

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).

**REPLY BRIEF OF APPELLANT
 UNIVERSITY OF NORTH DAKOTA AEROSPACE FOUNDATION**

William J. Katt, Esq. (#390715)
 LEIB & KATT, LLC
 River Bank Plaza, Suite 600
 740 North Plankinton Avenue
 Milwaukee, WI 53203
 (414) 276-8816

Charles E. Lundberg, Esq. (#6502X)
 Steven P. Aggergaard, Esq. (#336270)
 BASSFORD REMELE,
 A Professional Association
 33 South Sixth Street, Suite 3800
 Minneapolis, MN 55402
 (612) 333-3000

*Attorneys for Appellant
 University of North Dakota Aerospace Foundation
 (Additional Counsel continue on following page)*

Philip Sieff, Esq. (#169845)
Vincent J. Moccio, Esq. (#184640)
ROBINS, KAPLAN, MILLER
& CIRESI LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

*Attorneys for Respondent Rick Glorvigen, as
trustee for the next-of-kin of James Kosak*

Bruce Jones, Esq. (#179553)
Daniel Connolly, Esq. (#197427)
Dan Herber, Esq. (#386402)
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

-and-

Patrick E. Bradley, Esq.
Tara E. Nicola, Esq.
REED SMITH, LLP
Princeton Forrestal Village
136 Main Street, Suite 250
Princeton, NJ 08540-7839
(609) 524-2044

*Attorneys for Respondent
Cirrus Design Corporation*

Andrea B. Niesen, Esq. (#343493)
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue S.E., Suite 305
Rochester, MN 55904

*Attorneys for Amicus Curiae
Minnesota Association of Justice*

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

*Attorneys for Amicus Curiae
Minnesota Defense Lawyers Association*

Eric J. Magnuson, Esq. (#66412)
BRIGGS AND MORGAN
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

-and-

Edward J. Matonich, Esq. (#68603)
Darrold E. Persson, Esq. (#85364)
David Arndt, Esq. (#149330)
MATONICH & PERSSON,
CHARTERED
2031 Second Avenue East
P.O. Box 127
Hibbing, MN 55746
(218) 263-8881

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

Timothy Schupp, Esq. (#130837)
FLYNN, GASKINS & BENNETT, LLP
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
(612) 333-9500

*Attorneys for Respondent Estate of Gary Prokop,
by and through Katherine Prokop as personal
representative*

Robert J. Hajek, Esq. (#39512)
HAJEK & BEAUCLAIR, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305

-and-

Ronald D. Golden, Esq.
Raymond D. Speciale, Esq.
YODICE ASSOCIATES
411 Aviation Way
Frederick, MD 21701

*Attorneys for Amicus Curiae
Aircraft Owners and Pilots Association*

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INTRODUCTION

From airline pilot James Walters' criticism of the absence of "scenario-based" training to his opinion that pilot Gary Prokop lacked "tools" to make decisions, quality of education was the clear focus of this case from the start. (Tr. 227:2-24, 288:17-291:15.) And claims challenging the "quality of education" provided by Appellants Cirrus Design Corporation and University of North Dakota Aerospace Foundation ("UNDAF") fall squarely within the educational malpractice bar. *Alsides v. Brown Inst.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999).

But Respondents Thomas M. Gartland and Rick Glorvigen now assert that the case they brought to a verdict was not about quality of education. In identical footnotes, they claim the "clear focus" was simply on the initial training syllabus and a purported "lack of oversight" to ensure that a flight 4a training item titled "Recovery from VFR into IMC (auto-pilot assisted)" had a checkmark next to it. (Glorvigen Br. 31 n.8; Gartland Br. 31 n.15.) But Walters' testimony and the rest of the thick trial transcript belie Respondents' position. And in fact, Prokop received *substantial* ground and documentation training on the autopilot, and the training syllabus demonstrates Prokop received *in-flight instruction* on the autopilot during flights 1 and 5a. UNDAF Br. 6-7 (citing Tr. 387:3-10, 543:15-544:20, 545:9-12; Trial Ex. 4, at A87, 90, 92.) Respondents virtually ignore these undisputed facts.

Respondents also distance themselves from the district court's *sua sponte* effort to create a "negligent performance of contract" cause of action. Yet, neither Respondents nor amicus curiae Minnesota Association for Justice ("MAJ") has cited a single appellate

decision where an educator's liability has been affirmed for an injury that occurred *outside the time of instruction*, as occurred here. Respondents have not even cited an appellate decision where a flight school has been held liable at all.

As for Judge Paul A. Magnuson's federal decision, Respondents ignore that UNDAF was not even a party when the federal court denied *Cirrus'* motion for summary judgment. Nor do they acknowledge Judge Magnuson's stated basis—that "Cirrus' primary business is building and selling airplanes, not training pilots." Unquestionably UNDAF is in the business of training pilots, and unquestionably the educational malpractice doctrine bars claims with respect to UNDAF.

Further, Respondents still have failed to provide any basis for holding UNDAF liable when UNDAF was never served with a summons and complaint and where Plaintiffs affirmatively represented that they were not asserting any claim against UNDAF, telling the district court "we didn't sue UND" and "we only sued Cirrus." Plaintiffs also do not come to grips with the serious legal deficiencies on causation. Finally, Glorvigen has utterly failed to articulate how a school could owe a duty to a non-student such as aircraft passenger James Kosak.

Accordingly, this Court should hold the district court erred by not granting UNDAF's motion for judgment as a matter of law ("JAML"). Alternatively, the Court should hold UNDAF can owe no duty to a non-student such as aircraft passenger Kosak.

ARGUMENT

I. RESPONDENTS FAIL TO DEMONSTRATE THAT THEIR CLAIMS FALL OUTSIDE THE EDUCATIONAL MALPRACTICE BAR

To try to explain why the educational malpractice bar does not apply to claims involving UNDAF, Respondents make four main arguments: (1) Judge Manguson's federal decision is controlling, (2) Judge David J. Ten Eyck's decision is irrelevant, (3) this Court's precedent in *Alsides v. Brown Institute* does not apply, and (4) this was actually a products liability case. Although all parties now agree the state district court created no viable cause of action for "negligent performance of contract," Respondents' other arguments fail even on their own cited authority.

A. UNDAF Was Not a Party When Judge Magnuson Issued His Decision, So It Is Irrelevant With Respect to UNDAF

Gartland claims UNDAF "glossed over" Judge Magnuson's decision. But even a cursory review of the federal case demonstrates UNDAF was not a party when Judge Magnuson denied Cirrus' motion for summary judgment on educational malpractice grounds. UNDAF became a party only afterward, only after being served with Cirrus' indemnification demand and after the matter was remanded to state court. Respondents gloss over these facts. Respondents also ignore Judge Magnuson's dismissal of Plaintiffs' strict liability and breach of warranty claims.

Judge Magnuson clearly articulated the basis for not dismissing Cirrus. It was because "Cirrus' primary business is building and selling airplanes, not training pilots." *Glorvigen v. Cirrus Design Corp.*, No. 06-2661, 2008 WL 398814, at *4 (D. Minn. Feb. 11, 2008). But UNDAF's primary business is training pilots. In any event, the

unpublished federal decision is not binding precedent on whether Minnesota recognizes a negligence cause of action involving a flight school. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. Ct. App. 1986) (while federal decisions are “entitled to due respect in state court,” only decisions of the Minnesota Supreme Court are binding on court of appeals).

Further, a federal court only makes a “prediction” on how a state’s appellate courts would rule on an educational malpractice issue. *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006), at *15, *17. Here Judge Magnuson’s ruling was but a prediction. To the degree it is relevant at all, it would be ripe for this Court’s review.

B. The Parties Agree Minnesota Recognizes No Cause of Action for Negligent “Breach” or “Performance” of Contract

Respondents appear as perplexed as UNDAF about the district court’s 84-page ruling. Gartland states “negligent breach of contract is not the claim.” (Gartland Br. 35.) But the district court’s *sua sponte* ruling was that Gartland and Glorvigen had “properly framed” their claims as “negligent *performance* of contract,” not negligent breach, and the district court went on to distinguish between the two. (Add. 23, 29-31.) Gartland cites no authority indicating that negligent performance of contract is a viable cause of action in Minnesota. There is none.

Glorvigen similarly criticizes UNDAF for providing “string-cites” of cases on Pages 35-36 of UNDAF’s brief, distinguishing them as situations involving “commercial transactions and purely economic losses.” (Glorvigen Br. 22-23.) But this was the line

of cases on which the *district court* relied to affirm this verdict. UNDAF cited them only to demonstrate the legal error, an error all parties now apparently acknowledge.

Nevertheless, Respondents still claim “terms of [an] agreement can be considered by the jury in deciding the reasonableness of the conduct of those parties.” (Gartland Br. 36.) Gartland’s main authority is *Mervin v. Magney Construction Co.*, 416 N.W.2d 121 (Minn. 1987), holding that breach of a construction contract cannot constitute negligence per se. But negligence per se is what Respondents’ case would become should the Court adopt Respondents’ assertion that the trial’s “clear focus” was on the flight-training syllabus.

Further, to the degree the syllabus was an “agreement” containing “terms” with some relevance with respect to establishing a duty, the syllabus involved parties to this case. In *Mervin*, by contrast, the contract was between the defendant construction contractor and the *nonparty* United States Army Corps of Engineers. 416 N.W.2d at 122. This also was true in Gartland’s other cited cases. See *Dornack v. Barton Constr. Co.*, 272 Minn. 307, 317, 137 N.W.2d 536, 543 (1965) (contract between defendant road-construction contractor and nonparty State of Minnesota); *Rausch v. Julius B. Nelson & Sons, Inc.* 276 Minn. 12, 19, 149 N.W.2d 1, 6 (1967) (contract between defendant general contractor and nonparty school district); *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496 (Minn. 1997) (involving checklist that nonparty City of Minneapolis sent to defendant).

This is a key distinction given the *Mervin* court's warning against confusing "voluntarily assumed" contract obligations with tort obligations that are imposed "without regard to the consent of the parties":

The plaintiff contends, however, that even if the manual does not have the force and effect of law, incorporation of the safety requirements provided in the manual established the standard of care for performance of the contract and made violation negligence per se. **The argument confuses contract obligations, which are voluntarily assumed, with tort obligations, which are fixed and imposed by the law itself without regard to the consent of the parties.** See generally W. Keeton, Prosser and Keeton on the Law of Torts, § 92 (5th ed. 1984). This court has consistently held that the standard of care owed to others by a contracting party is not fixed by the terms of the contract.

Mervin, 416 N.W.2d at 124-25 (emphasis added). Here, as Cirrus also cogently explains, Respondents have committed a fundamental error by confusing contract and tort obligations. (Cirrus Reply Br. 19-20, 23.) A common-law training duty simply cannot be "fixed" by "terms" of a training syllabus consistent with Minnesota law.

Gartland's citation to *Rausch* actually demonstrates this very point. After stating "the general rule that contract provisions *do not* create duties to strangers to the contract," the supreme court explained that because only a common law negligence claim went to the jury in that case, "plaintiff's verdict does not rest upon any contract theory of liability, [and] *plaintiff will not be permitted to raise any such theory on appeal.*" 276 Minn. at 19, 149 N.W.2d at 6 (emphasis added). The exact same rationale applies here and the result affirmed in *Rausch* was what should have been ordered here: judgment for the defendant.

A full reading of *McCarthy* eviscerates Gartland's claim that the syllabus could establish bounds of a negligence duty. In *McCarthy*, a landlord who was found negligent for failing to abate lead in an apartment claimed he acted reasonably because he acted in compliance with a "contractor checklist" the Minneapolis Health Department had sent him. This Court agreed the checklist imposed a duty, but the supreme court stated it was "troubled by this reasoning," citing *Mervin*, and specifically *rejected* the idea that a checklist can establish "the extent of the duty owed":

In other words, while the terms in an agreement could be considered by the jury in deciding reasonableness, they would not, by themselves, establish a standard of care. **Therefore, we specifically reject the court of appeals' apparent use of a contractor checklist as conclusively establishing the extent of the duty owed by a landlord.**

McCarthy, 567 N.W.2d at 504-05 (emphasis added); accord *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 117 n.8 (Minn. 1979) (describing activities in curriculum bulletin "as guidelines [that] did not establish mandatory affirmative duties for teachers, principals, or superintendents"). Even Respondents' own authority conclusively demonstrates why UNDAF cannot be liable on any theory that the checklist delineated a standard of care.

C. This Court's Articulation of the Educational Malpractice Bar in *Alsides* Applies With Full Force Here

The educational bar in *Alsides v. Brown Institute* came from negligence cases and has been applied to bar negligence claims, including claims against flight schools. Nevertheless, Respondents contend the educational malpractice bar does not apply. The Estate, a Defendant at trial that filed no cross-appeal here, likens negligence claims to

fraud or misrepresentation claims, which *Alsides* permits under limited circumstances. But even if it were proper for a Defendant in the Estate's position to make such an argument, its sole authority is *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn. 1989), where the supreme court held there was no duty. *Id.* at 378. No claims were pleaded against UNDAF, let alone with the particularly Minn. R. Civ. P. 9.02 would require for fraud or misrepresentation claims.

As Cirrus also explains (Cirrus Reply Br. 9-11), Respondents primarily focus on the newly cited *Larson v. Independent School District No. 314* case and two Connecticut cases. But in each, students were injured *during instruction*, not afterward as here. This very distinction prompted the Missouri Court of Appeals to apply this Court's precedent in *Alsides* to bar a negligence claim against a flight school. *See Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696, 699-701 (Mo. Ct. App. 2008) (citing *Alsides*, 592 N.W.2d at 472).

1. Respondents fail to explain why the *Alsides* public policies do not apply

Gartland summarily asserts "educational malpractice is not the claim here." (Gartland Br. 30-31). "Educational malpractice" was not a claim in *Alsides* either, but this Court analyzed the claims through that prism. 592 N.W.2d at 471-72. A plaintiff need not plead the words "educational malpractice" for claims to be barred as such. *See, e.g., Cavaliere v. Duff's Bus. Inst.*, 605 A.2d 397, 403 (Pa. Super. 1992) (explaining bar applies whenever claim is "framed in terms of tort or breach of contract" and equally to trade and business schools).

Respondents next make a series of arguments about how the policies underlying the educational malpractice bar are not necessarily applicable on these unique facts, and therefore that the bar itself should not be applied here. As a threshold matter, this would be exactly the same as arguing in a case where a statute of limitations clearly barred a claim that the statute should not be applied because the unique facts of a case do not implicate the policies underlying the limitations statute (*e.g.*, missing witnesses, faded memories, etc.). No court has ever suggested a statute of limitations could be avoided because some policies behind the statute in general do not apply in a particular case. But that is precisely the sort of argument Respondents make here.

In fact, the public policies underlying the educational malpractice bar are unquestionably applicable here. The Estate of Gary Prokop suggests the bar “was developed to provide protection” to educators. (Estate Br. 21.) Actually, the bar protects *courts* from having to define a standard of care, confronting “inherent uncertainties about causation,” guarding against a “flood of litigation” against schools, and being “embroil[ed]” with overseeing educators’ day-to-day operations. *Alsides*, 592 N.W.2d at 472. The bar does not immunize educators from all personal injury claims, as evidenced by *Larson* and the Connecticut cases that affirmed educators’ liability for injuries during instruction.

In trying to divert attention from *Alsides*’ articulated concern over establishing a standard of care, Glorvigen ends up demonstrating how much training Prokop *did* receive by conceding “Respondents do not complain that the training materials—the Initial Training Syllabus (A86-94), the Cirrus SR-22 Training Manual (RA29-216), and

PowerPoint slides used during the training (RA255-368)—were deficient.” (Glorvigen Br. 35.) Importantly, those *300 pages* of undisputedly sufficient materials in Glorvigen’s Appendix include the training manual, which used pictures and words to demonstrate the precise procedure for escaping “Inadvertent IMC” conditions: “1. Establish Straight and Level,” “2. Activate Autopilot to Hold Heading and Altitude, 3. Reset Heading for a 180° turn, 4. Contact ATC for Assistance.” (RA160.) Respondents’ own submissions to this Court demonstrate that if Prokop did not know this procedure, he should have.

In contending Prokop’s attitude, motivation, and temperament were irrelevant, Glorvigen claims “[t]here was no evidence presented that Prokop’s ability to receive product instruction was affected by any of these factors.” (Glorvigen Br. 35-36.) But the *Alsides* Court did not limit its concerns to inability to *receive* instruction. The concerns apply equally to any inability to *implement* instruction, something affected by motivational and temperamental factors such as a pilot’s pressures to reach a destination, which Walters conceded are “always a consideration.” (Tr. 329:2-5.) *See also Dallas Airmotive, Inc.*, 277 S.W.3d at 701 (“many factors contribute to the quality of a student’s education *and the quality of his later performance*”) (emphasis added).

As for *Alsides*’ articulated concerns about a “flood of litigation” and judicial micromanagement of educators, the Estate merely states “Cirrus is not a school.” (Estate Br. 27.) Similarly, Glorvigen claims “Appellants are not educational institutions” and suggests the bar applies only when “academic freedom” and “autonomy” are at risk. (Glorvigen Br. 36-37.) But UNDAF most certainly is a school, and by adopting the bar

in *Alsides*—a case involving a for-profit training school—this Court conclusively demonstrated the bar applies to an educator such as UNDAF.

Respondents virtually ignore *Moss Rehab v. White*, 692 A.2d 902 (Del. 1997) (claim against driving school barred) and *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986) (claim against chiropractic school barred). The Estate distinguishes them on grounds that here transition training was “part of the purchase price.” (Estate’s Br. 29-30.) But Prokop purchased *extra* training not included in the purchase price. (Gartland Br. 11.) Further, holding UNDAF liable simply because Cirrus factored some of Prokop’s training into the SR-22’s purchase price would make education providers liable anytime someone other than the student (*e.g.* an employer) pays part of a tuition bill.

Remarkably, Glorvigen limits his analysis of *Moss Rehab* to a footnote and ignores the grave public-policy ramifications of holding a flight school liable for an aircraft passenger’s injury. His bare attempt is to describe Moss Rehab as being “unquestionably in the business of training drivers.” (Glorvigen Br. 41 n.10.) But, again, UNDAF is *unquestionably* in the business of training pilots, and Glorvigen’s utter failure to distinguish *Moss Rehab* or to assuage flood-of-litigation concerns speaks volumes.

2. The Missouri Court of Appeals’ Application of *Alsides* Demonstrates Liability Arises Only During Instruction

As UNDAF demonstrated (UNDAF Br. 26-29), the Missouri Court of Appeals applied this Court’s decision in *Alsides* to bar negligence claims against a flight school. See *Dallas Airmotive, Inc.*, 277 S.W.3d at 699-700. The Estate claims *Dallas Airmotive* and *Sheesley* focused “on the substance of the training itself” whereas here the claim

centered on “omission of training that was supposed to be provided.” (Estate Br. at 27-28.) But omission of training on exhaust-system failure was a claim in *Sheesley*, 2006 WL 1084103, at *15-*17. And omission of training on engine-shutdown procedure was a claim in *Dallas Airmotive*, 277 S.W.3d at 698.

These claims are analytically identical to this case’s alleged omission of one part of the training on the autopilot-assisted procedure for escaping IMC-like conditions. As the *Sheesley* court explained, differentiating between claims challenging “overall education” and “specific procedures” of flight training is a “distinction without a difference” in negligence cases because “[i]n both instances, the plaintiff is alleging that the school did not teach the student what he or she needed to know.” *Sheesley*, 2006 WL 1084103, at *16.

Glorvigen suggests *Dallas Airmotive* supports Respondents’ position by selectively quoting language from the decision stating that the “duty not to cause physical injury does not disappear when the negligent conduct occurs in the educational setting.” (Glorvigen Br. 38 (citing *Dallas Airmotive*, 277 S.W.2d at 700).) But Glorvigen omits the critical language that comes immediately after his selective citation—language that persuasively distinguishes the Connecticut cases Respondents cite as situations involving injuries “during the course of instruction or supervision”:

The duty pertains to an educator or supervisor using reasonable care so as not to cause physical injury to a trainee **during the course of instruction or supervision.** *Id.* For instance, a woodworking shop instructor has a duty “to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.” *Kirchner v. Yale*

Univ., 150 Conn. 623, 192 A.2d 641, 643 (1963). The duty recognized was the duty owed by an educator not to cause physical injury by negligent conduct **in the course of instruction**. *Id.* Another example is the duty of a medical school residency program to train a resident in needle safety and supervise him, in the course of his instruction, while performing a procedure involving needles. *Doe v. Yale Univ.*, 252 Conn. 641, 748 A.2d 834, 846-50 (2000). It is the duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee **during the course of instruction or supervision**. *Id.*

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

Dallas Airmotive, 277 S.W.3d at 700-01 (emphasis added). Here, too, this case is and always has been about the quality of instruction.

An injury in the classroom also was the circumstance in *Larson*, the only case Gartland cites to support his contention that Minnesota authorizes a cause of action for “failure to follow a prescribed curriculum intended to provide adequate instruction for the safety of the student.” (Gartland Br. 33.) As Gartland’s and MAJ’s briefs admit, the student was injured *during* a junior-high gym class while doing a “running headspring.” (*Id.*; MAJ Br. 6.) Here, by contrast, the injury did not occur during flight training, and holding UNDAF liable would be akin to holding the educator in *Larson* liable had the child been injured months later while doing a running headspring at home.

UNDAF simply was in no position to ensure that Prokop would perform the escape-from-IMC maneuver as instructed. *See Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 906 (Mich. 2000) (holding training school could not be liable because it was in no “position to ensure that plaintiff would make proper use of the instruction he received,”

and jury could only “speculate about whether such negligence was a proximate cause”). The educational malpractice bar easily co-exists with the supreme court’s decision in *Larson*.

3. Respondents Have Cited No Decision Where Negligence Liability Against a Flight School Has Been Affirmed

The Respondents and their amicus curiae have failed to cite even a single appellate decision where a negligence claim against a flight school has been affirmed. Respondents cite a district court case, *In re Cessna 208 Series Aircraft Product Liability Litigation*, 546 F. Supp. 2d 1153 (D. Kan. 2008), but the procedural posture there was the reverse of this case. After a state trial court ruled (without written opinion) that Texas would recognize a negligent training claim against FlightSafety International, the case was moved to federal court as part of Multi-District Litigation, see 28 U.S.C. § 1407. See *In re Cessna 208 Series*, 546 F. Supp. 2d. at 1158-59. Here, a federal court made a ruling on state law (without UNDAF’s involvement) *and then* remanded the cases to state court for further proceedings.

Where Judge Magnuson merely predicted how a state court would rule, *In re Cessna 208 Series* was a straightforward application of the *Erie* doctrine where the federal judge deferred to the state judge’s interpretation of state law. As the federal court explained, the Texas trial court’s interpretation *contradicted* this Court’s holding in *Alsides*. *In re Cessna 208 Series*, 546 F. Supp. 2d at 1159 (citing *Alsides*, 592 N.W.2d at 470-71). The federal judge’s ruling was not that the state court got it right, but that the state “ruling was a reasonable application of Texas law” supported by the dissent in *Page*

and decision in *Doe v. Yale University*, 748 A.2d 834 (Conn. 2000), a decision this Court should join the *Dallas Airmotive* court in distinguishing. *Dallas Airmotive*, 277 S.W.3d at 699-700.

D. Respondents' New "Duty to Warn," "Duty to Instruct," and "Duty Undertaken" Theories All Fail

Finally, Respondents claim this case falls somewhere among a hodgepodge of "duty to warn," "duty to instruct," or "duty undertaken" theories neither pleaded against UNDAF nor reflected in the jury instructions or verdict. The shotgun arguments are primarily if not exclusively targeted toward Cirrus, which cogently refutes them, and in the interests of economy UNDAF will only briefly summarize them here:

- Plaintiffs did not plead or try a products liability case. (Cirrus Reply Br. 14-15.)
- Judge Ten Eyck did not treat plaintiffs' claims as product liability claims. (*Id.* 16.)
- Judge Manguson's grant of summary judgment on a "failure to warn" claim forecloses any such claim in state court as a matter of law. (*Id.* 17-18.)
- Defendants had no common law duty to train Mr. Prokop to proficiency on the autopilot. (*Id.* 19-21.)
- Any contractual duty Defendants had to Mr. Prokop cannot sustain liability. (*Id.* 21-23.)

However, from UNDAF's perspective, a few additional arguments are worth brief mention:

- Gartland’s authority consists of *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782 (Minn. 1977) and *Gray v. Badger Mining Corp.*, 676 NW.2d 268 (Minn. 2004), which, as Gartland explains, involved manufacturers with purported duties to give instructions. (Gartland Br. 36.) But UNDAF is not a manufacturer. It simply was not served with any complaint, let alone one that pleaded these theories. The jury was instructed on general negligence, not with the model instruction applicable to duty-to-warn claims arising under either negligence or strict liability. See 4 Minn. Practice CIVJIG 75.25.

- Respondents generally contend that UNDAF was not “acting as an educational institution” but essentially as a manufacturer, or that UNDAF can be liable because the jury found Cirrus and UNDAF were joint enterprisers and UNDAF was Cirrus’ agent. But all this says is that Cirrus, the principal in the enterprise and the only one of the two enterprisers that was ever served with a summons and complaint, could be liable should the Court determine a duty was owed by the agent and causation evidence was sufficient. See, e.g., *Kellogg v. Woods*, 720 N.W.2d 845, 852 (Minn. Ct. App. 2006) (“a principal is liable for his agents’ acts committed in the scope of the agency relationship”); cf. *Dang v. St. Paul Ramsey Med. Ctr., Inc.*, 490 N.W.2d 653, 655 (Minn. Ct. App. 1992) (affirming judgment against joint enterpriser where plaintiff sued hospital and “added [joint enterpriser] as a defendant a year later”). The jury’s verdict constituted only a factual finding that UNDAF was negligent and that the negligence accounted for 37.5 percent of the causal fault. The verdict was not and cannot be a legal determination of liability.

- Respondents suggest that because UNDAF “undertook” some duty, it can be liable. But the Estate and MAJ’s citations demonstrate that the “duty undertaken” doctrine applies only when there is a duty to *protect*. See *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567 (Minn. 1979) (city’s duty to protect from fire); *Carcraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) (same); *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975) (duty to protect from dangers on real property); Restatement (Second) of Torts § 323 (1965) (duty to protect “others”); Restatement (Second) of Torts § 324A (1965) (duty to protect “third person or his things”). Plaintiffs never alleged UNDAF had a duty to protect Prokop, let alone passenger Kosak, and it strains credulity to suggest an educator has a special duty to protect anyone long after instruction is over.¹

E. Conclusion

Respondents’ shotgun spray of theories for how UNDAF could have owed a duty irrespective of the educational malpractice bar was not reflected in jury instructions, brought to a verdict, or pleaded in any complaint against UNDAF. The jury instructions and special verdict demonstrate this was a general negligence case, nothing more. Meanwhile, Respondents ignore the public policies articulated in *Alsides* that clearly apply to negligence claims, and their failure meaningfully to distinguish the Missouri

¹ Even if UNDAF had some duty to offer protective services, *e.g.* during training flights, UNDAF was “not required to continue them indefinitely, or even until [it] has done everything in [its] power to aid and protect the other.” Restatement (Second) of Torts § 323 cmt. c. This is because “[t]he actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him.” *Id.* No one has alleged Prokop was put “in a worse position” because of transition training, and the Restatement demonstrates any duty imposed on UNDAF had to have ended sometime.

Court of Appeals' holding in *Dallas Airmotive* is telling. The injuries did not occur during instruction, as was the case in *Larson*. And UNDAF is not a manufacturer to whom products liability law applies. For these numerous reasons, the Court should hold the district court erred by not granting UNDAF's motion for JAML on educational malpractice grounds.

II. RESPONDENTS IGNORE CONTROLLING AUTHORITY DEMONSTRATING WALTERS' TESTIMONY DID NOT CONSTITUTE A LEGALLY SUFFICIENT BASIS FOR CAUSATION

Respondents barely confront Appellants' arguments that Plaintiffs failed to present causation evidence reasonably tending to sustain the verdict. Glorvigen merely invites the Court to review 17 pages of Judge Ten Eyck's order and then "joins in the arguments of Respondent Gartland." (Glorvigen Br. 43-44.) Gartland does little more, failing to distinguish the controlling careless-smoking cases UNDAF quoted to demonstrate that Walters' testimony bears an uncanny resemblance to expert testimony the supreme court found legally deficient. *See Gerster v. Wedin*, 294 Minn. 155, 199 N.W.2d 633 (1972); *Rions v. Rochester Wood Specialties, Inc.*, 286 Minn. 503, 176 N.W.2d 548 (1970); *Huseby v. Carlson*, 306 Minn. 559, 238 N.W.2d 589 (1975) (per curiam).²

² Gartland claims "both Cirrus and UNDAF failed to raise the issue of the trial court's admission of Walters' testimony or any other evidentiary rulings in either their motions for a new trial or directly as an issue in their briefs." (Gartland Br. 40.) But UNDAF moved for *judgment as a matter of law* on grounds "causation has not been established between the negligent flight training allegations and the cause of the accident." (A77.) UNDAF's motion was authorized by *Langeslag v. KYMN Inc.*, 664 N.W.2d 860 (Minn. 2003), where the supreme court held the district court erred by submitting a claim to the jury because causation evidence was legally insufficient. *Id.* at 869-70.

Gartland claims Walters testified that “in his opinion, Prokop’s failure to use the autopilot occurred because he was not trained in its use in the circumstances in which he found himself.” (Gartland Br. 41.) Gartland does not cite to the record. In fact, Walters testified he *had no idea* whether Prokop tried and failed to use the autopilot. (Tr. 407:13-408:1.) Gartland also is wrong to claim the evidence establishes that although hand-flying a “slow-moving Cessna” might be proper when confronted with IMC-like conditions, hand-flying an SR-22 was “exactly the wrong thing to do” in an SR-22. (Gartland Br. 41.) In fact, as Walters explained, because Prokop was not authorized to fly in the clouds, he was required to maintain his altitude and turn 180 degrees regardless of his aircraft’s equipment. (Tr. 440:19-441:8.)

UNDAF laid out in its initial brief the reasons why Walters’ opinions constituted incompetent and legally insufficient evidence for causation purposes. Respondents have simply ignored UNDAF’s case law and argument. That silence speaks volumes. Walters’ speculation about how lack of training might have caused the crash is indistinguishable from the expert testimony in *Gerster* that the supreme court found legally deficient. Accordingly, even if the Court were to determine UNDAF owed a duty and could be liable, it still should hold the district court erred by denying UNDAF’s motion for JAML for lack of legally sufficient evidence on causation.

III. UNDAF CANNOT BE LIABLE TO A NONSTUDENT

Glorivgen pays shockingly little attention to UNDAF’s commonsense argument that a school cannot owe a duty to a nonstudent such as Kosak. Glorivgen cites *Wicken v. Morris*, 527 N.W.2d 95 (Minn. 1995), but *Wicken* does not involve schools or

nonstudents. It involved duties co-employees owe, or do not owe, each other. It held that the employee in question *did not* owe his co-employee a duty, and the supreme court resolved the case exactly as this Court should: by directing judgment in favor of the defendant. *Id.* at 98-99.

Glorvigen's only other cited cases are *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984) and *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W.2d 688 (1956). But those are products liability cases in which the plaintiffs were injured by products they were using. Glorvigen cites no authority demonstrating a flight trainer can be liable to a passenger who was neither a student nor actively "using" the instruction provided. Such a third-party claim would fall squarely in the educational malpractice bar. *See Moore*, 386 N.W.2d at 114 ("inherent uncertainty in determining the cause and nature of any damages . . . is particularly persuasive in the present case involving a third party claim against an institution for what it allegedly did not teach a student").

As Glorvigen acknowledges, duty is a question of law reviewed *de novo*. (Glorvigen Br. 17.) Glorvigen has failed to provide any explanation for how this Court could conclude *de novo* that UNDAF owed passenger Kosak a duty. Accordingly, even if the Court could find the claims survive outside the educational malpractice bar and also could find a sufficient causal connection between a breached duty and the crash, the Court should reverse the verdict in favor passenger Kosak with respect to UNDAF. *See Wicken*, 527 N.W.2d at 98-99.

IV. RESPONDENTS HAVE NOT DEMONSTRATED HOW UNDAF CAN BE LIABLE WHEN PLAINTIFFS NEVER ASSERTED A CLAIM AGAINST UNDAF

Gartland suggests Judge Ten Eyck was “bemused” by the idea UNDAF cannot be liable to Plaintiffs who never asserted any claim against UNDAF. (Gartland Br. 42.) But the nine pages of the judge’s memorandum dedicated to this threshold issue belies bemusement. He found the Plaintiffs’ predicament a “troubling one.” (Add. 49.) And neither Gartland nor the other Respondents even acknowledges trial counsel’s statements that “we didn’t sue UND” and “we only sued Cirrus.” (UNDAF Br. 47-48 (citing Pre-Trial Tr. of Apr. 20, 2009 107:7-8; Tr. 1717:2-3).)

From the day Plaintiffs served their complaints against Cirrus, through Gartland’s closing-argument invitation to send a message to corporate America, Respondents’ focus is, was, and always has been only on Cirrus. Only after the verdict did Respondents change their tune. And in their briefs, Respondents fail to provide any authority where an un-sued intervenor has been held liable on the circumstances of this case. By the time UNDAF sought to intervene in this case, the statute of limitations had already expired—because the crash occurred in January 2003, the limitations period for wrongful death claims is three years, *see* Minn. Stat. § 573.02, subd. 1, and UNDAF filed its Notice of Intervention in 2008. (A12-16.)

As for the jury’s finding that UNDAF was Cirrus’ agent and that the parties were engaged in a joint enterprise, it bears repeating that “a principal is liable for his agents’ acts committed in the scope of the agency relationship.” *Kellogg*, 720 N.W.2d at 852. The agency finding has no bearing on UNDAF’s liability to Plaintiffs, who simply never

added UNDAF as a defendant. *Cf. Dang*, 490 N.W.2d at 655 (affirming judgment against joint enterpriser where plaintiff sued hospital and “added [joint enterpriser] as a defendant a year later”). In no way do the jury findings regarding a joint enterprise and agency trump Plaintiff’s pre-verdict stated intent not to hold UNDAF liable, or their tactical decision not to sue UNDAF.

Respondents’ post-verdict about-face is virtually indistinguishable from what the Oregon Supreme Court confronted in *Konen Construction Co. v. United States Fidelity & Guarantee Co.*, 401 P.2d 48 (Or. 1965). Glorvigen criticizes UNDAF for “mining” the 1960s case from Oregon, without citing any law to the contrary and glossing over the result—that the plaintiff was legally barred from taking judgment against the intervenor “in the absence of a pleading to support it”:

The court made a conclusion of law that Konen waived its right to maintain its counterclaim against the intervenors. This conclusion is clearly warranted. **Konen knew that it was not entitled to a judgment against intervenors in the absence of a pleading to support it**, and knew that the court was willing to enter such a judgment under a proper pleading; yet deliberately, it must be assumed, and for reasons still not disclosed, though full opportunity for disclosure has been given it, chose not to file an amended pleading until after the decision of this court.

Id. at 50. Here, tellingly, Respondents do not disclose in their briefs why Plaintiffs failed to serve a pleading that would have supported judgment against UNDAF. Perhaps Plaintiffs realized the statute of limitations had expired.

UNDAF filed an Answer, as intervention requires, but only with respect to claims against Cirrus. So UNDAF could not have “waived” service, and Gartland’s citation to *Blaeser & Johnson, P.A v. Kjellberg*, 483 N.W.2d 98 (Minn. Ct. App. 1992) is readily

distinguished as a waiver situation where there *was* a summons and complaint (albeit mailed instead of personally served). *Id.* at 99-100.

As UNDAF explained and Respondents ignore, Minn. R. Civ. P. 24.01 was amended in 1968 to clarify that intervenors need not face the possibility of liability to a plaintiff to participate in a case. As UNDAF stated in its Notice of Intervention, Cirrus tendered defense and indemnification to UNDAF on February 19, 2008—a week *after* Judge Magnuson denied Cirrus’ motion for summary judgment on educational malpractice grounds. (A14 ¶ 4.) Cirrus claimed that UNDAF had “indemnity liability.” (*Id.*) So UNDAF sought to intervene to “protect its interests in this matter by controlling and maintaining its own strategy *for the defense of the claims against Cirrus which may be subject to the indemnity provisions of the Agreement.*” (*Id.* ¶ 7 (emphasis added).)

UNDAF did what it had to do. It intervened. Had UNDAF not intervened, the likely argument from Cirrus would have been that UNDAF should have done so after being served with the indemnification demand. Minnesota law and the record demonstrate it was not only permissible but preferred that UNDAF participate in the case without the expectation of being held liable to Plaintiffs who chose not to assert any claim against UNDAF. For these reasons and those stated in UNDAF’s initial brief, the Court should hold UNDAF cannot be liable to Plaintiffs.

V. UNDAF JOINED IN CIRRUS’ NEW TRIAL MOTIONS

Gartland claims “Cirrus alone seeks a new trial based on the alleged misconduct of Gartland’s counsel in final argument.” (Gartland Br. 44.) But UNDAF joined in Cirrus’ post-trial motion on this issue and referred to Cirrus’ arguments in its brief, just as

Gartland referred to Glorivgen's and the Estate's arguments regarding *Alsides*. (A79; UNDAF Br. 14 n.8; Gartland Br. 31-32.) Accordingly, as Judge Ten Eyck explained, "if a new trial were warranted for Cirrus it would necessarily entail a new trial involving UNDAF." (Add. 70 n.16.) Of course, a new trial would be unnecessary if the Court agrees UNDAF could owe no duty irrespective of the educational malpractice bar.

CONCLUSION

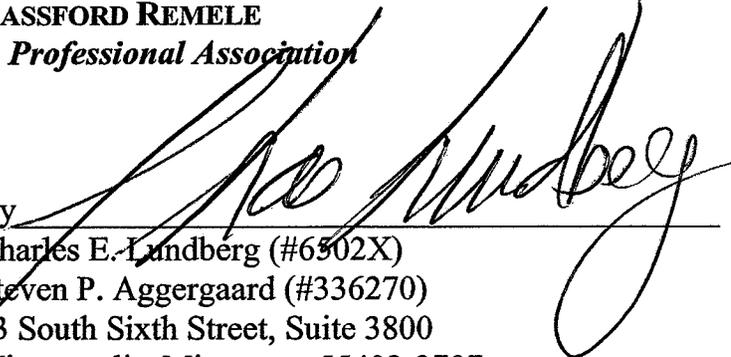
Among the law and facts that Respondents ignore are the unfortunate circumstances of the crash. The fact is, Prokop knew the weather was marginal for VFR flight. He was the one who told this to the weather briefers. (Tr. 331:11-16.) Yet from the time Prokop called for his first 4:55 a.m. weather briefing, he was understandably fixated on piloting his SR-22 instead of driving from Grand Rapids to St. Cloud for his son's 7:15 hockey game. And after receiving the second briefing indicating that the weather had barely improved if at all, Prokop and Kosak took off around 6:30 in darkness, less than 45 minutes before face-off.

Walters conceded a pilot's pressures to reach a destination are "always a consideration." (Tr. 329:2-5.) Here, the pressures on Prokop were unquestionably a consideration, and "intervening factors" such as Prokop's "attitude, motivation, temperament, past experience, and home environment" demonstrate why the educational malpractice bar should have been applied. *Alsides*, 592 N.W.2d at 472. Accordingly, the Court should hold the district court erred by not granting judgment as a matter of law in favor of UNDAF. The Court should also hold UNDAF cannot be liable because it was

never sued. Finally, in the alternative, the Court should hold that UNDAF could owe no duty to aircraft passenger and nonstudent Kosak.

BASSFORD REMELE
A Professional Association

Dated: November 16, 2010

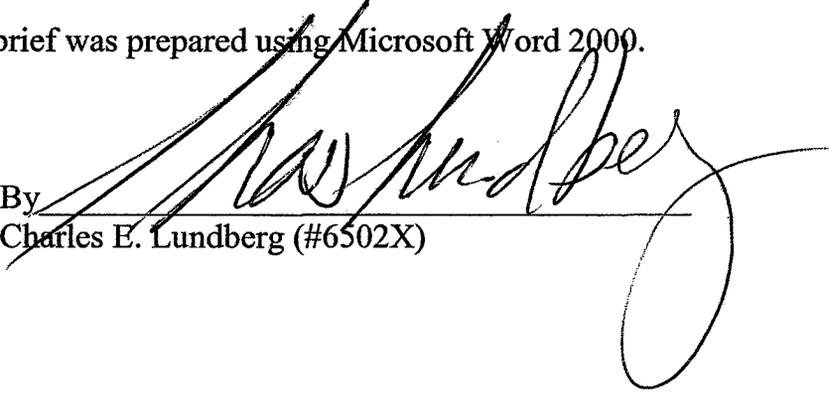
By 
Charles E. Lundberg (#6502X)
Steven P. Aggergaard (#336270)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
612-333-3000

LEIB & KATT, LLC
William J. Katt, Esq. (#390715)
River Bank Plaza, Suite 600
740 N. Plankinton Avenue
Milwaukee, WI 53203
414-276-8816

*ATTORNEYS FOR APPELLANT UNIVERSITY OF
NORTH DAKOTA AEROSPACE FOUNDATION*

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Proportional serif font, 13 point or larger. The length of this brief is 6,617 words. This brief was prepared using Microsoft Word 2000.

By 
Charles E. Lundberg (#6502X)

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