNIZED THIS NEW CLAIM, THE DISTRICT COURT ERRED IN CREATING AND APPLYING THAT NEW CLAIM *AFTER* THE VERDICT IN THIS CASE.

The trial court held that "educational institutions...will find liability only by totally omitting services that are part of the curriculum." ADD-30. But this was not the theory of recovery that the Plaintiffs pursued at trial, nor the theory that the court submitted to the jury. Moreover, Plaintiffs offered and the trial court admitted a wide variety of evidence that had nothing to do with the theory of recovery the court created after the trial. Thus, even assuming this Court were to approve the new cause of action, the Court cannot sustain a judgment on that ground here.

A. Plaintiffs Failed To Prove "Total Omission of Services" At Trial In The Three Areas The District Court Identified.

Plaintiffs failed as a matter of law to prove the "total omission" of promised services on which the trial court's decision relied. The trial court identified three areas "in which training, to be provided, was not provided":

1. Autopilot assisted recovery from VFR into IMC;
2. Situational training, and
3. "[D]iscrepancies in the flight training times."

ADD-18, 33. But the evidence fails to support the conclusion that Defendants "totally omitted" any of these areas.

1. Autopilot assisted recovery from VFR into IMC.

The trial court's primary "total omission" discussion involves the allegation "that Prokop never received training in the maneuver known as 'Recovery from VFR into IMC (auto-pilot assisted)'." ADD-34. But it is undisputed that UNDAF actually provided Mr. Prokop with three different types of instruction on autopilot assisted recovery from VFR into IMC. First, the SR22 operating handbook given to Mr. Prokop explains in detail how to use the autopilot feature on the SR22. A-253-254(Tr. at 403:16-404:1); 189-197(Exh. 9). Second, Mr. Prokop's three days of training included two hours of SR22 ground instruction entitled "Ground 4a: VFR into IMC Procedures." A-252, 269-270, 287(Tr. 387:6-19, 695:9-696:4, 932:6-8); A-90. Finally, Mr. Prokop viewed a PowerPoint presentation on VFR into IMC procedures. A-252(Tr. 387:6-23).

Plaintiffs and their expert contended that this training on VFR into IMC was inadequate, A-237(Tr. 258:19-259:5), and that ground training alone is not sufficient to teach this topic. A-237(Tr. 258:19-23). But according to the trial court's standard, the *adequacy* of Defendants' efforts is not at issue; all that is required is *some* training on the topic. See ADD-20 ("The standard of care will be met...if any type of training or instruction takes place."). Here, given the instruction manual, ground instruction, and PowerPoint presentation, no jury could reasonably conclude that Defendants had "totally omitted" any instruction on the topic of autopilot-assisted recovery from VFR into IMC. Thus, under the trial court's own standard, the evidence fails as a matter of law to support the necessary finding of "total omission negligence" on the issue of VFR into IMC training.

2. Situational training

The trial court also based its decision on Defendants' liability on the allegation "that situational training was not provided." ADD-18. The evidence adduced at trial, however, shows no "specific promise" by either Defendant to provide situational training; in fact, the phrase "situational training" does not even appear in the trial transcript. And the trial court repeatedly stresses that it is the existence of a *specific* promise that permits a court to resolve the Plaintiffs' claims *without* delving into educational policy. See ADD-12 (holding new cause of action applies only to "claims that allege the breach of a specific and identifiable aspect of an educational contract are permissible," citing Alsides and other cases). Because the record here contains no evidence of any "specific promise"

to provide "situational training," any claim of liability based on situational training thus fails under the trial court's own standard.

Moreover, as discussed in the previous section, to the extent that the trial court's reference to "situational training" refers to training in autopilot-assisted VFR into IMC training, see A-272-273(Tr. at 792:25-794:10), it is undisputed that Mr. Prokop received instruction on that topic from the Training Manual, from the ground instruction, and from the PowerPoint presentation. Because Mr. Prokop received some training on this subject, the trial court's own holding forbids any inquiry into the wisdom or adequacy of that instruction. ADD-20, 30. The evidence thus fails to support a finding of "total omission negligence" on the issue of "situational training."

3. Discrepancies in flight training times.

Finally, the trial court cites allegations of "discrepancies in the flight training times" as a basis for finding liability against Defendants under its "total omission" standard of care. ADD-18 (citing 4.5 and 5.2 hours of flight time for Flight 2 from different sources). But again, nothing in the evidence suggests that Defendants "specifically promised" a particular amount of flight time for any particular lesson or any particular topic; on the contrary, the course syllabus merely estimates the time that may be spent on each lesson. ADD-87-93. Thus, a .7 hour discrepancy in flight time for Flight 2 cannot breach a "specific promise" and cannot support a claim under the trial court's new cause of action.

More importantly, however, any claim based on a discrepancy in time of instruction by its nature falls outside the trial court's "total omission" standard of

liability. The trial court's standard "will be met... if any type of training or instruction takes place." ADD-21. Here, regardless of whether Defendants provided 4.5 or 5.2 hours of flight training in Flight 2, no one can reasonably dispute that some flight training occurred. There was no "total omission" of services. As a result, the undisputed evidence forecloses any finding of liability under the trial court's standard based on discrepancies in flight training time.

In sum, the evidence fails as a matter of law to support any of the three possible grounds for "total-omission negligence" identified by the trial court. The verdict against Cirrus and UNDAF therefore cannot be sustained, and the judgments based on it must be reversed.

B. Plaintiffs Offered And The Court Admitted Substantial Evidence Having Nothing To Do With A "Total Omission Of Services"

Even assuming that the evidence could have sustained liability under the trial court's new cause of action, the judgments nevertheless cannot stand. Plaintiffs introduced and the court permitted the jury to consider a wide array of prejudicial evidence that had nothing to do with the narrow "total omission" standard of care, permitting the jury to rest its verdict on evidence that had nothing to do with the ground for recovery that the trial court late found permissible.

The trial court created this problem because it did not announce its new theory of recovery until six months *after* the parties had presented all their evidence and the jury had reached its verdict. As a result, the parties could not have known to object at trial to evidence that did not support that new theory, and the jury was permitted to base its

decision on evidence reaching far beyond the narrow "total omission" ground for liability that the trial court later adopted. Because no one can tell whether the jury based its decision on evidence supporting the "total omission" theory or on evidence supporting other grounds for recovery that the trial court rejected, the judgments based on that verdict cannot stand. See Kaiser-Bauer v. Mullan, 609 N.W.2d 905, 911 (Minn. App. 2000) (holding that "when the trial court erroneously submits one or more negligence theories to the jury and the jury returns a general verdict for plaintiff, defendant is entitled to judgment notwithstanding the verdict and a new trial"); Schroht v. Voll, 71 N.W.2d 843, 846 (Minn. 1955).

1. The court permitted Plaintiffs to introduce evidence concerning areas of training in which there was undisputedly no "total omission of services"

Despite the trial court's eventual ruling approving the jury's verdict based on the total omission of promised services, Plaintiffs offered and the court admitted at trial considerable expert testimony concerning claimed failures to exercise due care in aspects of Defendants' training in which *some* training undisputedly *had* occurred.

For example, no one disputes that UNDAF provided Mr. Prokop with *some* transition training. A-264(Tr. 488:19-22). Yet Plaintiffs offered and the court admitted expert testimony regarding the reasonableness, efficacy, and adequacy of the transition training provided. See A-237(Tr. 260:24-261:1 "Q. Was the training he received, transition training that he received reasonable? A. I don't believe so."); A-235, 239-240(Tr. 242:22-243:14; 274:15-275:8 Plaintiffs' expert discussing his view of "the only effective way" to conduct the training); A-237(Tr. 260:21-24 "Q. Do you have an

opinion as to whether [the transition training given Mr. Prokop] meets industry standards? A. My opinion is, no, it does not meet industry standards.").

Likewise, no one disputes that Mr. Prokop received ground training in VFR-into-IMC procedures. A-236(Tr. 257:12-15). Yet Plaintiffs offered and the court admitted expert testimony that ground training alone was insufficient and that Mr. Prokop was not adequately trained. See A-237(Tr. 258:19-23 "[I]s simply doing the ground lesson enough to train a pilot to proficiency in how to execute VFR into IMC V procedures? A. No, sir."); A-237(Tr. 259:25-260:4 "Do you have an opinion as to whether or not Mr. Prokop was ever trained to proficiency in use of the autopilot? A. My opinion is that he was not trained for proficiency."). Plaintiffs also affirmatively argued this evidence, both to the trial court, A-301(Tr. 1421:19-23) and to the jury, A-311-312, 315(Tr. 1922:16-20; 1943:12-15; 1967:14-18).

The introduction and argument of this evidence is flatly inconsistent with the trial court's posttrial conclusion that "[i]f the specific training is **in any way** provided, this Court shall not examine its quality or propriety and shall not conjecture whether other training would have been preferable." ADD-22 (emphasis in original). If—as the trial court held—the *only* relevant question is whether the training promised was provided *at all*, none of this evidence about the course's design, quality, reasonableness, or compliance with industry standards had any possible relevance to the ultimate issue. Nevertheless, the jury heard both this evidence and Plaintiffs' arguments based on it, and one cannot determine whether the jury based its verdict of negligence on these irrelevant

grounds or on the single ground—"total omission"—that the trial court ultimately sustained. The judgments based on such a verdict cannot stand.

2. The court permitted Plaintiffs to introduce evidence concerning areas of training in which there was undisputedly no promise of training.

Similarly, despite the trial court's eventual narrowing of the permissible ground for recovery to the total omission of *promised* services, ADD-20, Plaintiffs offered and the court admitted a large body of evidence concerning Defendants' supposed negligence in failing to provide training that undisputedly *was never promised.* For example, the parties do not dispute that Defendants never promised to provide Mr. Prokop with scenario-based training, yet Plaintiffs attorneys repeatedly asked jurors to find Defendants negligent precisely because Mr. Prokop's flight training *should have included* scenario-based training. Plaintiffs urged this ground for negligence first in opening statement, A-231-232(Tr. 60:17-61:3); then in their expert's testimony, A-242(Tr. at 288:17-290:4 ("A. [UND's training] appears not to be scenario based training. Q. Was the industry standard at this point in time scenario based training? A. Yes, it was."), see also A-247(Tr. 324:24-325:3)); and finally in closing argument, A-315(Tr. 1955:11-14).

Similarly, although it is undisputed that Defendants did *not* promise Mr. Prokop risk-assessment training, Plaintiffs repeatedly urged the jury to find Defendants negligent based on the lack of risk assessment training from the course curriculum. Again, Plaintiffs urged such a finding in opening, A-231(Tr. 59:23-60:9 ("[Captain Walters] will also say in general the training was insufficient because it didn't have adequate risk

assessment tools.")); in expert testimony, A-240(Tr. 277:25-282-24); and finally in closing, A-319(Tr. 1987:4-7).

Again, given the dominance of these issues in Plaintiffs' case, the trial court erred in stating in its posttrial order that "the claim of negligence is not in regards to ... training that **should have been included in the curriculum.**" ADD-18 (emphasis in original). On the contrary, the lion's share of Plaintiffs' evidence did *not* involve training that Plaintiffs claim Defendants promised but *omitted*, but instead rested on the premise that Defendants had never offered these types of training *at all*. This is exactly the type of disagreements over curriculum content that both the Alsides court and the trial court here held cannot properly underlie a negligence claim. See Alsides, 592 N.W.2d at 473; ADD-8-10, 22. Yet because the trial court did not announce its new theory of recovery until *after* the jury's verdict, the jury was permitted to base its verdict on these improper grounds. The judgments based on this improperly grounded verdict cannot stand.

3. The court permitted Plaintiffs to introduce evidence concerning Cirrus's administrative oversight of the UNDAF training.

Further, despite the trial court's focus on specifically promised services and its repetition of the Alsides court's admonition against engaging in a review of educators' administrative policies (ADD-10 (quoting Alsides)), Plaintiffs offered substantial evidence and argued that the jury should find Cirrus liable for negligent oversight of UNDAF. Once again, Plaintiffs urged this ground for liability in opening, A-231(Tr. 59:14-18); in expert testimony, A-240-241, 243-244(Tr. 276:9-277:9, 281:20-282:24, 294:19-296:16 ("Q. Do you have an opinion as to whether that management oversight

met industry standard? A. It did not meet industry standard, in my opinion.")); and in closing, A-319(Tr. 1989:9-14). And again, under the district court's own "total omission negligence" standard, such lack of educational "oversight" cannot sustain a claim. It involves no specific promise by Cirrus to Mr. Prokop and goes directly to the "administrative policies" of educational institutions that the Alsides court refused to invade. Alsides, 592 N. W.2d at 473.

4. In the face of the admission of such evidence before the trial court identified its new theory of recovery, the judgments based on the jury's verdict cannot stand.

The admission of the large body of ultimately irrelevant evidence described in the previous three sections taints the jury's verdict and requires vacation of the judgments based on that verdict. In each of these instances, Defendants did not know and had no way of anticipating that the trial court would redefine the legal theory of recovery after the verdict, and thus had no basis for objecting to the introduction of the evidence that turned out to be entirely irrelevant to the single, narrow ground for recovery that the trial court eventually adopted.

Early in this case, Cirrus moved for summary judgment based on Minnesota's educational malpractice bar, and the trial court (at that time the federal district court, following removal) denied the motion, holding that "general negligence principles apply." A-27-29(2/11/08 Magnuson Order at 8-10 (citing Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922 (Minn. 1986)). Back in state court, Defendants moved in limine to exclude evidence sounding in educational malpractice, and the trial court had the opportunity to revisit the issue and to articulate its "extended" version of the applicable

law at that time. It did not do so. See A-228-230(5/15/09 Tr. 4:10-6:25; 10:13-12:20). Based on those rulings, Defendants tried the case and framed their objections as the court's original order had directed, applying "general negligence principles."

Defendants did not learn until the trial court's Order denying their posttrial motions that the judgment against them would rest, not on general principles of negligence, but on a new cause of action for "negligent performance of contract" based on a new "total omission" definition of negligence. By that time, of course, Defendants could not object to the court's earlier admission of prejudicial evidence concerning claimed conduct irrelevant to that standard. Thus, even assuming that the trial court's new "total omission negligence" stated a viable claim, the timing of the trial court's announcement of that new cause of action denied Defendants any opportunity at trial to object to the substantial body of prejudicial evidence that did not fit that claim. See, e.g., Folk v. Home Mut. Ins. Co., 336 N.W.2d 265, 267 (Minn. 1983) ("It is fundamental that a party must have notice of a claim against him and an opportunity to oppose it before a binding adverse judgment may be rendered.")

The trial court said in its posttrial order: "This Court ... is not permitting claims which allege '... educational services provided were inadequate, substandard, or ineffective.'" ADD-19 (quoting Dallas Airmotive, 277 S.W.3d at 700.). Yet the trial court admitted, the Plaintiffs argued, and the jury considered evidence of exactly such claims, meaning the judgments here cannot be sustained. Even if this Court were to approve the trial court's new cause of action, Defendants would at the very least be

entitled to a new trial, at which the evidence could be limited to evidence relevant to that new claim.

C. The Judgments Cannot Stand Because The Neither The Trial Court's Instructions Nor The Jury's Special Verdict Addressed The New "Total Omission Of Promised Services" Legal Theory.

In addition, the judgments here cannot stand because the trial court never instructed the jury about its new standard of care and the jury never applied that standard to the evidence. The trial court never told the jury that it could only find a Defendant negligent if that Defendant had totally omitted promised training, but instead permitted the jury to find Defendants liable if they merely failed to exercise reasonable care in performing such training, the very claim barred by Alsides.

First, the trial court failed to instruct the jury or ask it special verdict questions concerning the contract-based theory of recovery it ultimately adopted. The "total omission of promised services" theory on which the court rested its posttrial ruling requires "the breach of a specific and identifiable aspect of an educational contract." ADD-12. To address such a claim, a jury would need to decide (1) whether an educational contract existed, (2) whether the "specific and identifiable aspect" on which the claim relies was a term of that contract, and (3) whether the defendant breached that term. And to answer those questions, the jury would need to be instructed concerning the law of contracts. See generally CIVJIG IV Category 20 (Contracts) (5th ed. 2006). Here, however, the trial court did not give the jury such instructions or ask the jury such questions. The trial court's instructions to the jury included no contract-related instructions of any kind, see A-305(Tr. 1775:21-1795:10 (entire jury charge)); A-49-72

(same), and the special verdict form posed no questions about the existence, terms, or breach of any contract, ADD-94-96.

These omissions are understandable. The parties did not propose any contract jury instructions because Plaintiffs did not assert a claim for breach of contract; the claims were asserted, as the federal court said, under "general principles of negligence." And the trial court did not *sua sponte* instruct the jury on contract issues because it had not yet formulated its new theory of recovery. Understandable or not, however, the omission of these instructions meant that the jury was never told that it could find Defendants liable only if it found (1) that a contract existed, *and* (2) that that contract contained a certain specific term, *and* (3) that Defendants had breached that term. Put another way, the trial court never instructed the jury about the ground for recovery on which the court later based its entry of judgment and never asked the jury to determine whether Plaintiffs' proof satisfied that ground. Jury instructions are to "convey to the jury a clear and correct understanding" of the applicable law. Kirsebom v. Connelly, 486 N.W.2d 172, 174 (Minn. App. 1992). The instructions here failed to do so, because the court did not create the "applicable law" until after the jury's verdict. The trial court here thus upheld a verdict based on a legal ground that the jury was never asked to address and in fact did not address.

The prejudice created by the trial court's failure to instruct the jury about the new "total omission of promised services" cause of action was magnified by the instructions that the court ***did*** give. Rather than instruct the jurors about contracts or tell them that "[t]he standard of care will be met ... if any type of training or instruction takes place,"

ADD-20), the trial court gave the jury the standard negligence instruction, CIVJIG 25.10, and told jurors without qualification that they should find a defendant negligent if it "does something that a reasonable person would not do" or "fails to do something that a reasonable person would do." A-307(Tr. 1783:23-1784:9.)

This negligence standard is inconsistent with the standard on which the trial court eventually held Defendants could be held liable, and in fact is much broader. The standard of care the trial court adopted required *only* that a defendant make *some* effort to perform a specific contractual duty; as the court put it, "[t]he only time the standard of care may be violated is when there is a **total omission ...** in providing specific training." ADD-20 (emphasis in original.) The standard of care the trial court instructed the jury to apply, however, was the much broader standard of "reasonable care" in "the same or similar circumstances." A-307(Tr. 1783:25-1784:1.) Under the reasonable care instruction actually given, the jury could find a defendant negligent *even if it had provided promised training* if the jury found that the training provided was unreasonable under the circumstances because (for example) it had the wrong content, or it was of poor quality, or it did not conform to industry standards. These are the very same claims that the trial court agreed that Alsides bars as educational malpractice claims. See ADD-10 ("Alsides ... demonstrates that impermissible claims of educational malpractice are grounded in challenging the quality of the education...."). Yet given the evidence outlined in sections II(B)(1), (2), and (3) above, and the "reasonable care" instruction the court gave the jury, the jury could easily have based its finding of negligence on just such impermissible grounds.

In sum, the trial court's posttrial redefinition of negligence fatally and unavoidably undermines the instructions the court gave the jury. Even assuming the "total omission of promised training" standard of care were legally viable, the jury's verdict cannot support the judgments here based on the supposed violation of that standard. Defendants are at the very least entitled to a new trial at which the court would properly instruct the jury about this new standard of care.

III. PLAINTIFFS FAILED AS A MATTER OF LAW TO PROVE CAUSATION UNDER THE TRIAL COURT'S NEW THEORY OF RECOVERY

This Court should also reverse the judgments against Defendants because the evidence at trial failed as a matter of law to establish causation. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (holding negligence plaintiff must prove "breach of the duty was the proximate cause of the injury"). To establish causation, the evidence must show that the negligent act "was a substantial factor in the harm's occurrence." George v. Estate of Baker, 724 N.W.2d 1, 11 (Minn. 2006). Here, Plaintiffs failed to establish any causal link between any of the claimed instances of "total-omission negligence" and the plane crash. Cirrus is therefore entitled to judgment as a matter of law.

Problems with proof of causation are inherent in claims like this, and indeed form one of the reasons courts bar educational malpractice claims. See Alsides, 592 N.W.2d at 472. Even where a student's performance of a task caused a particular injury, many factors other than the quality of instruction can affect that performance. See, e.g., Donohue v. Copiague Union Free School District, 391 N.E.2d 1352, 1355 (N.Y. 1979)

("Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.") (Wachtler, J., concurring). These factors render any finding that an educator caused the injuries resulting from a student's conduct inherently speculative and uncertain. See, e.g., Dallas Airmotive, 277 S.W.3d at 701 ("[M]any factors contribute to the quality of a student's education and the quality of his later performance. The recognition of liability, of course, would be a great invitation to speculation as to causation."); Alsides, 592 N.W.2d at 472 (noting "the inherent uncertainties about causation ... in light of intervening factors such as the student's attitude, motivation, temperament, past experience, and home environment"); Sheesley, 2006 WL 1084103, at *17; Donohue, 391 N.E.2d at 1353 ("this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process"). Ultimately, the student must ultimately responsible for his or her own education. See Nalepa, 525 N.W.2d at 904 ("The ultimate responsibility for what is learned, however, remains with the student, and many considerations, beyond teacher misfeasance, can factor into whether a student receives the intended message.").

The instant case offers a prime example of the problems inherent in trying to prove that an educator's conduct caused a student's actions: Plaintiffs' whole "proof" of causation rests on *ipse dixit* conclusions that can only speculate both about what Mr. Prokop did or did not know, what he did or did not do, and why he did or did not do it. Under Minnesota law, Plaintiffs must prove that the injury they suffered was caused by the negligence they allege. See Lubbers, 539 N.W.2d at 401. The trial court here

identified three possible areas of Defendants' conduct that it concluded fit its "total omission" definition of negligence: autopilot-assisted recovery from VFR into IMC, situational training, and discrepancies in recorded flight time. See ADD-18, 34. Thus, to sustain Plaintiffs' claims, one or more of these instances of "negligence" must have caused the crash and thus Plaintiffs' damages. The record evidence, however, fails to support a finding of causation in any of these three areas.

The third area of claimed negligence is the most easily disposed of. Plaintiffs "alleged that there were discrepancies in the actual amounts of training time that Prokop received." ADD-34; see also ADD-18 (noting that different records showed 4.5 and 5.2 hours of flight time for the same day). The record, however, contains no evidence that the lack of an additional 42 minutes of flight time in Flight 2 played any role in causing the crash. Absent such evidence, any claim of causation tied to this discrepancy fails as a matter of law.

That leaves the claims that "that Prokop never received training in the maneuver known as 'Recovery from VFR into IMC (auto-pilot assisted)'" and "that Prokop did not receive certain situational training." ADD-34. Although the trial court never explained what it meant by "situational training," its citations to testimony and exhibits suggest that it was referring to "under the hood" training on recovery from VFR into IMC. See id. at 18 (citing A-272-273(Tr. 793:3-794:22, 797:12-18), and Exh. 12A). Thus, both of the remaining categories of negligence rely on the claimed total omission of training concerning autopilot assisted recovery from VFR into IMC.

The record here, however, contains no evidence from which the jury could reasonably conclude that any omission of training for autopilot-assisted recovery from VFR into IMC caused the plane crash. The only evidence Plaintiffs offered in support of a causal link between the crash and the omission of "VFR into IMC"—either in-flight or "under the hood"—was the testimony of their expert, Captain James Walters. Walters testified that Mr. Prokop had been hand-flying the plane at the time of the crash, but could not opine with any certainty whether Mr. Prokop attempted to use the autopilot, or even whether he *wanted* to use the autopilot on the flight in question. Walters testified:

> Q And you said he was hand-flying the aircraft?
>
> A I believe he was hand-flying the aircraft.
>
> Q As we sit here today you cannot tell me whether he ever attempted to use the autopilot?
>
> A No, sir, I can't.
>
> Q You can't tell me if in his head he wanted to use the autopilot, can you?
>
> A I absolutely cannot.

A-262(Tr. 445:9–17). Walters also testified that, prior to the crash, Prokop was taught each and every one of the risk management factors that every pilot must consider on every flight prior to take-off, including fitness to fly, competency in the airplane, flight experience, aircraft knowledge, weather and other environmental conditions, human factors, and situational awareness. A-257-261(Tr. 421:12–436:20). In addition, Mr. Prokop's friend Patrick Bujold testified that *he* instructed Mr. Prokop on the use of the autopilot and watched him operate it. A-288(Tr. 987:23-988:24).

Given this testimony, the jury had no factual basis on which to conclude that any omission of recovery-from-VFR-into-IMC training was a "direct cause" of the plane crash. See Gerster v. Special Adm'r for Estate of Wedin, 199 N.W.2d 633, 636 (Minn. 1972) (upholding JNOV based on lack of sufficient evidence of direct cause of fire, noting that "the opinion of an expert must be based on facts sufficient to form an adequate foundation for his opinion and that an opinion based on speculation and conjecture has no evidentiary value"). Absent causation, the verdict cannot stand, and this Court should reverse.

IV. EVEN IF THE EVIDENCE PERMITTED A FINDING OF CAUSATION UNDER "TOTAL-OMISSION NEGLIGENCE," THE DISTRICT COURT ERRED IN SUSTAINING THE JURY'S FINDING OF CAUSATION.

Even assuming that the record evidence were sufficient to support the jury's finding of causation under the trial court's new cause of action, the judgments here cannot stand. As with "negligence," the Plaintiffs offered and the court admitted a broad array of causation evidence that had nothing to do with the omissions underlying the theory of recovery the court adopted after trial. And as with negligence, the court's instructions permitted the jury to find causation based on conduct that the trial court itself held could not sustain a claim against Defendants. The judgments based on that verdict cannot stand, and Defendants are at the least entitled to a new trial.

A. Plaintiffs Offered And The Court Admitted Substantial Causation Evidence Having Nothing To Do With A "Total Omission Of Services"

Plaintiffs introduced and the court permitted the jury to consider substantial prejudicial causation evidence that had nothing to do with any claimed violation of the

"total omission" standard of care, the only ground for recovery that the trial court later found permissible. For example, Plaintiffs' expert testified:

- That Defendants' failure to train Mr. Prokop to proficiency on the autopilot was "causally related" to the crash. A-239(Tr. 273:20-274:15);
- That Cirrus's "lack of appropriate management oversight" was "causally related" to the crash. A-240(Tr. 275:10-277:10);
- That Defendants' lack of risk assessment training was "causally related" to crash. A-241(Tr. 281:13-19); see also A-245(Tr. 300:1-24); and
- That Cirrus's failure to use "scenario based" training was "causally related" to the crash. A-242(Tr. 288:18-291:16).

None of these alleged causes of the crash involve the "total omission" of items in the Defendants' curriculum. On the contrary, all of these alleged causes rest on the very claims that both the Alsides court and the trial court agree may *not* form the basis of a claim against an educator: ineffective training, inadequate administrative oversight, and curriculum decisions. See Alsides, 592 N.W.2d at 472; ADD-8, 19.

B. The Jury's Causation Finding Cannot Stand Because the Trial Court's Instructions Did Not Address The New "Total Omission Of Promised Services" Legal Theory.

The trial court's instructions to the jury only magnified the prejudice created by the admission of this body of irrelevant evidence. As discussed in section II(C) above, the trial court never instructed the jury about its new definition of "negligence," using instead the conventional "reasonable care" negligence instruction. See A-307(Tr. 1783:23-1784:9). But the trial court's subsequent causation instructions and the

causation questions about Cirrus and UNDAF incorporated that inappropriate (under the trial court's standard) definition of negligence. See A-307(Tr. 1786:7-1787:22); ADD-95 ("Was this negligence by Cirrus Design Corporation a direct cause of the plane crash?"). The jury was never told that it could find liability only if it found that a defendant's "total omission" of promised services caused the plane crash, and was never asked whether this causal connection existed. Thus, even if Minnesota were to recognize the trial court's new cause of action, the jury's verdict cannot support the judgments here. At the very least, Defendants are entitled to a new trial at which the jury is properly instructed on the new standard of care and the causation requirements tied to it.

V. PLAINTIFF GARTLAND'S COUNSEL'S IMPROPER CLOSING ARGUMENT AND THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY TO DISREGARD HIS COMMENTS JUSTIFIES A NEW TRIAL.

Finally, in the alternative, this Court should reverse and remand this case for a new trial based on the numerous, repeated, and deliberate improper comments in closing argument by Plaintiff Gartland's attorney. This Court reviews rulings concerning improper jury argument for abuse of discretion. Eklund v. Lund, 222 N.W.2d 348, 351 (Minn. 1974). In reviewing comments of counsel, a court should assess whether, in light of the whole record, the comments were so highly prejudicial as to preclude a fair trial. See Nadeau v. County of Ramsey, 277 N.W.2d 520, 524 (Minn. 1979).

The most serious of Plaintiff's attorney's wide-ranging improper arguments included:

- The attorney asked the jury to send a message to corporate America, making comments about "rogue terroristic countries," "Bernie Madoff who stole billions," corporations "that have laid our economic foundation low," and a lack of government oversight. A-313(Tr. 1949:4-18). The trial court found these comments "tantamount to asking the jury to punish the Defendants" and called them "obviously impermissible." ADD-73. See Jewett v. Deutsch, 437 N.W.2d 717, 721 (Minn. App. 1989).
- The attorney called Defendants' suggested damage award of $500,000 "despicable" and compared it to the supposed $600,000 annual cost (not in the record) of imprisoning murderers, terrorists, and warmongers. A-317(Tr. 1972:22-1973:16). The trial court found this argument "improper in many ways," including its references to terrorists and criminals, its assertion of facts not in evidence, and its "egregious" impugning of Cirrus's counsel. ADD-77.
- The attorney made a Golden Rule Argument that asked the jury to "be guided by your respective spirits" and be the "conscience of the community." A-172(Tr. 1952:22-1953:3); A-317(1973:24-25). The trial court agreed that such a "golden rule" argument "has been consistently rebuked." ADD-78. See Ivy v. Sec. Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978).
- The attorney mocked the nationality of Cirrus's corporate witness as a "smiley little English person" and, using a mock German accent,

caricatured him as a Nazi soldier who "should have had the accent of Sergeant Schultz" from Hogan's Heroes. A-320(Tr. 1955:25-1956:14). The trial court found these remarks "questionable" but not wholly outside the bounds of permissibility. ADD-75. See State v. Cabrera, 700 N.W.2d 469, 474-75 (Minn. 2005).

Cirrus timely objected to these improper arguments, A-317-318(Tr. 1974:14–1976:13), and expressly asked the court to instruct the jury to disregard them. A-318(Tr. 1977:1–1978:2). The trial court declined, electing instead to repeat the standard instruction that the statements of counsel are not evidence. A-318(Tr. 1976:2-12), A-321(2006:10-12); CIVJIG 10.25. When Cirrus moved for a new trial, the trial court condemned many of Plaintiff's attorney's arguments, but it the motion on the grounds that none of the improper comments was sufficiently prejudicial and that the court's restatement of the instruction that attorneys' statements are not evidence cured any prejudice. ADD-69-82. Cirrus submits that the trial court abused its discretion in denying this motion for several reasons.

First, although the trial court found insufficient prejudice in any of the individual improper comments to justify a new trial, it unfortunately did not consider the cumulative effect of those comments. See Wild, 234 N.W.2d at 786 (granting new trial based on cumulative effect of misconduct). There can be little question that the combined effect of demeaning Cirrus's witness, impugning Cirrus's attorney, invoking swindlers and terrorists, asking the jury to punish Cirrus, and inviting the jury to make their decision based on emotion rather than fact, all presented in a single closing with no curative

instruction and no opportunity for rebuttal by Cirrus, had a prejudicial effect far beyond that of any of the improper conduct taken alone. The trial court's decision fails to account for this combined effect in any way.

Moreover, the trial court's analysis of prejudice itself is too narrow. The court rejects the existence of prejudice based on its observation that the jury did not give Plaintiffs as much money as Mr. Gartland's attorney requested. ADD-77-78. But the fact that a jury's award may not be quite as unreasonable as a plaintiff's attorney suggests does not mean it is not unreasonable at all. And more importantly, the trial court failed to consider the effect of the jury's remarkable allocation of fault in evaluating prejudice. Knowing that Mr. Prokop's family would recover from a defendant *only* if the jury found that Defendant as much or more at fault as Mr. Prokop, A-308(Tr. 1787:7-11), the jury allocated three quarters of the fault in the case to the Defendants, despite the remoteness of Defendants' conduct and despite the admission of Plaintiffs' expert that Mr. Prokop should not even have taken off given the conditions the morning of the accident. A-250, 255, 298(Tr. 357:10-11, 412:8-11; 1253:8-11). Cirrus submits that this disproportionate allocation of fault demonstrates prejudice resulting from counsel's misconduct in closing as clearly as any excessive award of damages, and has the same ultimate effect.

The court's mere repetition of the "attorney's comments are not evidence" instruction was not an appropriate or adequate cure for the improper comments outlined above. The threat to a fair trial arose not from whether Plaintiff's attorney's statements

were "evidence,"[6] but from whether and how the jury should regard the repeated improper and inflammatory arguments. The circumstances here demanded that the Court specifically instruct the jury to disregard the particular offending comments of Gartland's attorney, not simply repeat a general instruction applicable to all counsel. See Jewett, 437 N.W.2d at 721 (finding a "proper curative instruction" where "[t]he trial court instructed the jury to 'completely disregard the existence or disposition of any criminal proceedings and not let that enter or affect [them] in any way as to [their] verdict in this matter.'"). The generic instruction the Court actually gave was not sufficient to cure the harm caused by the closing argument of counsel for Plaintiff Gartland. Plaintiff Gartland's argument was improper in multiple respects, and the Court failed to cure the resulting prejudice.

Finally, Gartland's counsel's improper comments were undeniably deliberate. This Court and others have repeatedly criticized these very counsel for this very type of unacceptable jury argument. See Jewett, 437 N.W.2d at 721 ("send a message" argument "improper"); Zaitz v. Bezek, 1995 WL 146818 (Minn. App. Apr. 4, 1995) (implication of insurance "inappropriate"); see also Rogers v. Ponti-Peterson # 1720 VFW, 495 N.W.2d 898, 902 (Minn. App. 1993).

In sum, Plaintiff Gartland's attorney's improper comparisons to terrorists and criminals, appeals to spirit and conscience, invocations of ethnic prejudices, and urgings

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[6] The one arguable narrow exception to this was Gartland's attorney's unsupported assertions about the costs of keeping various kinds of prisoners.

to "send a message" to punish Defendants all combined to deprive Cirrus of a fair trial. See Morrissey v. Welsh Co., 821 F.2d 1294, 1304 (8th Cir. 1987) (reversing and remanding for new trial where "the cumulative effects of the numerous improper and inflammatory remarks made by plaintiffs' counsel were prejudicial"). Even assuming an adequate curative instruction were possible, the Court's instruction here did not cure the prejudice. See Adkins v. Aluminum Co. of Am., 750 P.2d 1257, 1265-66 (Wash. 1988) (ordering new trial where court refused to give the specific curative instruction counsel requested in light of opposing counsel's improper golden rule comments). Cirrus is therefore entitled to a new trial.

CONCLUSION

For the foregoing reasons, Cirrus Design Corporation urges the Court to reject the trial court's creation of a new cause of action and to reverse the judgment as a matter of law on the grounds that (1) Minnesota does not recognize a cause of action for negligent performance of contract and (2) evidence does not as a matter of law support a finding of liability or causation. In the alternative, should the Court recognize the trial court's new cause of action, the Court should remand the case for a new trial whose evidence, legal rulings, and jury instructions are consistent with that cause of action. Finally, again in the

alternative, the Court should reverse and remand for a new trial based on Plaintiff Gartland's attorney's improper closing argument.

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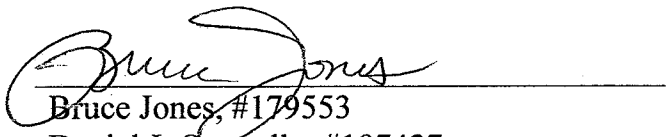

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STATE OF MINNESOTA
IN COURT OF APPEALS

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

Respondent,

vs.

Cirrus Design Corporation and the Estate of Gary Prokop, by and through Katherine Prokop as Personal Representative,

Appellant.

CERTIFICATION OF BRIEF LENGTH

Appellate Court Case Numbers A10-1242, A10-1243, A10-1246, and A10-1247

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,971 words. This brief was prepared using Microsoft Word 2007 software.

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