

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),
 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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STATEMENT OF LEGAL ISSUES¹

1. Does Minnesota now recognize the tort of “negligent breach of contract” and the corresponding potential for unlimited liability under that heretofore unrecognized tort?

Interest of Minnesota Defense Lawyers Association

The MDLA, founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice. The MDLA devotes a substantial portion of its efforts to the defense of clients in civil litigation. Over the past 45 years, it has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

Among the MDLA’s many goals are the protection of the rights of litigants in civil actions, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law in which its members regularly practice. MDLA’s interest in this case is primarily a public one: to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota.

ARGUMENT

I. Introduction

The district court’s order wrongly assumes that every cause of action – whether in contract or tort – provides for unlimited potential liability. Therefore, the court seemingly also assumed that “simply extending the Minnesota Court of Appeals holding [in *Alsides v. Brown Institute, LTD.*, 592 N.W.2d 468 (Minn. App. 1999)] to cases

¹ Pursuant to Rule 129.03, the undersigned certifies that no counsel for a party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the *amicus curiae* and its counsel.

sounding in negligence” would provide a legal basis for upholding tort liability of more than \$16 million in these consolidated cases. (Add. 19-20).² To support these assumptions, the court found the existence of “an independent duty, not dependent on a contract” and used that duty to fashion a tort called “negligent performance of contract” in the nature of “negligent failure to provide training.” (Add. 19, 22, 24) (emphasis omitted). Consistent with the admonition that “[c]reating a new tort is a function properly reserved for the supreme court based upon appropriate facts and records,” (*Federated Mut. Ins. Co. v. Robins, Zelle, Larson & Kaplan*, 456 N.W.2d 434, 439 (Minn. 1990)), the MDLA urges this court to reject not only the creation of this new tort cause of action, but the corresponding potential for unlimited liability as well.

II. The court should not recognize negligent breach of contract as a cause of action.

A. The defendants owed no duty to Mr. Prokop that was independent of a contract.

The potential sources for a legal duty are few – a contractual relationship, an applicable statute, the common law, and the parties’ conduct. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996). Contractual duties arise from a promise, and “[c]ontract actions are created to protect the interest in having promises performed.” W. Prosser, *Handbook of the Law of Torts* § 92, at 613 (4th ed. 1971). One easy way to determine whether the source of a legal duty is contractual is to examine whether the defendant would have any obligation toward the plaintiff absent a

² Record citations are to the addendum and appendix filed by the University of North Dakota Aerospace Foundation (“UNDAF”).

contract. *See D & A Dev. Co v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984) (stating that the architect’s “duty was created by its promise, not by law or by public policy. Apart from the contract, [the architect] had no duty to complete the plans at all”). The same is true in this case. The defendants’ duty to provide transition flight training was created by their contractual promise. Or, examined conversely, apart from a promise to provide transition flight training, the defendants owed no duty to provide any flight instruction to Mr. Prokop at all. Indeed, as one of the plaintiffs’ counsel was constrained to admit, “[t]he claim was, you didn’t give Mr. Prokop what you promised to give him.” (T. vol. 22 at 16-17 (02/19/10 Hrg.)).

Despite the conceded fact that this case is founded upon an alleged breach of a contractual promise, the court ruled “that UNDAF (and by proxy) Cirrus owed Prokop a duty of care” in tort. (Add. 30). The court defined this duty as “one of [exercising] due care in actually providing the training without recourse to challenging its adequacy.” (Add. 20) (emphasis omitted). And, said the court, the duty is “an independent duty, not dependent on a contract” (Add. 22). This court should reject these rulings.

First, no such independent source of duty exists. The supreme court has narrowly circumscribed the sources of legal duty, and none but the parties’ contract apply here. *Servicemaster of St. Cloud*, 544 N.W.2d at 307. Absent their contract, the parties had no relationship upon which a duty could be founded. The district court did not identify a legally cognizable source for the “independent” duty it imposed, nor could the MDLA find such a source in Minnesota law.

It's true that a duty to meet a given standard of care accompanies the formation of certain professional relationships, but such a duty has no application here. For example, a doctor's legal duty is often said to require him or her to use the same degree of skill and learning that a doctor in good standing would use in a similar practice and in similar circumstances. *See* 4A *Minnesota Practice*, CIVJIG 80.10. But that duty arises only upon the formation of a physician-patient relationship. *See, e.g., Henkemeyer v. Boxall*, 465 N.W.2d 437, 439-40 (Minn. App. 1991) (holding that independent medical examiner owed no duty to an examinee to discover cancer because no physician-patient relationship exists in such circumstances), *review denied* (Minn. Mar. 27, 1991). The same type of professional duty arises upon the formation of an attorney-client relationship and myriad other professional relationships, such as architect-client and accountant-client. Because the relationship gives rise to a duty, such professionals become liable in negligence if they fail to conform to the required standard of conduct. *See, e.g., Rasmussen v. Prudential Ins. Co.*, 277 Minn. 266, 268-69, 152 N.W.2d 359, 362 (1967).

But that is the very type of liability rejected in the context of the relationship between an education provider and its students. *Alsides*, 592 N.W.2d at 473. An educational provider has no tort duty to provide any given training – or to provide the training at a given level of skill – because courts will not inquire into whether, the manner of, or the extent to which, providing that training falls within or beyond the standard of care for such providers. *Id.* In short, the courts have refused to recognize a common-law duty independent of the parties' contract. Indeed, the *Alsides* court

expressly limited its recognized exception to cases “alleg[ing] that the institution *failed to perform on specific promises . . .*” *Id.* (emphasis added). Specific promises are the hallmark of contracts. Consistent with *Alsides*, the defendants’ duties, if and to the extent they existed, were necessarily dependent on, not independent of, a contract.

Second, the district court’s order confuses “duty” and “standard of care.” A duty is an obligation imposed from a legally recognized source, like a contract or the common law. Discharging a contractual duty is called performance. Correspondingly, discharging a tort duty is called meeting the standard of care. *Rasmussen*, 277 Minn. at 208, 152 N.W.2d at 362 (stating that person under tort duty must “conform to a particular standard of conduct toward another”). But “[a] defendant will not be bound to conform its conduct to a [tort] standard of care unless a legally recognized duty exists.” *ServiceMaster of St. Cloud*, 544 N.W.2d at 307. In this case, the district court conflated the concepts of contractual performance and tort standard of care by re-labeling contractual performance – *i.e.*, providing promised training – as a so-called “standard of care,” and then using that standard to create a tort “duty.” The district court’s merging of these concepts is unmistakable in its statements that: (1) “[t]he standard [of care] is simply one of due care in actually **providing** the training” (Add. 20) (emphasis in original); and (2) “in the case of UNDAF this exercise of skill and judgment only requires giving the training which they set out to give.” (Add. 29) Re-labeling the contractual duty to perform as the “standard of care” does not create a duty “independent of a contract.” The defendants’ duties, if and to the extent they existed, were dependent

on, not independent of, a contract. This court should reject the notion that a duty independent of contract exists in the circumstances of this case.

B. The district court grounded its ruling in negligent breach of contract, a heretofore unrecognized tort.

Re-labeling the contractual obligation to perform as a tort “standard of care” allowed the district court to impose liability for negligent breach of contract, a tort heretofore unrecognized in Minnesota. *See, e.g., Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 424 (Minn. 1987) (stating that “negligent breach of contract [is] a cause of action not recognized in this state”). According to the court’s order, the defendants could be negligent for failing to use “due care” in performing their contractual undertaking. (Add. 20) (holding that education institution “must exercise due care in actually providing that course of study”) (original emphasis deleted).³ But under Minnesota law, to succeed on a claim sounding in negligence, “a plaintiff must prove as one element that the defendant breached ‘some duty imposed by law, not merely one imposed by contract.’” *D & A Dev.*, 357 N.W. 2d at 158 (quoting *Keiper v. Anderson*, 138 Minn. 392, 398, 165 N.W. 237, 238 (1917)); *see also, Rasmussen*, 277 Minn. at 269, 152 N.W.2d at 362 (stating that “[l]acking duty, there can be no negligence”); W. Prosser, *Handbook of the Law of Torts* § 68 at 481 (5th ed. 1984) (stating that “being under no duty, [the defendant] cannot be charged with negligence”). In this case, the plaintiffs

³ The court did not define the role of “due care” in this formulation. Based upon the recognized meaning of “due care” in negligence law, the court’s formulation would mean that an educational institution is not liable in tort for completely failing to provide a given course of study so long as it was duly careful in its complete failure. This legal disconnect demonstrates that the district court’s ruling cannot withstand close scrutiny.

succeeded on a claim sounding in negligence – negligence is the only basis upon which the underlying judgment rests – yet no source of duty exists beyond the parties’ contract.

In addition to converting contractual performance into a tort standard of care, the district court used a second re-labeling of terms to reach its holding and avoid the proscribed negligent breach of contract. The court labeled its cause of action “negligent *performance* of contract,” a cause of action the court described as “permissible in Minnesota [and] distinguishable from, but similar to, * * * negligent *breach* of contract.” (Add. 24) (emphasis added). Combining the cause of action (“negligent performance of contract”) with the standard of care (“due care in actually providing the training”), the district court ruled that “[t]he only time the standard of care may be violated is when there is a total omission, as here, in providing specific training included in the curriculum.” (Add. 20) (original emphasis deleted).

Regardless of label, the substance of this ruling is the recognition of liability for negligent breach of contract. A duty to provide “specific training included in the curriculum” does not exist in the common law or in any legally cognizable source beyond contract. And no legal source exists for declaring that the discharging of such a contractual obligation is measured by a tort “standard of care.” Indeed, *Alsides* itself holds that educational liability must rest on the “alleg[ation] that the institution failed to *perform on specific promises . . .*” 592 N.W.2d at 473 (emphasis added). The “total omission” of training is, at most, the failure to perform a promise, known in the law as a breach of contract. In other words, “total omission” is nothing more than failed performance, and failed performance is nothing more than a breach of contract. Only

semantics separates “negligent-performance-through-total-omission” from negligent breach of contract. Creating a new tort is a function reserved for the supreme court. *Federated Mut.*, 456 N.W.2d at 439. This court should decline to recognize the tort cause of action upon which the district court grounded its decision in this case.

C. The limits on educational liability – i.e., breach-of-contract liability for failure to perform on specific promises – also limits damages to the economic benefit of performance.

The law recognizes contract actions to protect the parties’ interest in having promises performed. *D & A Dev.*, 357 N.W.2d at 156. Therefore, when this court in *Alsides* rejected causes of action sounding in educational malpractice, it logically still recognized (with limitations) that “a student may bring an action against an educational institution for breach of contract . . . if it is alleged that the institution failed to perform on specific promises it made to the student” 592 N.W.2d at 473.⁴ But when the district court said that it was “simply extending” the *Alsides* holding “to cases sounding in negligence,” it not only recognized liability for negligent breach of contract, it created a previously unrecognized basis for upholding staggering liability for consequential tort damages. (Add. 19-20).

The purpose of awarding damages for breach of contract is to place the non-breaching party in the same economic position he or she would have enjoyed had the contract been performed. *Lesmeister v. Dilley*, 330 N.W.2d 95, 102 (Minn. 1983). This measure of damages protects the non-breaching party’s interest in having the promise

⁴ The *Alsides* court also recognized a student’s right to bring an action for fraud or misrepresentation in the same circumstances, but the plaintiffs made no such claim here. 592 N.W.2d at 473.

performed by restoring his or her loss of economic value. A good example is *Alsides* itself. If the former students in *Alsides* proved on remand that Brown Institute had “agreed, but failed, to provide instruction on the installment and upgrade of the Unix operating system” (592 N.W.2d at 474 n.3), the proper measure of damages would be the students’ cost to obtain that computer training elsewhere.⁵

The same is true in this case. Had there been evidence of UNDAF’s complete failure to provide training on the use of the auto-pilot feature, UNDAF would not have become the guarantor of its student’s flight safety in IFR conditions. Instead, the measure of damages would be the cost of obtaining that training elsewhere. A provider of training does not become liable for staggering tort liability in such circumstances, because “a party is not entitled to recover tort damages for a breach of contract, absent an ‘exceptional case’ where the breach of contract ‘constitutes or is accompanied by an independent tort.’” *Cherne Contracting Corp. v. Wausau Ins. Co.*, 572 N.W.2d 339, 343 (Minn. App. 1997) (quoting *Wild v. Rarig*, 302 Minn. 419, 440-41, 234 N.W.2d 775, 789-90 (1975)), *review denied* (Minn. Feb. 19, 1998). And, bringing the discussion full circle, the test for an independent tort is “whether a relationship would exist which would give rise to the legal duty without the enforcement of the contract promise itself.” *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 308 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). In other words, tort liability follows only when “the duty is an incident of

⁵ Although the plaintiffs made no claim for misrepresentation, the measure of damages for such claims is similar – the plaintiffs’ out-of-pocket loss. *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988).

the relationship rather than the contract. . . .” *Wild*, 302 Minn. at 441, 234 N.W.2d 790.⁶ No such relationship or duty exists in this case, as the *Alsides* holding makes clear; therefore, no legal basis exists for imposing tort liability in these circumstances.

D. Public policy strongly supports upholding the prohibition on tort liability for negligent breach of contract and the limitations on damages for breach of contract.

The district court did far more than “simply extend[]” the *Alsides* holding “to cases sounding in negligence.” (Add. 19-20). By assuming that this extension was all that would be necessary to change the fundamental nature of the available damages, the court extended liability for educational institutions far beyond what Minnesota law has ever recognized. Not only is such an extension an improper function for lower courts, it defies sound public policy as well.

It is no exaggeration to state that affirming the district court’s decision would portend a flood of litigation. Then every outcome related to a subject matter implicated by prior training would warrant developing a theory about “complete omission” of an item in the curriculum. A few examples should demonstrate that the possibilities are endless:

⁶ It bears repeating that the underlying judgment rests solely on tort liability for negligence. Tort damages should not be confused with consequential damages for breach of contract, a claim the plaintiffs did not, and could not, make. *See, e.g., Lesmeister*, 330 N.W.2d at 103 (allowing recovery of consequential economic damages that “could reasonably be supposed to have been contemplated by the parties when making the contract as the *probable* result of the breach”) (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854) (emphasis added)). Regardless, even if *Hadley v. Baxendale* applied to tort damages, the parties’ agreement in this case specifically states that “[n]either Cirrus, nor its training contractor [UNDAF], will be responsible for the competency of purchaser . . . during or after the training.” (Tr. Exh. 7 at p. 19).

- Nutritionist’s liability for complete failure to teach healthy food options for maintaining proper levels of blood sugar – obese student develops diabetes and its serious affects on health.
- Driving school’s liability for complete failure to teach left-hand turns – driver and passenger are injured in an intersection collision.
- Security guard trainer’s liability for complete failure to teach tactics for avoiding armed confrontations – guard is shot during a confrontation.
- Smoking cessation trainer’s liability for complete failure to teach strategies for avoiding urges to smoke – smoker relapses and develops serious smoking-related health issues.
- Bartending school’s liability for complete failure to teach effective tactics for indentifying intoxicated patrons – intoxicated patron injures himself and third person.
- Law school’s liability for complete failure to teach ethical restraints on handling client funds – lawyer is disbarred and client loses substantial money.

The possible examples are indeed endless, and no disciplined analysis distinguishes these examples from this case. The underlying public policy supporting the *Alsides* holding applies equally to the district court’s ruling in this case.

Moreover, when Minnesota courts have recognized new avenues of liability – invasion of privacy comes to mind as a recent example – ultimately the willingness to do so is grounded, at least in part, in sensible public policy for shaping acceptable conduct. Here, however, affirming the district court’s ruling would reduce an entire theory of liability to an analysis of bullet points on a syllabus. In this case, had UNDAF prepared a syllabus with a single bullet point for all auto-pilot training, the district court could not even plausibly have grounded its decision in a “total omission” of training. Reducing the analysis of liability to the number and detail of bullet points on a syllabus lacks a sound basis in public policy. In other words, there is no public policy *substance* in the district

court's ruling as to what the actionable conduct was in this case. This court identified and addressed the applicable public-policy considerations in *Alsides*. The court should follow both the legal substance and the public policy of *Alsides* and rule that no tort liability exists in these circumstances.

CONCLUSION

The expansion of tort liability is properly a function of the supreme court. The district court expressly stated that it was expanding tort liability by extending the breach-of-contract exception to educational liability – an exception this court recognized in *Alsides* – to tort liability. In doing so, the district court also imposed liability for negligent breach of contract, a cause of action the supreme court has expressly disavowed. Finally, the effect of the court's rulings was to expand the fundamental nature and extent of available damages. For the substantive and policy reasons set forth above, and in the court's decision in *Alsides*, this court should reject those rulings and leave expansion of liability and damages to the supreme court.

Respectfully submitted,

Dated: October 5, 2010

By 

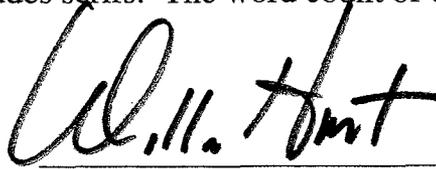
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FORM AND LENGTH CERTIFICATION

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