

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

State of Minnesota
In Supreme Court

Rick Glorvigen, as Trustee for the Next-of-Kin of
decedent James Kosak,
Appellant/Cross-Respondent (A10-1242, A10-1246),
and

Thomas M. Gartland, as Trustee for the Next-of-Kin of
decedent Gary R. Prokop,
Appellant/Cross-Respondent (A10-1243, A10-1247),
vs.

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

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

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

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AS AMICUS CURIAE**

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Introduction and Statement of Interest

This brief is submitted on behalf of the Board of Regents of the University of Minnesota (University)¹. The University is interested in this case because it is the first case in which the Supreme Court may address the existence and scope of the “educational malpractice” bar. As is well known, the University is a comprehensive institution of higher education that provides instruction and education to literally tens of thousands of students each year in Minnesota. Along with the Minnesota State Colleges and Universities system, the University is the largest provider of higher education in the State. Accordingly, the University has a serious and important interest in the Court’s consideration of the “educational malpractice” bar in this case.

However, as noted in the University’s Motion For Leave to File Amicus Brief, the University takes no position on “whether Petitioners may recover based on a product liability theory, or the question whether Cirrus Design Corporation or the University of North Dakota Aerospace Foundation is covered by the educational malpractice claim bar.” (Motion at page 1-2.) The University recognizes the important and vital interests of the parties in this matter and seeks only to assert its own interest in the recognition and development of the educational malpractice doctrine.

That is, if the Court should reach the issue, the University urges the Court to recognize the doctrine barring educational malpractice claims recognized in *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999), and recently applied to

¹ This brief was authored in whole by the attorneys in the Office of General Counsel at the University of Minnesota. No other person or entity made a monetary contribution to the preparation or submission of this brief.

claims asserted against the University in *Zinter v. University of Minnesota*, 799 N.W.2d 243 (Minn. Ct. App. 2011). The University believes that the doctrine reflects good public policy and that it is vital for the functioning of an effective educational institution like the University.

University of Minnesota

The University was established through the University Charter in 1851 passed by the Territorial Legislature. Through the Constitution of the State of Minnesota the people of the State perpetuated to the University “[a]ll the rights, immunities, franchises, and endowments heretofore granted or conferred.” Minn. Const. Art. XIII, § 3. This Court recognized the State constitutional status of the University in *State ex rel. University of Minnesota v. Chase*, 175 Minn. 259, 220 N.W. 951 (1928). *See also Star Tribune v. Univ. of Minnesota Br. of Regents*, 683 N.W. 2d 274 (Minn. 2004).

Over the 150 years since its establishment, the University has evolved into a land grant university that provides comprehensive higher education in a wide variety of disciplines at the undergraduate, graduate and professional levels. At the same time, it also is a recognized research university conducting over 800 million dollars in scientific and other research annually.

The University annually educates nearly 65,000 students.² These students study subjects ranging over such diverse fields as liberal arts, law, medicine, public health,

² Enrollment Data for Spring 2011, University of Minnesota Office of Institutional Research, http://www.oir.umn.edu/student/enrollment/term/1113/current/show_all (last visited July 29, 2011).

agriculture, and engineering. The University offers over 135 majors³ and almost 12,000 courses each year.⁴ It confers over 13,000 degrees each year.⁵ Indeed, the University provides education in virtually all subjects and in many diverse formats of instruction.

Argument

The Court Should Confirm the Bar Against Claims of Educational Malpractice.

While this case involves several legal issues, the University wishes to address only the issue of the educational malpractice doctrine. If the Court reaches the doctrine, the University asks that the Court recognize the bar on educational malpractice claims and affirm the bar that has been developed and applied by the Minnesota Court of Appeals. Such a holding would be consistent with the law in virtually all other jurisdictions and would reflect well thought-out public policy.

A claim for educational malpractice has never been recognized in Minnesota, and the Minnesota Court of Appeals has specifically rejected the viability of such a claim. The Court of Appeals rejected the viability of an educational malpractice claim in *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999). The Court recognized that the judiciary must show deference to the academic decisions of educational

³ University of Minnesota Admissions, <http://admissions.tc.umn.edu/academics/index.html> (last visited July 29, 2011).

⁴ University of Minnesota Catalogues, <http://www.catalogues.umn.edu/index.html> (last visited July 29, 2011).

⁵ Degrees Awarded by Degree Level for 2006-2010, University of Minnesota Office of Institutional Research, <http://www.oir.umn.edu/student/degrees/year/2010/trend/10001> (last visited July 29, 2011).

institutions and that, therefore, claims should not be allowed that would “involve an inquiry into the nuances of educational processes and theories.”⁶ *Id.* at 473. The Court in *Alsides* looked to numerous cases in other jurisdictions that had concluded that public policy dictated that education institutions should not be subject to malpractice claims.⁷

The Court of Appeals recently applied *Alsides* in affirming the dismissal of a claim against the University. In *Zinter v. University of Minnesota*, 799 N.W.2d 243 (Minn. Ct. App. 2011), a graduate student in the University’s Master of Liberal Studies program brought claims for breach of contract and promissory estoppel challenging her academic advisor’s determination that she was not adequately prepared to create the final project needed for award of a master’s degree. *Id.* at 245.⁸ The Court of Appeals properly rejected the claims, concluding that the claims were essentially for educational malpractice and would force the courts to inquire into whether the plaintiff met the educational goals of the program and whether the plaintiff had articulated a sufficiently clear idea for her final project. *Id.* at 246–47.

⁶ The Minnesota Court of Appeals has also noted the lack of an educational malpractice claim in unpublished decisions.

⁷ *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992); *Blane v. Alabama Commercial Coll., Inc.*, 585 So. 2d 866, 868 (Ala. 1991); *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155, 157 (Idaho 1986); *Hunter v. Bd. of Educ.*, 439 A.2d 582, 585 (Md. 1982); *Swidryk v. Saint Michael's Med. Ctr.*, 493 A.2d 641, 642 (N.J. Super. Ct. Law Div. 1985); *Helbig v. City of New York*, 622 N.Y.S.2d 316, 318 (N.Y. App. Div. 1995); *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868, 870 (N.Y. App. Div. 1982); *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996); *Cavaliere v. Duff's Bus. Inst.*, 605 A.2d 397, 403 (Pa. Super. Ct. 1992). See generally Joel E. Smith, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 1 A.L.R. 4th 1139 (2010).

⁸ The petition for further review of *Zinter* is currently before this Court.

Public policy firmly supports the continued rejection of educational malpractice claims in Minnesota. The Court of Appeals in *Alsides* relied upon public-policy grounds articulated by courts in other jurisdictions when rejecting educational malpractice claims:

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

Alsides, 592 N.W.2d at 472 (citations omitted).⁹ And in *Zinter*, the Court of Appeals noted the policy that also guides the law in this area—the “deference to an institution’s academic determinations.” 799 N.W.2d at 245–246. The Court of Appeals cited decisions from the United States Supreme Court and the Eighth Circuit Court of Appeals, as well as its own decisions, in illustrating how “[a]t all levels of education, courts show deference to an institution’s academic determinations.” *Id.* at 245 (citing *Bd. of Curators v. Horowitz*, 435 U.S. 78, 90 (1978); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999); *Zellman v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 221–22 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999)).

Each of the public policy considerations listed in *Alsides* is particularly important when considering potential claims against an educational institution like the University.

⁹ See also Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 Clev. St. L. Rev. 323, 342–50 (1991) (discussing policy reasons against allowing educational malpractice claims).

1. Lack of satisfactory standard of care

The University offers thousands of courses each year, taught in a multitude of ways, and at varying levels. Professors undertake a vast range of educational activities, as varied as lecturing in large first-year mathematics courses, to instructing students in music, to training medical students in didactic and laboratory settings, to overseeing the programs of Ph.D. candidates in French studies, electrical engineering, and stem cell biology. There is no single standard by which the educators at the University could be evaluated. Judicial review would be necessarily arbitrary. Moreover, judicial determination of the appropriateness of an academic program would improperly intrude into academic judgment and policy. Any standard set by a court in a given field would naturally ossify that academic program, stifling creativity and discovery, which are at the heart of the academic enterprise.

2. The inherent uncertainties about causation and the nature of damages

The success or failure of University students is dependent on many factors relevant to causation and damages, including “a student's attitude, motivation, temperament, past experience, and home environment.” The University educates nearly 65,000 individual students each year, and each brings a unique set of attributes and experiences to their studies. To ascertain whether the failure or success of a particular student is attributable to a problem in teaching or instead to an attribute or experience of the student would be, without question, an uncertain and flawed analysis.

3. The potential for a flood of litigation against schools

Allowing for educational malpractice claims certainly poses a risk to an institution like the University of Minnesota for a flood of litigation. The University annually educates a large number of students, some of whom will inevitably be dissatisfied with the education they receive and some of whom will fail to achieve the degrees they seek. The *Zinter* case is an example of a student who failed to achieve the degree she sought and who blames her academic advisor. Allowing for educational malpractice claims would open the door for all those who are dissatisfied with their academic advisors, their progress in school or their success post-graduation to sue their schools, forcing schools to spend more and more resources on defending lawsuits, rather than on educating students.

4. Embroil the courts into overseeing the day-to-day operations of schools

If educational malpractice claims were allowed, the judiciary will necessarily be involved in reviewing day-to-day operations of the University, depending on the nature of each claim. The *Zinter* case would have required a review of the specific operations of the Masters of Liberal Studies program and the manner in which advisors carried out their functions. Other claims could involve inquiry into any number of the schools, programs, and courses at the University and would require the University to comply with whatever specific determinations were made by the judiciary for those schools, programs, and courses. Instead of the judiciary deferring to the academic judgment of the University, the University would need to defer to the academic judgment of the judiciary. Courts should not substitute their judgment for that of professional educators.

The *Alsides* court articulated a logical distinction between claims that could proceed in contract or otherwise and those that cannot. On the one hand, claims that involve specific promises and that do not involve inquiry into academic judgment or policy are permissible. For example, in *Alsides*, one claim deemed viable related to a promise by the academic institution that it would provide instruction on installing and upgrading a particular software system. 592 N.W.2d at 474. On the other hand, claims that do involve inquiry into academic judgment or policy are not viable. For example, as in *Zinter*, claims that involve inquiry into whether a student has met subjective standards necessary to progress toward a degree should not be allowed.

Any decision that addresses tort liability based on an educational institution's academic judgment as to what to teach or how to teach it, or based on the institution's evaluation of a student's academic performance, must be made with careful attention to consequences that could ripple from the decision into contexts such as the University of Minnesota. The University urges the Court to keep in mind the strong public policy justifications for the educational malpractice bar and to frame its decision by recognizing the protection for educational institutions that has been thoughtfully developed by the Minnesota Court of Appeals.

Conclusion

The University asks that the Court recognize the doctrine barring educational malpractice claims. The Court of Appeals in *Alsides*, following many other jurisdictions,

has articulated a rule that reflects sound public policy and will not hinder the functioning of educational institutions.

Dated: August 1, 2011

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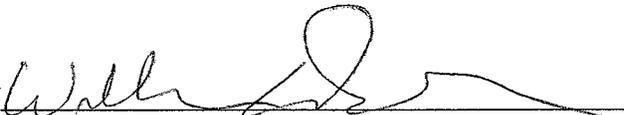
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amicus Curiae Regents of the University of Minnesota certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Office Word 2010 software and contains 2,216 words, including headings, footnotes and quotations.

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