

A10-1242, A10-1243, A10-1246, A10-1247

STATE OF MINNESOTA

IN SUPREME COURT

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

Appellant/Cross-Respondent,

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

Appellant/Cross-Respondent,

vs.

Cirrus Design Corporation,

Respondent,

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

Appellant/Cross-Respondent,

University of North Dakota Aerospace Foundation,

Respondent/Cross-Appellant.

BRIEF OF AMICUS CURIAE STATE OF MINNESOTA

(Counsel Listed On Inside Cover)

Philip Sieff
Vincent J. Moccio
ROBINS, KAPLAN, MILLER
& CIRESI, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

ATTORNEYS FOR APPELLANT/
CROSS-RESPONDENT RICK
GLORVIGEN, AS TRUSTEE FOR
THE NEXT-OF-KIN OF DECEDENT
JAMES KOSAK

Sam Hanson
Diane B. Bratvold
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157

Edward J. Matonich
Darrold E. Persson
David Arndt
MATONICH & PERSSON, CHARTERED
2031 Second Avenue East, P.O. Box 127
Hibbing, MN 55746

ATTORNEYS FOR APPELLANT/
CROSS-RESPONDENT THOMAS
M. GARTLAND, AS TRUSTEE FOR
THE NEXT-OF-KIN OF DECEDENT
GARY R. PROKOP

Timothy R. Schupp
Robert W. Vaccaro
GASKINS, BENNETT, BIRRELL,
SCHUPP, L.L.P.
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402

ATTORNEYS FOR APPELLANT/
CROSS-RESPONDENT ESTATE OF
GARY PROKOP, BY AND THROUGH
KATHERINE PROKOP AS PERSONAL
REPRESENTATIVE

LORI SWANSON
Attorney General
State of Minnesota
ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
JOHN S. GARRY
Assistant Attorney General
Atty. Reg. No. 0208899
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

ATTORNEYS FOR AMICUS
CURIAE STATE OF MINNESOTA

Wilbur M. Fluegel
FLUEGEL LAW OFFICE
150 South Fifth Street, Suite 3475
Minneapolis, MN 55402

ATTORNEYS FOR AMICUS CURIAE
MINNESOTA ASSOCIATION OF JUSTICE

OFFICE OF GENERAL COUNSEL,
UNIVERSITY OF MINNESOTA
William P. Donohue
Deputy General Counsel
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 5545-2006

ATTORNEYS FOR AMICUS CURIAE
UNIVERSITY OF MINNESOTA

Bruce Jones
Daniel J. Connolly
Daniel J. Herber
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Patrick E. Bradley
REED SMITH, LLP
Princeton Forrestal Village
136 Main Street, Suite 250
Princeton, NJ 08540-7839

ATTORNEYS FOR RESPONDENT
CIRRUS DESIGN CORPORATION

Charles E. Lundberg
Steven P. Aggergaard
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707

William J. Katt
LEIB & KATT, LLC
River Bank Plaza, Suite 600
740 N. Plankinton Avenue
Milwaukee, WI 53203

ATTORNEYS FOR RESPONDENT/
CROSS-APPELLANT UNIVERSITY
OF NORTH DAKOTA AEROSPACE
FOUNDATION

Mark S. Olson
OPPENHEIMER, WOLFF
& DONNELLY, L.L.P.
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609

ATTORNEYS FOR AMICUS CURIAE
PRODUCT LIABILITY ADVISORY
COUNCIL, INC.

William M. Hart
Damon L. Highly
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402

ATTORNEYS FOR AMICUS CURIAE
MINNESOTA DEFENSE LAWYERS
ASSOCIATION, MINNESOTA PRIVATE
COLLEGE COUNCIL, AND MINNESOTA
CAREER COLLEGE ASSOCIATION

Robert J. Hajek
HAJEK & BEAUCLAIR, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305

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

ATTORNEYS FOR AMICUS CURIAE
AIRCRAFT OWNERS AND PILOTS
ASSOCIATION

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LEGAL ISSUE.....	1
STATEMENT OF THE CASE AND FACTS.....	2
STANDARD OF REVIEW	3
ARGUMENT	4
I. THE EDUCATIONAL MALPRACTICE DOCTRINE DOES NOT IMMUNIZE PRODUCT MANUFACTURERS FROM TORT LIABILITY.....	4
A. The Educational Malpractice Doctrine Should Not Be Extended To Product Manufacturers	4
B. The Policy Underlying The Educational Malpractice Doctrine Shows That It Applies To Claims Regarding The General Quality Of Education Provided In Minnesota Public Schools And Similar Non- Profit Educational Institutions, Not To Claims Against Product Manufacturers..	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

Page

MINNESOTA CASES

<i>Alsides v. Brown Inst., Ltd.</i> , 592 N.W.2d 468 (Minn. Ct. App. 1999)	1, 4, 6, 8
<i>Dziubak v. Mott</i> , 503 N.W.2d 771 (Minn. 1993).....	3
<i>Glorvigen v. Cirrus Design Corp.</i> , 796 N.W.2d 541 (Minn. Ct. App. 2011)	2, 3, 5, 6
<i>Hubred v. Control Data Corp.</i> , 442 N.W.2d 308 (Minn. 1989).....	3
<i>Jepson v. General Cas. Co.</i> , 513 N.W.2d 467 (Minn. 1994).....	5
<i>Larson v. Wasemiller</i> , 738 N.W.2d 300 (Minn. 2007).....	3
<i>Pletan v. Gaines</i> , 494 N.W.2d 38 (Minn. 1992).....	3, 5
<i>Redden v. Minneapolis Comm. & Tech. College</i> , 2004 WL 835768 (Minn. Ct. App. Apr. 20, 2004)	4
<i>Zinter v. University of Minnesota</i> , 799 N.W.2d 243, 2011 WL 2175872 (Minn. Ct. App. June 6, 2011)	4

OTHER STATE CASES

<i>Donohue v. Copiague Union Free Sch. Dist.</i> , 391 N.E.2d 1352 (N.Y. 1979)	4, 6, 7
<i>Gupta v. New Britain Gen. Hosp.</i> , 687 A.2d 111 (Conn. 1996).....	4, 5
<i>Hunter v. Board of Educ.</i> , 439 A.2d 582 (Md. 1982).....	7
<i>Miller v. Loyola Univ. of New Orleans</i> , 829 So.2d 1057 (La. Ct. App. 2002)	7, 8

<i>Peter W. v. San Francisco Unified Sch. Dist.</i> , 131 Cal. Rptr. 854 (Cal. Ct. App. 1976)	7
--	---

FEDERAL CASES

<i>Glorvigen v. Cirrus Design Corp.</i> , 2008 WL 398814 (D. Minn. Feb. 11, 2008)	5
--	---

<i>In re Air Crash Near Clarence Center</i> , 2010 WL 5185106 (W.D. N.Y. Dec. 12, 2010)	6, 8
--	------

<i>Makaeff v. Trump Univ., LLC</i> , 2010 WL 3988684 (S.D. Cal. Oct. 12, 2010)	8
---	---

<i>Ross v. Creighton Univ.</i> , 957 F.2d 410 (7th Cir. 1992).....	1, 4, 6, 7
---	------------

OTHER AUTHORITIES

Andrea Ford, <i>Going for Broke</i> , Time, May 9, 2011	9
---	---

Barry Yeoman, <i>The High Price of For-Profit Colleges</i> , Academe, May/June 2011	9
--	---

U.S. Gov't Accountability Office, GAO-10-948T, <i>For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices</i> (2010).....	8, 9
---	------

LEGAL ISSUE

Does the educational malpractice doctrine, which bars claims that challenge the general quality of education provided by a public school and similar non-profit educational institutions, immunize product manufacturers from liability to consumers that tort law would otherwise impose?

In a 2-1 decision, the Court of Appeals held that the educational malpractice doctrine immunizes the defendant manufacturer from tort claims that allege it failed to provide adequate instructions for the safe use of its product.

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

Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992)

STATEMENT OF THE CASE AND FACTS¹

This case concerns tort claims against an airplane manufacturer, Defendant Cirrus Design Corporation (“Cirrus”), for its failure to provide adequate instructions on the safe use of a high-performance airplane it manufactured. *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541 (Minn. Ct. App. 2011). Plaintiffs are the families of the pilot and passenger who died in an airplane crash allegedly caused by Cirrus’ failure to provide adequate instructions. *Id.* at 546-48. In particular, Plaintiffs assert that although the manufacturer promised to provide instruction regarding autopilot-assisted recovery from non-visual flight conditions, a critically important aspect of the safe use of the plane, no such instruction was given. *Id.* at 547. The University of North Dakota Aerospace Foundation (“UNDAF”), which intervened as a Defendant, acted as Cirrus’ contractual agent with respect to providing instructions for the safe use of the airplane. *Id.* at 545-46.

The jury returned a verdict for Plaintiffs. 796 N.W.2d at 548. The district court denied motions by Cirrus and UNDAF for judgment as a matter of law and for a new trial. *Id.* Judgment was entered against Cirrus and UNDAF, and they appealed. *Id.*

The Court of Appeals reversed in a divided opinion. The majority held that the educational malpractice doctrine extends to product manufacturers and bars Plaintiffs’ tort claims. 796 N.W.2d at 552-55. The dissent disagreed, noting that the educational malpractice doctrine applies only to educational institutions and that applying the

¹ Pursuant to Minn. R. Civ. App. P. 129.03, it is certified that no person other than counsel for the State of Minnesota authored any part of this brief and that no person or entity other than the State made a monetary contribution to the preparation or submission of this brief.

doctrine here means “every coffee pot manufacturer who issues instructions for its product’s use would constitute an educational institution to which the educational-malpractice bar would apply.” *Id.* at 561. (Klaphake, J., dissenting).

This Court granted further review and the State’s motion for leave to file an amicus brief. The State has an interest in the law not allowing product manufacturers to invoke the educational malpractice doctrine to avoid liability that established Minnesota tort law would otherwise impose. As asserted in the State’s amicus motion, such a result would harm Minnesota consumers by denying them a longstanding remedy and wrongly immunizing manufacturers from accountability for their tortious conduct.

STANDARD OF REVIEW

Whether the Court should extend the educational malpractice doctrine to product manufacturers is a legal issue that the Court decides *de novo*. *See Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007) (stating that Supreme Court has the power to recognize common-law doctrines and to define tort defenses); *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989) (stating that Supreme Court gives no deference to the decision of the Court of Appeals with respect to a question of law). In deciding whether to apply such a doctrine, the Court considers public policy and the law of other states that have addressed the issue. *E.g.*, *Dziubak v. Mott*, 503 N.W.2d 771, 773, 774 n.4 (Minn. 1993); *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992).

ARGUMENT

I. THE EDUCATIONAL MALPRACTICE DOCTRINE DOES NOT IMMUNIZE PRODUCT MANUFACTURERS FROM TORT LIABILITY.

The educational malpractice doctrine bars contract or tort “claims that attack the general quality of education provided to students.” *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999). The doctrine was developed to protect public schools and similar non-profit educational institutions. *E.g.*, *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979) (public K-12 system); *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) (traditional private non-profit university); *Redden v. Minneapolis Comm. & Tech. College*, 2004 WL 835768, at *5 (Minn. Ct. App. Apr. 20, 2004) (Minnesota State Colleges and Universities System – MnSCU); *Zinter v. University of Minnesota*, 799 N.W.2d 243, 2011 WL 2175872, at *2-3 (Minn. Ct. App. June 6, 2011) (University of Minnesota).

A. The Educational Malpractice Doctrine Should Not Be Extended To Product Manufacturers.

Until the Court of Appeals’ majority opinion in this case, no decision had ever applied the educational malpractice doctrine to bar a claim against an airplane manufacturer or any other product manufacturer. The case on which the Court of Appeals majority relied, *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111 (Conn. 1996), does not support the extension of the educational malpractice doctrine to product manufacturers. *Gupta* held that the doctrine barred a surgical resident’s contractual claim that a teaching hospital provided him a generally inadequate education in its five-year residency program. *Id.* at 112, 118-20.

Extending the educational malpractice doctrine to product manufacturers would deny injured consumers an existing tort remedy, and manufacturers would have little incentive to provide proper instructions for the safe use of their products. As the dissent recognized, *Glorvigen*, 796 N.W.2d at 560-61, manufacturers would be able to evade responsibility for providing adequate instructions on the safe use of their products by casting the instructions as “educational” or by contracting with “educators” to provide the instructions. In other words, manufacturers would have the obligation under tort law to instruct regarding the safe use of a product, but they could fail to provide such instruction with impunity. This result is contrary to Minnesota’s strong tradition of protecting consumers. *See, e.g., Jepson v. General Cas. Co.*, 513 N.W.2d 467, 472 (Minn. 1994) (“Minnesota places great value in compensating tort victims.”); *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992) (“Tort liability seeks to compensate the injured and to deter wrongdoing.”).

Cirrus is an airplane manufacturer. *Glorvigen v. Cirrus Design Corp.*, 2008 WL 398814, at *4 (D. Minn. Feb. 11, 2008) (“Cirrus’ primary business is building and selling airplanes, not training pilots.”). UNDAF intervened in this case as Cirrus’ contractual agent. *Glorvigen*, 796 N.W.2d at 545-46. Thus, whether or not UNDAF is affiliated with an educational institution, in this case it acted as the agent of the product manufacturer. *Id.* at 554 (treating Cirrus and UNDAF as one and the same); *see also id.* at 560 (“[A]lthough UNDAF is associated with an educational institution, the University of North Dakota, it operates as an entity separate from the university for the purpose of providing on-site factory training for Cirrus.”) (Klaphake, J., dissenting).

Nor does the instruction in question here involve the “traditional educational setting,” the context in which the educational malpractice doctrine was created. *In re Air Crash Near Clarence Center*, 2010 WL 5185106, at *6 (W.D. N.Y. Dec. 12, 2010). This subject is distinctly different from a manufacturer’s sale of an airplane where instructions are provided by the manufacturer to the purchaser so that the product can be safely used.

In any event, a product manufacturer should not be allowed to omit promised instruction for the safe use of its products. As the Court of Appeals held in *Alsides*, 592 N.W.2d at 472-73, the educational malpractice doctrine cannot be invoked to bar a claim that a school failed to perform on a specific promise. *See also, e.g., Ross*, 957 F.2d at 417 (holding same). Similarly, at a minimum, a product manufacturer should be held accountable under tort law when it fails to provide specific, promised instruction for the safe use of a product and injury or death is a direct and foreseeable consequence of that failure. *See Glorvigen*, 796 N.W. 2d at 559-60 (Klaphake, J., dissenting).

B. The Policy Underlying The Educational Malpractice Doctrine Shows That It Applies To Claims Regarding The General Quality Of Education Provided In Minnesota Public Schools And Similar Non-Profit Educational Institutions, Not To Claims Against Product Manufacturers.

As indicated above, the educational malpractice doctrine was developed to deal with concerns about the detrimental consequences of allowing lawsuits which challenge the general quality of education that schools provide to students, and in particular, such claims against public schools. *See, e.g., Donohue*, 391 N.E.2d at 1354 (stating that “[r]ecognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system”).

The decision in *Ross* concluded that permitting educational malpractice claims would unleash “a flood of litigation against schools.” *Ross*, 957 F.2d at 414; *see also*, e.g., *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) (concluding that such lawsuits against public schools “would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers”); *Hunter v. Board of Educ.*, 439 A.2d 582, 584 (Md. 1982) (noting the “extreme burden which would be imposed on the already strained resources of the public school system to say nothing of those of the judiciary”).

Ross further found that deciding such claims would “embroil the courts into overseeing the day-to-day operations of schools.” *Ross*, 957 F.2d at 414; *see also*, e.g. *Donohue*, 391 N.E.2d at 1354 (allowing public schools to be sued for educational malpractice “would require the courts not merely to make judgments as to the validity of broad educational policies . . . but, more importantly, to sit in review of the day-to-day implementation of these polices”); *Miller v. Loyola Univ. of New Orleans*, 829 So.2d 1057, 1060 (La. Ct. App. 2002) (“It is not the place of the court system to micro-manage the adequacy of instruction or management at institutions of higher learning, even if it were feasible, which we feel it is not.”); *Donohue*, 391 N.E.2d at 1355 (Wachtler, J. concurring) (noting “the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student”).

These policy considerations are simply not implicated by lawsuits against product manufacturers for failing to provide adequate instructions on the safe use of their products. Application of traditional tort claims against manufacturers will not expose

schools to a barrage of lawsuits or make judges the overseers of daily school operations. The instructions required to allow for the safe use of a product is a discrete subject for which the manufacturer must be accountable to the consuming public.

It should also be noted that although *Alsides* involved claims against a “for-profit, proprietary trade school,” 592 N.W.2d at 470, the educational malpractice doctrine should not apply in that context. Such for-profit businesses are not “the traditional educational institutions” for which the doctrine was developed and do “not implicate the same policy considerations present in the traditional educational setting.” *Clarence Center*, 2010 WL 5185106, at *6 (declining to apply the educational malpractice doctrine to a private flight-training school that is “a private corporation engaged in the business of providing specialized training”); *see also Makaeff v. Trump Univ., LLC*, 2010 WL 3988684, at *2 (S.D. Cal. Oct. 12, 2010) (refusing to apply the educational malpractice doctrine to Trump University’s real estate investment seminars and noting that no case has applied the doctrine “to private, unaccredited, and for-profit companies selling educational seminars”). Thus, the Court should confine its recognition of the educational malpractice doctrine to public and similar non-profit educational institutions, such as the K-12 system, MnSCU and the University of Minnesota. *See, e.g., Miller*, 829 So.2d at 1060-61 (recognizing that educational malpractice doctrine is properly applied to traditional non-profit universities in addition to public schools); *see also* U.S. Gov’t Accountability Office, GAO-10-948T, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing*

Practices (2010) (differentiating between for-profit colleges and other higher-education institutions).²

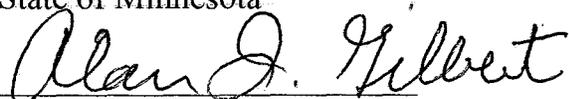
CONCLUSION

The Court should not extend the educational malpractice doctrine to product manufacturers.

Dated: August 4, 2011

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota


ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678

JOHN S. GARRY
Assistant Attorney General
Atty. Reg. No. 0208899

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1450

ATTORNEYS FOR AMICUS CURIAE
STATE OF MINNESOTA

² For examples of recent news accounts describing concerns with the for-profit college industry, see Barry Yeoman, *The High Price of For-Profit Colleges*, *Academe*, May/June 2011, at 32-37; and Andrea Ford, *Going for Broke*, *Time*, May 9, 2011, at 44-46.