

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

STATE OF MINNESOTA  
IN SUPREME COURT

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Rick Glorvigen, as Trustee for the  
next-of-kin of decedent James Kosak,  
*Appellant/Cross-Respondent* (A10-1242, A10-1246),

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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BRIEF OF *AMICUS CURIAE*  
MINNESOTA ASSOCIATION FOR JUSTICE

---

Wilbur W. Fluegel, #30429  
**FLUEGEL LAW OFFICE**  
150 South 5<sup>th</sup> St., Suite 3475  
Minneapolis, MN 55402  
(612) 238-3540  
*Attorneys for Amicus Curiae*  
*Minnesota Association for Justice*

Philip L. Sieff, #169845  
Vicent J. Moccio, #184640  
**ROBINS KAPLAN MILLER & CIRESI**  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402  
(612) 349-8500  
*Attorneys for Appellant Glorvigen*

*Additional Appearances on Inside Cover*

Sam Hanson, #0041051  
Diane Bratvold, #018696X  
**BRIGGS & MORGAN**  
2200 IDS Center  
80 South 8<sup>th</sup> Street  
Minneapolis, MN 55402-2157  
(612) 977-8400

-and-

Edward J. Mantonich, # 68603  
**MANTONICH & PERSSON**  
2031 Second Ave. East  
Hibbing, MN 55746  
(218) 263-8881  
*Attorneys for Appellant Gartland*

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

-and-

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

-and-

Thomas R. Thibodeau, #108960  
**THIBODEAU, JOHNSON &  
FERIANCEK, PLLP**  
800 Lonsdale Building  
302 West Superior Street  
Duluth, MN 55802  
(218) 722-0073  
*Attorneys for Respondent/Cross-  
Appellant University of North Dakota  
Aerospace Foundation*

Bruce Jones, # 179553  
Daniel J. Connolly, #197427  
Daniel J. Herber, #0386402  
**FAEGRE & BENSON, LLP**  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
(612) 766-7000

-and-

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

Timothy Schupp, # 130837  
Robert W. Vacarro, #0313750  
**GASKINS, BENNETT, BIRRELL,  
SCHUPP L.L.P.**  
333 South Seventh Street, Suite 2900  
Minneapolis, MN 55402  
(612) 333-9500  
*Attorneys for Estate of Prokop*

William M. Hart, # 150526  
Damon L. Highly, #0300044  
**MEAGHER & GEER, PLLP**  
Suite 4400  
33 South Sixth Street  
Minneapolis, MN 55402  
(612) 338-0661  
*Attorneys for Amicus Curiae  
Minnesota Defense Lawyers Association,  
Minnesota Private College Council, and  
Minnesota College Association*

Robert J. Hajek, # 39512  
**HAJEK & BEAUCLAIR, LLC**  
Suite 1050  
601 Carlson Parkway  
Minnetonka, MN 55305  
(612) 801-5067

-and-

Kenneth M. Mead, Esq.  
**BAKER BOTTS L.L.P.**  
The Warner  
1299 Pennsylvania Avenue NW  
Washington, DC 20004-2400

-and-

Ronald D. Golden  
**YODICE ASSOCIATES**  
411 Aviation Way  
Frederick, MD 21701  
(301) 695-2300  
*Attorneys for Amicus Curiae  
Aircraft Owners and Pilots Association*

Mark B. Rotenberg, 126263  
**GENERAL COUNSEL**  
William P. Donohue, #23589  
**DEPUTY GENERAL COUNSEL**  
360 McNamara Alumni Center  
200 Oak Street SE  
Minneapolis, MN 55455-2006  
(612) 624-4100  
*Attorneys for Amicus Curiae Regents of  
the University of Minnesota*

Alan I. Gilbert, #0034678  
John S. Garry, #0208899  
**OFFICE OF THE ATTORNEY GENERAL**  
1400 Bremer Tower  
445 Minnesota Street  
St. Paul, MN 55101  
*Attorneys for Amicus Curiae State of  
Minnesota*

Mark S. Olson, #82120  
**OPPENHEIMER, WOLFF &  
DONNELLY, LLP**  
Plaza VII, Suite 3300  
45 South Seventh Street  
Minneapolis, MN 55402-1609  
(612) 607-7000

-and-

Hugh F. Young, Jr.  
**PRODUCT LIABILITY ADVISORY  
COUNCIL**  
1850 Centennial Park Drive  
Suite 510  
Reston, VA 20191  
(703) 264-5300  
*(Of Counsel)*  
*Attorneys for Amicus Curiae Product  
Liability Advisory Council, Inc.*

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## INTRODUCTION

*Amicus* Minnesota Association for Justice (MAJ)<sup>1</sup> submits this brief to aid the court in assessing the “educational malpractice” doctrine and its application to this case. The supreme court took review of this case to address the applicability of the “educational malpractice” doctrine to a tort claim involving the crash of a high-performance aircraft that allegedly lost control due to the failure of the manufacturer to instruct about the safe use of its product.

As this affords the opportunity for the court to adopt or reject the “educational malpractice” doctrine and to set parameters for its application to tort cases that seek personal injury or wrongful death damages, *Amicus* MAJ summarizes the history, development and application of “educational malpractice,” though it contends the doctrine is inapplicable here.

### **1. What is “educational malpractice”**

Lawsuits by students or others claiming that they did not receive the reasonable academic training that they had bargained for has become known as “educational malpractice.”<sup>2</sup> These cases involve allegations that, as a result of the institution’s negligent instruction, the student received an inadequate education, and have been the subject of

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<sup>1</sup> Pursuant to Minn. R. Civ. App. Prac. 129.03, it should be noted that neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case, and neither has a financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

<sup>2</sup> See generally John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992).

skepticism by the courts of most other states, which have generally rejected such a cause of action.<sup>3</sup>

## 2. Why have most courts rejected “educational malpractice”?

Courts rejecting the claim have said that:

a cause of action seeking damages for acts of negligence in the educational process is precluded by considerations of public policy, among them being [1] the absence of a workable standard of care against which the defendant educational institution’s conduct may be measured, [2] the inherent uncertainty in determining the cause and [3] nature of any damages and [4] the extra burden which would be imposed on the schools as well as the judiciary.<sup>4</sup>

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<sup>3</sup> See, e.g., *Blane v. Alabama Commercial College, Inc.*, 585 So.2d 866 (Ala. 1991); *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Key v. Coryell*, 185 S.W.3d 98 (Ark. App., 2004); *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (Cal. App. 1976); *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399 (Colo.1994); *Gupta v. New Britain General Hospital*, 687 A.2d 111, 119 (Conn. 1996); *Brantley v. District of Columbia*, 640 A.2d 181 (D.C. App. 1994); *Moss Rehab. v. White*, 692 A.2d 902 (Del. Supr. 1997); *Tubell v. Dade County Pub. Sch.*, 419 So.2d 388 (Fla. App. 1982); *Diallo v. Amer. Intercontinental Univ.*, 687 S.E.2d 278, 281 (Ga. App. 2009); *Wickstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986); *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986); *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 693 (Kan. 1993); *Rich ex rel. Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky. App.1990); *Miller v. Loyola University of New Orleans*, 829 So.2d 1057, 1061 (La. App. 2002); *Doe v. Board of Educ.*, 453 A.2d 814 (Md. 1982); *Hunter v. Board of Educ.*, 292 Md. 481, 439 A.2d 582 (Md. App. 1982); *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 903 (Mich., 2000); *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. App. 1999); *Dallas Airmotive v. Flightsafety Intern.*, 277 S.W.3d 696, 700 (Mo. App., 2008); *Bindrim v. University of Montana*, 766 P.2d 861, 863 (Mont. 1988); *Swidryk v. Saint Michael’s Med. Ctr.*, 493 A.2d 641 (N.J. Super. 1985); *Rubio By and Through Rubio v. Carlsbad Mun. School Dist.*, 744 P.2d 919, 921 (N.M. App. 1987); *Hoffman v. Board of Educ.*, 400 N.E.2d 317 (N.Y. App. 1979); *Lawrence v. Lorain Cty. Community College*, 549 713 N.E.2d 478, 479 (Ohio App. 1998); *Bittle v. Oklahoma City University*, 6 P.3d 509, 514 (Okla. App., 2000); *Aubrey v. School District of Philadelphia*, 437 A.2d 1306 (Pa. 1981); *Hendricks v. Clemson University*, 578 S.E.2d 711, 714 (S.C. 2003); *Lord v. Meharry Med. Coll. School of Dentistry*, 2005 WL 1950119, at \*2 (Tenn. App., Aug. 12, 2005); *Natrona County School Dist. No. 1 v. McKnight*, 764 P.2d 1039, 1050 (Wyo. 1988); see also *Ross v. Creighton Univ.*, 957 F.2d 410 (7<sup>th</sup> Cir. 1992) (Illinois law).

<sup>4</sup> *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986) (footnote & citation omitted).

### 3. What type of “educational” claims are allowed?

These public policy objections do not apply to claims based on theories of breach of contract, misrepresentation or promissory estoppel, as in each of the latter cases, the “standard of conduct” to which the “instructor” is held is the specific duty that the institution has voluntarily undertaken by promising expressly to teach it,<sup>5</sup> whether the claimant is a student or someone else.<sup>6</sup>

### 4. The bar on “educational malpractice” claims has never been applied to negligence claims by consumers injured by defective products who challenge the adequacy of their instruction in the safe use of a product

Since at least the 1970s, Minnesota law has protected consumers by imposing duties on manufacturers to warn and to instruct users about dangers in their products that may not

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<sup>5</sup> See, e.g., *Christensen v. Southern Normal School*, 790 So.2d 252, 254-55 (Ala. 2001) (“Breach-of-contract and fraud actions against educational institutions are not precluded under Alabama law. *Blane v. Alabama Commercial Coll., Inc.*, 585 So.2d 866 (Ala.1991), *VanLoock v. Curran*, 489 So.2d 525 (Ala.1986), and *Craig v. Forest Inst. of Prof'l Psychology*, 713 So.2d 967 (Ala.Civ.App.1997). However, Alabama does not recognize a cause of action for educational malpractice.” *Blane v. Alabama Commercial Coll., supra.*); *Squires By Squires v. Sierra Nevada Educational Foundation Inc.*, 823 P.2d 256, 258 (Nev. 1991) (declining to rule on negligence claim for “educational malpractice” as plaintiff articulated actionable “breach of contract and misrepresentation” claims); *Ryan v. University of NC Hosp.*, 494 S.E.2d 789, 791 (N.C. 1998)(declining to rule on “negligence” theory and holding that an actionable claim for “breach of contract” was stated as the curriculum promised a medical student a one-month gynecological rotation and failed to fulfill that promise).

<sup>6</sup> Three different types of claimants have been addressed by the courts, as was concisely summarized by the Iowa Supreme Court in *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986). These include (1) a claim by a student for the failure to teach adequate skills or those represented by the school as being taught that are grounded in an alleged common law duty and pursued as a claim of negligence or misrepresentation, (2) a claim on behalf of a child for alleged negligent failure of a school to properly place a student in a class for those with special needs, and (3) a claim against the school by a third party who claims injury from a less-than-properly educated or supervised student of the school.

be readily apparent.<sup>7</sup> *Amicus* MAJ has found no case in any jurisdiction that applied the “educational malpractice” doctrine to bar a suit against a product manufacturer for failing to “teach” adequate product safety to a consumer.

## 5. The duty of a manufacturer to properly instruct is “non-delegable”

When a product manufacturer sells a complex product that is beyond the common experience of its average purchasers, the manufacturer has a non-delegable duty to fully and fairly instruct and inform them how to safely use its machine.<sup>8</sup>

When a manufacturer chooses to delegate that duty-to-instruct to any third-party (whether a person, a corporation, or a school), such a delegation does not absolve the manufacturer of its underlying responsibility under the tort law to instruct the purchaser in the product’s safe use, and when the instruction fails to cover a subject that the industry acknowledges is essential to the safe use of the machine, then the manufacturer must stand

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<sup>7</sup> The court recognized this obligation in *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)(“where the manufacturer or the seller of a product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to give warning of such dangers.”); *see also Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004)(“To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury.”); *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. App. 1984), *review denied* (Minn., Feb. 6, 1985) (adequacy of a warning “cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product. . . .”) (quotation omitted).

<sup>8</sup> *See Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624 (Minn. 1984)(“The better rule, which we hereby adopt, is that a manufacturer may not delegate its duty to design a reasonably safe product.”); *Hartmon v. National Heater Co.*, 60 N.W.2d 804, 810 (Minn. 1953) (ruling in case involving inadequate instructions on how to bleed air from pipes of a furnace, that “[r]easonable care . . . must be commensurate with the risks of the situation as they were, or should have been, reasonably anticipated by the actor.”).

accountable in tort for the failure to instruct or warn.<sup>9</sup>

**6. This case involved a product manufacturer delegating the duty of “instruction” to a school**

What occurred in this case is that the manufacturer agreed that the subject pilot could not fly its product without the training Cirrus required,<sup>10</sup> and it would not allow Prokop to take delivery of the aircraft without completion of the training.<sup>11</sup>

Regrettably, the very training that was essential to safely operate the aircraft in the weather conditions it encountered<sup>12</sup> - - the subject of Flight Lesson 4a<sup>13</sup> - - was not taught

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<sup>9</sup> Minnesota has followed this rule in several contexts, extending obligations to both the owner of the duty and the one to whom the owner employs as an agent to undertake it for them. *See generally Engvall v. Soo Line Railroad*, 632 N.W.2d 560, 572, n.10 (Minn. 2001) (citation omitted) (“While an employer’s duties under FELA may be non-delegable, there also exist separate, independent duties which a third party may owe to either the plaintiff-employee or the defendant-employer, or both.”); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 925 (Minn. 1986) (when manufacturer argued it was relieved of its duty to warn, court ruled “if a manufacturer-seller should anticipate that an unwarned operator might use the machine in a particular manner so as to increase the risk of injury,” the duty remains on the manufacturer to warn). The exception is when the manufacturer provides the product to a “learned intermediary” like a physician to prescribe it to their patient. *See Mulder v. Parke Davis & Company*, 181 N.W.2d 882, 885 (Minn. 1970) (“the manufacturer is not liable if the doctor was fully aware of the facts which were the subject of the warning.”). The non-delegable duty concept has been applied in other states. *See, e.g., Walton v. Avco Corp.*, 610 A.2d 454, 460 (Pa. 1992) (noting that while aircraft manufacturer “had a non-delegable duty to provide complete and effective warnings,” a duty to furnish safe warnings also exists on those in the chain of distribution of the product); *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 581 (Wyo. 1992) (“It is a well settled principle that a manufacturer is under a non-delegable duty to make a product that is reasonably safe; it may not delegate that duty to the dealer, user or purchaser of the product.”) (quotation omitted).

<sup>10</sup> T 1528.

<sup>11</sup> T 1494-95, 1528.

<sup>12</sup> T 697-98 (the key subject is how to safely “transition” a high-performance aircraft from Visual Flight Rules or VFR conditions into Instrument Meteorological Conditions or IMC as

to the pilot,<sup>14</sup> even though “transition training” is a standard in the industry,<sup>15</sup> and both the manufacturer,<sup>16</sup> and its agent instructor, UNDAF,<sup>17</sup> maintained that the training was essential for safe operation. Indeed, purchasing pilots were to be trained to proficiency.<sup>18</sup>

**7. In cases involving the duty to instruct in the safe use of private planes, the Minnesota Supreme Court has ruled that the duty of the manufacturer is “non-delegable” though others in the chain of distribution may also be legally accountable**

In *Tayam v. Executive Aero, Inc.*, 166 N.W.2d 584, 586 (Minn. 1969), the manufacturer of a private plane was held to a duty to adequately instruct plane purchasers about whether to leave a specified fuel mixture operating as the aircraft approached certain

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inexperienced pilots tend to need visual clues, rather than instrument readings to maintain their spatial orientation, as being unable to read instrument or see the ground may cause the pilot to fly into the ground and die).

<sup>13</sup> “Recovery from VFR into IMC” was the subject of Flight Lesson 4a, *see* T 698, which lesson was “required” and Prokop was intended by Cirrus and UNDAF to be “given this training.” *Id.* at 511. As to that lesson “you can’t just do it on the ground. . . . It has to be done in the sky with the pilot.” *Id.* at 696; *see id.* at 626 (“needed to be done.”). No other part of the instruction covers the transition from VFR to IMC. *Id.* at 514.

<sup>14</sup> The protocol at UNDAF required that each lesson be checked off when it was completed, T 602-03, 638, and when an assignment was not completed it was left unchecked, *id.* at 512, 924, which was the circumstance here - - Flight Lesson 4a was unchecked.

<sup>15</sup> T 181. “Transition training is a specialized type of training that is done when a pilot is qualified, typically in one type of airplane, and is moving for whatever reason to another type of airplane. . . . [W]e take that pilot and give him extensive training and teach him the differences.” *Id.* at 156-57.

<sup>16</sup> T 1509.

<sup>17</sup> T 498.

<sup>18</sup> T 505.

specific weather conditions,<sup>19</sup> though the distributor was also held to have a duty to act based on its knowledge. The *Tayam* plane crashed because the pilot lacked this instruction.

The manufacturer may have a common law right of contribution against the agent to whom it has delegated the instruction function, but the manufacturer remains accountable as well.<sup>20</sup>

**8. MAJ is concerned that product manufacturers may seek to limit their responsibility to fairly instruct consumers by delegating their “instructive” role to schools and avert liability for product safety**

In this case, the court of appeals majority recognized that a manufacturer had these

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<sup>19</sup> The airplane in *Tayam* was powered by a fuel-injection engine, equipped with what is called a “ram air” or “power boost system” that increased the horsepower of the engine when activated by the pilot. It bypassed the engine air filter and permitted the engine to operate on direct unfiltered “ram air.” The key missing instruction was that this setting “should be operated only in clean, dust free air at altitude, and turned off for take-off and landing,” such that it was dangerous when used “in ‘icing conditions’” and “should be turned off.” *Id.* The plane crashed because the pilot had no knowledge of this important instruction, which the court said was the duty of the manufacturer, though it also existed on others - - like the seller - - who were in the chain of distribution. *Tayam* is distinguishable from the instant case in only two circumstances: (1) the *Tayam* aircraft was less sophisticated and complex than the one here, requiring fewer instructions, and (2) the *Tayam* manufacturer did not attempt to “delegate” its duty-to-instruct to a school. The duty of the manufacturer to properly instruct its purchaser was still held to be inherent in the sale of a product, and that is the main commonality with *Glorvigen’s* facts.

<sup>20</sup> See *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146 (Minn. App. 1992), *review denied* (Minn., Feb. 12, 1993)(in contribution claim by product installer against product manufacturer, court ruled that a “product manufacturer is held to a higher duty of care than a loader or shipper of goods. Most significantly, a product manufacturer ‘may not delegate its duty to design a reasonably safe product.’ . . . . Our supreme court has stated that such arguments are inconsistent with the manufacturer’s duty to produce a safe product, and that the only way to ensure the use of a safety device is to put the duty on the manufacturer to install it.”) (quoting *Bilotta*, 346 N.W.2d at 624).

duties,<sup>21</sup> but said that the plaintiff's

contention that the duty to warn by providing adequate instructions for safe use includes an obligation to train the end user to proficiency is unprecedented. And in the absence of precedent, we are not willing to extend the duty to warn to encompass this obligation.<sup>22</sup>

Since the manufacturer and its instructor-agent here undertook to train Prokop to proficiency,<sup>23</sup> the decision of the court of appeals affords product manufacturers the opportunity to avoid their non-delegable duty by delegating it to an educational institution. In this case, Cirrus sought to delegate to a third-party vendor, UNDAF, to furnish the instruction that the manufacturer deemed minimally necessary.<sup>24</sup>

The doctrine of "educational malpractice" has emerged as a defense when a student challenges vague notions about the choice of text, development of curricula, quality of teachers and other generalized "duties." It is - - and should remain - - inapplicable to tort claims involving the adequacy of instruction in the safe use of a product where the instruction

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<sup>21</sup> "[W]here the manufacturer or the seller of a product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to give warning of such dangers." *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 555 (Minn. App. 2011), quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977).

<sup>22</sup> *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 558 (Minn. App. 2011).

<sup>23</sup> T 505.

<sup>24</sup> Though marketed as easy enough for "pilots with a wide range of experience" to safely fly, T 240, the aircraft involved was so complex that the Federal Aviation Administration required pilots to earn a "high performance aircraft endorsement" before they could fly the aircraft away. T 635, 687, 858. The manufacturer therefore provided comprehensive instructions as an integral part of the purchase of each of its planes for this reason - - building the cost of that into the sale price. T 182, 245, 466, 489, 711-12, 1476.

at issue was focused and specific, as that would undercut completely the common law duties of a product manufacturer.

**9. Supreme Court need not reach the “educational malpractice” doctrine**

Given the factually distinct character of this case - - a tort injury claim over the safety of a private plane - - it is like *Tayam*, and is properly resolved without reaching the “educational malpractice” doctrine.

**10. Even if the court adopts the “educational malpractice” doctrine, it should not bar this tort suit as here the subject promise - - to teach “transition flying” from VFR to IMC in a high performance aircraft during flight lesson 4a - - was sufficiently definite and articulable, that exceptions to the “educational malpractice” doctrine apply to justify the jury’s verdict**

While a review of precedent on “educational malpractice” is outlined below to facilitate the court’s analysis should it elect to weigh the adoption of the doctrine, candidly, the doctrine is not truly relevant to this case, because it has generally been applied to protect the right of an educational institution to formulate and re-formulate its curriculum and pedagogical approach within a broad range of educator’s discretion. Courts have not traditionally second-guessed how-to-teach, but have made school’s keep explicit and readily enforceable promises they make to their students. This case involves the latter situation.

In general, educational institutions must have the freedom to formulate and redefine their curricula as substantive knowledge expands and as educational science progresses. Court interference with the educational process would embroil the courts in a flood of litigation that would impair the unique and important relationship of teachers and students,

leading ultimately to the undermining of an essential right. The courts should not dictate what curricula schools should teach or intrude themselves on how that teaching is done. This is the basic, operative philosophy of the “educational malpractice” doctrine as adopted by the vast majority of the jurisdictions.

Those same jurisdictions, however, allow negligence claims for inadequate instruction of a product user by a manufacturer or their agent. The distinguishing features of this claim, make the “educational malpractice” doctrine inapplicable, even if it were adopted.

### ANALYSIS

#### **I. “Educational Malpractice” Doctrine, when Adopted, Should Protect against Lawsuits Claiming that a School should have Taught a “better or more effective curriculum,” but not Bar Claims based on a School’s Breach of a Promise to Teach a Specific Thing**

The “educational malpractice” doctrine - - if adopted by the court in this case - - should protect educational institutions from suits by students or third-parties (*e.g.*, patient alleging his doctors did not learn “what they should have” in medical school<sup>25</sup>) that challenge whether a curriculum was designed to be sufficiently comprehensive or was properly taught by a school.

MAJ respectfully submits that an exception to this latter rule should be based on

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<sup>25</sup> See *Swidryk v. Saint Michael’s Medical Center*, 493 A.2d 641 (N.J.Super.Ct. Law Div.1985). There plaintiff, in his first year of medical residency in obstetrics and gynecology, was named as a defendant in a malpractice action for his participation in the delivery of a child. The resident brought an action against the director of medical education at the hospital alleging that he was inadequately supervised and as a proximate result of this negligence, the physician was sued for malpractice.

claims of breach of contract, misrepresentation or promissory estoppel when: (1) the school has undertaken to present each student information about subject “A,” (2) the student is induced to attend the school and pay their tuition, in reasonable reliance that they will be shown subject matter “A,” relying to their detriment on the promise, and (3) when the school fails to fulfill its voluntary undertaking to teach subject “A,” and (4) the student can prove non-speculative damages in consequence of the breach. As formulated, this version of the “educational malpractice” doctrine is consistent with the court of appeals’ *Alsides*’ decision and with case law of other jurisdictions.

In this way, “educational malpractice” is implicated and serves as a defense to a claim when the plaintiff challenges whether the curriculum was properly devised, *see Dallas Airmotive v. Flightsafety International*, 277 S.W.3d 696, 701 (Mo. App. 2008),<sup>26</sup> but not when a specific type of specialized knowledge was contracted for and the instructor failed to provide it. *See Baldrige v. State of New York*, 293 A.D. 2d 941, 942 (N.Y. App. Div. 2002).<sup>27</sup>

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<sup>26</sup> In *Dallas Airmotive*, a claim was barred by the “educational malpractice” when it sued for using on-the-ground *simulators* instead of *in-flight training* in use of Piper two-engine turboprop when one of the engines fails in flight, as the claim focused on the *choice* and *development* of training methods and thus raised nebulous issues about the educational effectiveness, as opposed to what the instructor agreed should have been taught for flight safety. 277 S.W.3d at 701. In *Glorvigen*, the manufacturer and instructor both felt in-flight training was mandatory to teach the requisite skills, so the debate over selection of *method* is irrelevant here.

<sup>27</sup> The *Baldrige* court observed:

While New York does not recognize a cause of action for “educational malpractice”. . . , our courts have acknowledged that “[w]hen a student is admitted to a university, an implied contract arises between the parties which

This effectively limits claims against schools to those that do not challenge the formulation of curricula but that seek damage for the failure of a school to comply with its promised curricula - - allowing the school to set its own standard of conduct about what it will and will not choose to teach, based on educational decision-making.<sup>28</sup>

With the express understanding that the “educational malpractice” doctrine is only tangentially relevant to the subject claim in this case, *Amicus* MAJ, now sets forth a short summary on the recognition and development of the doctrine in other jurisdictions and in Minnesota.

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states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks” . . . . The rights and obligations of the parties to this contractual relationship flow from “the university’s bulletins, circulars and regulations made available to the student, [which] become a part of this contract” . . . . Therefore, while a school may be subject to a cause of action for breach of contract, this requires a contract which provides for “certain specified services” . . . as “courts have quite properly exercised the utmost restraint applying traditional legal rules to disputes within the academic community” . . . .

293 A.D.2d at 942 (citations omitted).

<sup>28</sup> In this way, it would be unnecessary directly to address “educational malpractice” in the context of this case, as the doctrine as expressed above, would not bear on a tort claim regarding the compliance by the manufacturer of a complex machine with proper instruction in its safe use - - a duty dating back at least to *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)(“where the manufacturer or the seller of a product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to give warning of such dangers.”); *see also Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004)(“To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury.”); *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. App. 1984), *review denied* (Minn., Feb. 6, 1985) (adequacy of a warning “cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product. . . .”) (quotation omitted).

## II. Courts have Differentiated between “Negligence” and Other Theories in Determining whether or not to Apply the “Educational Malpractice Doctrine”

“In educational malpractice cases, a plaintiff sues his or her academic institution for tortiously failing to provide adequate educational services.” . . . . If a negligence claim raises questions concerning the reasonableness of the educator’s conduct in providing educational services, then the claim is one of educational malpractice. . . . Similarly, if the claim requires “an analysis of the quality of education received and in making that analysis the fact-finder must consider principles of duty, standards of care, and the reasonableness of the defendant’s conduct,” then the claim is one of educational malpractice. . . . If the duty alleged to have been breached is the duty to educate effectively, the claim is one of educational malpractice. . . . A claim that educational services provided were inadequate, substandard, or ineffective constitutes a claim of educational malpractice. . . . Where the court is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an educational institution, the claim is one of educational malpractice. . . .

*Dallas Airmotive v. Flightsafety Intern.*, 277 S.W.3d 696, 700 (Mo. App. 2008) (citations omitted).

The “seminal” case is *Peter W v. San Francisco Unified School Dist.*, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976). There, the eighteen-year-old plaintiff sued his school district for, among other things, negligently failing to teach him “basic academic skills such as reading and writing.” *Id.* at 818, 131 Cal.Rptr. 854. Refusing to recognize a cause of action for what it characterized as “educational malfeasance,” the California court observed:

We find in this situation no conceivable “workability of a rule of care” against which defendants’ alleged conduct may be measured . . . , no reasonable “degree of certainty that . . . plaintiff suffered injury” within the meaning of the law of negligence . . . , and no such perceptible “connection between the defendant’s conduct and the injury suffered,” as alleged, which would establish a causal link between them within the same meaning.

*Id.* at 824-825, 131 Cal.Rptr. 854 (citations omitted). *Peter W* represents the “classic” case

of educational malpractice in which a public school is alleged to have failed to adequately instruct a student in basic academic skills. The courts of nearly every state have generally rejected a cause of action for “educational malpractice,”<sup>29</sup> when it claims negligence against the institution to challenge the quality of the education the student received.

**A. A Negligence Theory in an Injury Claim turns on the Presence of a Clear Legal Duty and the Showing of Causal Link between a Breach of that Standard and the Plaintiff’s Injury**

A claim of “negligence” classically turns on the claimant’s demonstration that a specific legal duty that was owed by the defendant has been breached and that the breach caused an injury for which the claimant seeks compensation. *Sonntag v. Adkinson*, 251 Minn. 328, 333, 87 N.W.2d 845, 848 (1958).

Despite its potentially seductive appeal,<sup>30</sup> the “classic” application of the “educational malpractice” doctrine has largely been rejected to both claims of students and third-parties injured by those students, because the duty of conduct could not be readily articulated and the “causal link” between the manner of teaching and the plaintiff’s lack of understanding was often unclear.:

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<sup>29</sup> See note 3 *supra*.

<sup>30</sup> See *Ross v. Creighton University*, 740 F.Supp. 1319, 1328 (N.D. Ill.1990):

Admittedly, the term “educational malpractice” has a seductive ring to it; after all, if doctors, lawyers, accountants and other professionals can be held liable for failing to exercise due care, why can’t teachers? [Citation omitted]. The answer is that the nature of education radically differs from other professions. Education is an intensely collaborative process, requiring the interaction of student with teacher.

A good student can learn from a poor teacher; a poor student can close his mind to a good teacher. Without effort by a student, he cannot be educated. Good teaching method may vary with the needs of the individual student. In other professions, by contrast, client cooperation is far less important; given a modicum of cooperation, a competent professional in other fields can control the results obtained. But in education, the ultimate responsibility for success remains always with the student. Both the process and the result are subjective, and proof or disproof extremely difficult.

*Ross v. Creighton University*, 740 F.Supp. 1319, 1328 (N.D. Ill.1990). How to evaluate the average “receptivity” of the student makes “negligent educating” into a highly difficult causal challenge.

**B. Here, the Duty was Focused and Explicit and a Causal Link was Found by the Jury**

In this case, Cirrus determined that its purchasers had to be taught “transition flying” from VFR to IMC to safely operate its product and that the knowledge was to be imparted by Flight Lesson 4a, which had to be taught to comply with a standard that the manufacturer set as a minimum level of compliance. Here the jury found that it was not taught and that the failure to teach it played a causal role in the crash - - like the failure to teach the *Tayam* pilot to turn off “ram air” in “icing conditions.” Under a JMOL standard of review, the explicit nature of the standard of conduct and the causal link support the jury’s decision.

**C. A Focused Standard of Conduct and Evidence from which a Juror can Find Causation Support the Jury’s Decision Here under the “Educational Malpractice” Doctrine of Other States**

A cause of action challenging the performance of an instructor has been found to be actionable when a very specific type of sophisticated training was bargained for and was not

taught, as this fact pattern implicates not only breach of contract concepts, but also the doctrines of misrepresentation and promissory estoppel.<sup>31</sup>

The reason that some non-injury negligence claims have been rejected and other types of claims have not, lies in the public policy objections to a cause of action for “educational malpractice” regardless of who the claimant is.<sup>32</sup> The fundamental public policy considerations outlined earlier, were:

1. The absence of a workable standard of care against which the defendant educational institution’s conduct may be measured,
2. The inherent uncertainty in determining the cause,
3. The speculative nature of any damages and,

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<sup>31</sup> See, e.g., *Christensen v. Southern Normal School*, 790 So.2d 252, 254-55 (Ala. 2001) (“Breach-of-contract and fraud actions against educational institutions are not precluded under Alabama law. *Blane v. Alabama Commercial Coll., Inc.*, 585 So.2d 866 (Ala.1991), *VanLoock v. Curran*, 489 So.2d 525 (Ala.1986), and *Craig v. Forest Inst. of Prof’l Psychology*, 713 So.2d 967 (Ala.Civ.App.1997). However, Alabama does not recognize a cause of action for educational malpractice.” *Blane v. Alabama Commercial Coll., supra.*); *Squires By Squires v. Sierra Nevada Educational Foundation Inc.*, 823 P.2d 256, 258 (Nev. 1991) (declining to rule on negligence claim for “educational malpractice” as plaintiff articulated actionable “breach of contract and misrepresentation” claims); *Ryan v. University of NC Hosp.*, 494 S.E.2d 789, 791 (N.C. 1998)(declining to rule on “negligence” theory and holding that an actionable claim for “breach of contract” was stated as the curriculum promised a medical student a one-month gynecological rotation and failed to fulfill that promise).

<sup>32</sup> Three different types of claimants have been addressed by the courts, as was concisely summarized by the Iowa Supreme Court in *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986). These include (1) a claim by a student for the failure to teach adequate skills or those represented by the school as being taught that are grounded in an alleged common law duty and pursued as a claim of negligence or misrepresentation, (2) a claim on behalf of a child for alleged negligent failure of a school to properly place a student in a class for those with special needs, and (3) a claim against the school by a third party who claims injury from a less-than-properly educated or supervised student of the school.

4. The extra burden which would be imposed on the schools as well as the judiciary.<sup>33</sup>

1. **Workable standard of care**

As to the absence of a readily articulable standard of care, the California court in *Peter W.* stated:

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject.

60 Cal.App.3d at 824, 131 Cal.Rptr. at 860-61. Here, however, there was no debate on what the standard of conduct should have been. All agreed that “transition flying” had to be taught and that Flight Lesson 4a was the method. Rather than debate “how well” the lesson was conveyed or how receptive Prokop was as a student, there is simply no debate: the necessary teaching was not given. There is nothing on the scale to weigh. The complete absence of compliance with its own self-set standard means that the “standard of care” is readily workable here, and the first public policy objection does not apply.

2. **Causation**

While proving that a given student may have achieved a more productive career with a better-designed curriculum will “indeed be difficult, if not impossible to prove,” *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d at 1353-54, the causal link here is like that

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<sup>33</sup> *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986) (footnote & citation omitted).

in Minnesota's *Tayam* case. Without being told to turn off "ram air" the pilot in *Tayam* foreseeably left it on in icing conditions to power his way through them, when a proper instruction would have warned him if he did that he'd jam ice in the engine and cause it to stall and crash - - which it did. Here, without being told how to adjust the controls to switch properly from VFR to IMC using the automatic pilot, an inexperienced pilot would foreseeably simply steer away from the weather threat, leading to a stall from lack of power and a crash - - which it did. T 257-58, 524-25. Causation was clear and was found by the jury. T 222-23 ("the accident would not have happened.").

### **3. Non-speculative damages**

Unlike trying to value a well-trained student from a poorly trained one, the valuation here was straightforward under Minnesota's wrongful death law: placing a value on the pecuniary loss from the decedents' deaths.

### **4. Flood of litigation impairing function of schools**

The "flood of litigation" concern was expressed by the Maryland court in *Hunter*, 439 A.2d at 584, and its interference with the orderly operation of educational institutions was voiced as well in *Donohue*, 391 N.E.2d at 1354, and by the U.S. Supreme Court in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), which observed that "[w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment." *Id.* (footnote omitted). The reason for such deference was described in *Regents of the University of California v.*

*Bakke*, 438 U.S. 265, 312 (1978), which “recognized that academic freedom thrives on the autonomous decision-making by the academy itself.” In this last consideration, courts have been reluctant “to pass judgment on the curriculum” of a school as it entails micro-managing a business. *Moore v. Vanderloo*, 386 N.W.2d 108, 115 (Iowa 1986).

MAJ agrees with this philosophy, but notes that it has no bearing when the curriculum is devised by the manufacturer who fails to provide what it promised. The curriculum here is not being second-guessed by the plaintiff, let alone by the court. The curriculum is merely being enforced.

**D. Lessons from the Minnesota Court of Appeals are Uninformative**

Minnesota addressed the issue of “educational malpractice” as a breach of contract or misrepresentation claim in the case of *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. App. 1999), in which students responded to various advertisements promising the business school’s curriculum would sufficiently acquaint them with computer network operating systems to enable them to pass a certain recognized qualification test. *Id.* at 471. The school argued that when a student files suit against a school alleging false statements and broken promises, the matter involves curriculum and, however styled, the case is one for educational malpractice and should be dismissed. *Id.* The court of appeals ruled that a “student may bring an action against an educational institution for fraud, misrepresentation, or breach of contract if the institution failed to perform on specific promises it made to the student and the claim would not involve an inquiry into the nuances of educational processes

and theories.” *Id.* at 470.

In this manner, the Minnesota court sought to avoid the public policy issue of “standard of care” by approaching the theory as a contract or promissory doctrine, and the “flood gate” and “undue interference” concerns by allowing the curriculum to dictate what the promise had been, holding the school to what it had pledged to do, rather than to any scrutiny of why it chose the curriculum it did. While *Alsides* recognized the general rejection of a student’s tort claims for “educational malpractice,” based on public policy reasons,<sup>34</sup> it noted that the essence of “[t]he basic relationship between a student and an educational institution is contractual in nature,” *id.* at 472, quoting *CenCor, Inc. v. Tolman*, 868 P.2d 396, 398 (Colo.1994), and that the “catalogs, bulletins, circulars, and institution regulations given to the student form part of the contract.” *Id.*, citing *Zumbrun v. University of S. Cal.*, 25 Cal.App.3d 1, 101 Cal.Rptr. 499, 504 (1972).

Thus, the bulletin here formed a commitment to teach a subject that had to be taught, and is unlike the quality-of-education debate raised in earlier Minnesota cases.

### CONCLUSION

Minnesota case law allows those injured from a dangerous product to sue the manufacturer of the product for its negligent failure to properly instruct in the safe use of the machine. It protects consumers by imposing duties on manufacturers to warn and instruct as to dangers that may not be fully apparent. The court should not alter or dilute that protection,

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<sup>34</sup> *Id.* at 472, quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir.1992) (citations omitted).

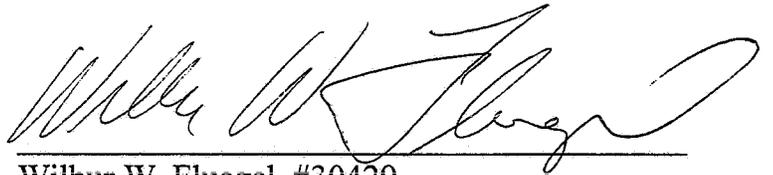
which is the result of decades of case law development and balancing of policy considerations.

The educational malpractice doctrine should not be applied to product liability claims or claims seeking tort recovery for personal injury or wrongful death because product liability law and personal injury negligence law has developed its own balance of policy considerations and choices, and the “educational malpractice” doctrine addresses wholly different policy considerations, many of which are not implicated in injury/death tort cases.

While protection of an educator’s right to select the best means by which to teach students should be left to the educators, that vital public policy goal is not defeated by allowing a product safety claim involving the adequacy of a manufacturer’s instruction to still form the basis of the critical goal of the protection of consumer’s health and lives.

Respectfully Submitted,

Dated: 8-4-11



Wilbur W. Fluegel, #30429

**FLUEGEL LAW OFFICE**

150 South 5<sup>th</sup> Street, Suite 3475

Minneapolis, MN 55402

(612) 238-3540

*Attorney for Minnesota Ass’n for Justice, Amicus*

## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional front. The length of this brief is 561 lines and 6,939 words. This brief was prepared using Corel WordPerfect Office X4.

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8-4-11



Wilbur W. Fluegel, #30429

**FLUEGEL LAW OFFICE**

Suite 3475

150 South 5<sup>th</sup> Street

Minneapolis, MN 55402

(612) 238-3540

*Attorney for Minnesota Ass'n for Justice, Amicus*