

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),

Thomas M. Gartland, as Trustee for the Next-of-Kin of
decedent Gary R. Prokop,

Appellant/ Cross-Respondent (A10-1243, A10-1247),

v.

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),

University of North Dakota Aerospace Foundation,

Respondent/ Cross-Appellant (A10-1242, A10-1243).

**BRIEF OF AMICI CURIAE
MINNESOTA PRIVATE COLLEGE COUNCIL,
MINNESOTA CAREER COLLEGE ASSOCIATION,
AND MINNESOTA DEFENSE LAWYERS ASSOCIATION**

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

*Attorneys for Amici Curiae
Minnesota Private College Council, Minnesota Career College Association, and
Minnesota Defense Lawyers Association*

[Additional Counsel listed on following pages]

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/ Cross-Appellant
University of North Dakota Aerospace Foundation*

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

*Attorneys for Appellant/ Cross-Respondent
Rick Glorvigen, as Trustee for the Next-of-Kin of
Decedent James Kosak*

Timothy R. Schupp (#130837)
Robert W. Vaccaro (#0313750)
GASKINS, BENNETT, BIRRELL,
SCHUPP, L.L.P.
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
(612) 333-9500

*Attorneys for Appellant/ Cross-Respondent Estate
of Gary Prokop, by and through Katherine Prokop
as Personal Representative*

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

-and-

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

*Attorneys for Respondent
Cirrus Design Corporation*

Sam Hanson (#0041051)
Diane B. Bratvold (#018696X)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

-and-

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

*Attorneys for Appellant/ Cross-Respondent
Thomas Gartland, as Trustee for the Next-of-Kin of
Decedent Gary R. Prokop*

Wilbur W. Fluegel (#0030429)
FLUEGEL LAW OFFICE
150 South Fifth Street, Suite 3475
Minneapolis, MN 55402
(612) 238-3540

*Attorneys for Amicus Curiae
Minnesota Association of Justice*

Mark B. Rotenberg (#126263)
General Counsel
William P. Donohue (#23589)
Deputy General Counsel
University of Minnesota
360 McNamara Alumni Center
200 Oak Street S.E.
Minneapolis, MN 55455-2006
Tel: (612) 624-4100

*Attorneys for Amicus Curiae
Regents of the University 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) 607-7000

*Attorneys for Amicus Curiae
Product Liability Advisory Council, Inc.*

Alan I. Gilbert (#0034678)
John S. Garry (#0208899)
Office of the Attorney General
445 Minnesota Street, Suite 1100
Saint Paul, MN 55101-2128
(651) 757-1450

*Attorneys for Amicus Curiae
State of Minnesota*

Robert J. Hajek (#39512)
HAJEK & BEAUCLAIR, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305
(612) 455-0651

-and-

Kenneth M. Mead
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue N.W.
Washington, D.C. 20004-7744
(202) 639-7744

-and-

Ronald D. Golden
Raymond C. Speciale
YODICE ASSOCIATES
411 Aviation Way
Frederick, MD 21701
(301) 695-2300

*Attorneys for Amicus Curiae
Aircraft Owners and Pilots Association*

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STATEMENT OF LEGAL ISSUES¹

1. Will this Court recognize a tort duty that sounds in “educational malpractice?”

Interest of Minnesota Private College Council

The MPCC, founded in 1948, represents private nonprofit higher education in Minnesota. The MPCC consists of three related nonprofit organizations, and the MPCC’s board is made up of 17 college presidents, up to 24 business and community leaders, and the president of the organizations. The MPCC has a membership of 17 private-college institutions that share a liberal-arts focus. Its members educate 45,000 undergraduate students and 15,000 graduate and professional students.

The MPCC’s mission is to serve its members’ shared needs and advocate for public policy that meets the educational needs of students, enhances private higher education, and strengthens Minnesota’s economic and civic fabric, as well as maintains the viability of a healthy private college sector in Minnesota. The MPCC’s interest in this case is a public one.

Interest of Minnesota Career College Association

Since 1958, the MCCA has been the voice of career-focused education in Minnesota. Its membership consists of private, higher-learning institutions that deliver career-specific education, and its members are accredited by agencies recognized by the U.S. Department of Education. Currently, the MCCA’s membership includes 14

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

different educational systems with 36 campuses that educate more than 15,000 students annually.

The MCCA's mission includes actively promoting the values of career-focused higher education, supporting educational excellence among its member institutions through strong peer networking and professional-development opportunities, and advocating at both the state and federal levels on behalf of career-minded students, so as to ensure choice in and access to higher education. The MCCA's interest in this case is a public one.

Interest of Minnesota Defense Lawyers Association

The MDLA, founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice. The MDLA devotes a substantial portion of its efforts to the defense of clients in civil litigation. Over the past 48 years, it has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

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

This brief refers to the MPCC, the MCCA and the MDLA as the "amicus parties."

ARGUMENT

I. Introduction

The district court's post-trial order wrongly assumed that every claim for relief – whether in contract or tort – provides for unlimited potential liability. Therefore, the court seemingly also assumed that “simply extending the Minnesota Court of Appeals holding [in *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. App. 1999)] to cases sounding in negligence” would provide a legal basis for upholding tort liability of more than \$16 million in these consolidated cases. (Add. 70-71).² To support these assumptions, the district court found the existence of “an independent duty, not dependent on a contract” and used that duty to fashion a tort called “negligent performance of contract” in the nature of “negligent failure to provide training.” (Add. 70, 73, 75) (emphasis omitted). Both before and after this ruling – below and on appeal – the plaintiffs have changed the source from which they argue the defendants' duty arose (general negligence, product liability, assumed duty). But one argument has remained constant: The plaintiffs seek to impose liability based upon an independent tort duty – *i.e.*, a duty not dependent on a contract – for the alleged failure to train the purchaser to proficiency in the plane's auto-pilot function. The amicus parties urge the Court to hold that no such duty exists in the context of educator and student.

² Unless otherwise noted, record citations are to the addenda and joint appendix filed by the appellants Rick Glorvigen and Estate of Gary Prokop.

II. The Court should not recognize the existence of a tort duty under which educators would be bound to teach students to a given level of proficiency or face unlimited tort liability for consequential damages.

A. The defendants owed no legal duty that was independent of a contract.

The potential sources of a legal duty are few – a contractual relationship, an applicable statute, the common law, and the parties’ conduct. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996). Contractual duties arise from a promise, and “[c]ontract actions are created to protect the interest in having promises performed.” W. Prosser, *Handbook of the Law of Torts* § 92, at 613 (4th ed. 1971). One reliable way to determine whether the source of a legal duty is contractual is to examine whether the defendant would have any obligation toward the plaintiff absent a contract. *See 80 South Eighth Street Ltd. P’ship. v. Carey-Canada, Inc.*, 486 N.W.2d 393, 395 (Minn. 1992) (“Through a tort action, the duty of certain conduct is imposed by law and not necessarily by the will or intention of the parties.”); *D & A Dev. Co v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984) (“[A] [tort] plaintiff must prove as one element that the defendant breached ‘some duty imposed by law, not merely one imposed by contract.’”) (quoting *Keiper v. Anderson*, 138 Minn. 392, 398, 165 N.W. 237, 238 (1917)); *see also Rasmussen v. Prudential Ins. Co.*, 277 Minn. 266, 268-69, 152 N.W.2d 359, 362 (1967) (stating that “[l]acking duty, there can be no negligence”); W. Prosser, *Handbook of the Law of Torts* § 68 at 481 (5th ed. 1984) (stating that “being under no duty, [the defendant] cannot be charged with negligence”). Here, any duty to provide transition flight training was created by a contractual promise. Or, examined conversely,

apart from a promise to provide transition flight training, the defendants owed no duty to provide any flight instruction to the plane's purchaser at all. (T. vol. 22 at 16-17 (02/19/10 Hrg.) (plaintiffs' counsel arguing that "[t]he claim was, you didn't give Mr. Prokop what you promised to give him").

The source of one's legal duty is paramount, because the source determines the type of recoverable damages for a breach. In this case, accepting the plaintiffs' argument would convert the defendants' contractual duty into a tort duty, thereby expanding educator liability beyond all reasonable bounds. The purpose of awarding damages for breach of contract is to place the non-breaching party in the same *economic* position he or she would have enjoyed had the contract been performed. *Lesmeister v. Dilley*, 330 N.W.2d 95, 102 (Minn. 1983). This measure of damages protects the non-breaching party's interest in having the promise performed, by restoring his or her loss of economic value. A good example is *Alsides* itself, where the court of appeals remanded for adjudication of whether "the institution *failed to perform on specific promises . . .*" 592 N.W.2d at 473 (emphasis added). Specific promises are the hallmark of contracts. Therefore, if the former students in *Alsides* proved on remand that Brown Institute had "agreed, but failed, to provide instruction on the installation and upgrade of the Unix operating system software" *id.* at 474 n.3, the proper measure of damages would be the students' cost to obtain that computer training elsewhere.³

³ The *Alsides* court also recognized a student's right to bring an action for fraud or misrepresentation in the same circumstances, 592 N.W.2d at 473, but the plaintiffs made no such claim here. In any event, the measure of damages for such claims is similar – the

In this case, too, if a missing check mark on a syllabus is evidence of a failure to provide the training for that item, the proper measure of damages would be the cost of obtaining that training elsewhere. The plaintiffs, however, are seeking here to make the provider of training a guarantor of the student's proficiency, thus converting contract damages into eight-figure tort damages.⁴ But not all duties provide the potential for unlimited liability. Nor should they. The amicus parties believe that this critical point has been obscured by the prominence of other issues. Simply put, a provider of education or training should not become liable for staggering tort liability in these circumstances, because a party is not entitled to recover tort damages for a breach of contract, absent an "exceptional case[] where the defendant's breach of contract constitutes or is accompanied by an *independent* tort." *Wild v. Rarig*, 302 Minn. 419, 440, 234 N.W.2d 775, 789 (1975) (emphasis added). And, bringing the discussion full circle, the test for an independent tort is "whether a relationship would exist which would give rise to the legal duty without enforcement of the contract promise itself." *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 308 (Minn. App. 1992), *review denied* (Minn. plaintiffs' out-of-pocket loss. *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988).

⁴ It bears repeating that the underlying judgment rested solely on tort liability for negligence. Tort damages should not be confused with consequential damages for breach of contract, a claim the plaintiffs did not, and could not, make. *See, e.g., Lesmeister*, 330 N.W.2d at 103 (allowing recovery of consequential economic damages that "could reasonably be supposed to have been contemplated by the parties when making the contract as the *probable* result of the breach") (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854) (emphasis added)). Regardless, even if *Hadley v. Baxendale* applied to tort damages, the parties' agreement in this case specifically states that "[n]either Cirrus, nor its training contractor [UNDAF], will be responsible for competency of Purchaser . . . during or after training." (A. 163).

Feb. 12, 1993). In other words, tort liability follows only when “the duty is an incident of *the relationship* rather than the contract. . . .” *Wild*, 302 Minn. at 441, 234 N.W.2d 790 (emphasis added).

Similarly, the type of duty – contract or tort – also determines what a person must do to discharge the duty. A person discharges a contractual duty through performance. A person discharges a tort duty by meeting the standard of care. *Rasmussen*, 277 Minn. at 268, 152 N.W.2d at 362 (stating that person under tort duty must “conform to a particular standard of conduct toward another”).⁵ A duty to meet a given standard of care accompanies the formation of certain professional *relationships*. For example, a doctor’s legal duty is said to require him or her to use the same degree of skill and learning that a doctor in good standing would use in a similar practice and in similar circumstances. *See* 4A *Minnesota Practice*, CIVJIG 80.10 (2010). But that duty arises only upon the formation of a physician-patient *relationship*. *See, e.g., Henkemeyer v. Boxall*, 465 N.W.2d 437, 439-40 (Minn. App. 1991) (holding that independent medical examiner owed no duty to an examinee to discover cancer because no physician-patient relationship exists in such circumstances), *review denied* (Minn. Mar. 27, 1991). The same type of professional duty arises upon the formation of an attorney-client relationship and myriad other professional relationships, such as architect-client and accountant-client. Because the relationship gives rise to a duty, such professionals

⁵ The different measure of damages and the different standard for discharging contract duties readily explains the rule that “negligent breach of contract [is] a cause of action not recognized in this state.” *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 424 (Minn. 1987).

become liable in tort if they fail to conform to the required standard of conduct. *See, e.g., Rasmussen*, 277 Minn. at 268-69, 152 N.W.2d at 362.

Conversely, “[a] defendant will not be bound to conform its conduct to a [tort] standard of care unless a legally recognized duty exists.” *ServiceMaster of St. Cloud*, 544 N.W.2d at 307. In this case, the plaintiffs have never identified a legally recognized duty that is, in the words of the district court, “not dependent on a contract.” (Add. 73). The only avenue to tort liability, therefore, is the recognition of educational tort liability. The *amicus* parties urge the Court to hold that in the context of educator liability for students’ level of competency, there is neither a recognized tort duty under Minnesota law nor justification for creating one.

B. The Court should not create a tort duty that sounds in “educational malpractice.”

Ultimately, the question of duty is one of public policy. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989) (so stating). In this context, court after court – including the court of appeals in *Alsides* – has rejected the notion that an educator/student relationship warrants the recognition of a tort duty to teach to a standard of care for student competency. And for sound reasons. In the educator/student relationship, the student’s willingness and ability to learn are as important, if not more important, than the lessons taught or the chosen method of teaching. Factors like environment, personal values, and post-education experience likewise greatly influence a student’s ability to apply what he or she has learned.

Here, for example, the only evidence of causation is the fact that the auto pilot wasn't engaged. There is no evidence as to why. Perhaps in the moment the pilot forgot to engage it. Perhaps the pilot valued personal control of the aircraft over the auto-pilot function. And even if there were evidence that the pilot did not know how to use the auto pilot, there is no evidence that anything the instructor did or failed to do caused the hypothetical lack of proficiency. Courts should not inquire into whether, the manner of, or the extent to which, a given educator's instruction was within or beyond a hypothetical "standard of care."

It is no exaggeration to state that a contrary ruling would portend a flood of litigation. Then every outcome related to a subject matter implicated by prior education or training would warrant a suit against the educator. And the public policy that counsels against such a rule applies as much to "formal" educational settings as it does to other kinds of training. A few examples should demonstrate that the possibilities are endless:

- Nutritionist's liability for failure to meet the "standard of care" for teaching healthy food options for maintaining proper levels of blood sugar – obese student develops diabetes and its serious affects on health.
- Driving school's liability for failure to meet the "standard of care" for teaching left-hand turns – driver and passenger are injured in an intersection collision.
- Security guard trainer's liability for failure to meet the "standard of care" for teaching tactics to avoid armed confrontations – guard and bystander are shot during a confrontation.
- Smoking cessation trainer's liability for failure to meet the "standard of care" for teaching strategies to avoid urges to smoke – smoker relapses and develops serious smoking-related health issues, while also inflicting family members with second-hand-smoke illnesses.

- Bartending school's liability for failure to meet the "standard of care" for teaching effective tactics to identify intoxicated patrons – intoxicated patron injures himself and third person.

- Law school's liability for failure to meet the "standard of care" for teaching ethical restraints on handling client funds – lawyer is disbarred and client loses substantial money.

The possible examples are endless, and no disciplined analysis distinguishes these examples from this case or from each other. And note that under the plaintiffs' argument in this case, the bystanders, third persons, passengers, family members, and clients in the above examples would be no less entitled to recover against the educator than the student. The education system cannot withstand such a drastic extension of previously unrecognized liability. This Court should adopt the underlying public policy supporting the *Alsides* holding and rule that Minnesota recognizes no tort duty that sounds in "educational malpractice."

Moreover, when Minnesota courts have recognized new avenues of liability – invasion of privacy comes to mind as a recent example – ultimately the willingness to do so is grounded, at least in part, in sensible public policy for shaping acceptable conduct. Here, however, reinstating the underlying judgment would do little to shape acceptable conduct because the factors informing what is acceptable teaching methodology, or what is student "proficiency," are vulnerable to the subjective whim of whomever second-guesses what was taught, how it was taught, and with what materials it was taught. More than anything, therefore, such a ruling would encourage educators to reduce or eliminate the training they are even willing to offer. Ultimately, this would make dangerous

CONCLUSION

The Minnesota Private College Council, Minnesota Career College Association, and Minnesota Defense Lawyers Association respectfully urge the Court not to recognize a tort duty that sounds in educational malpractice.

Respectfully submitted,

Dated: September 13, 2011

By 

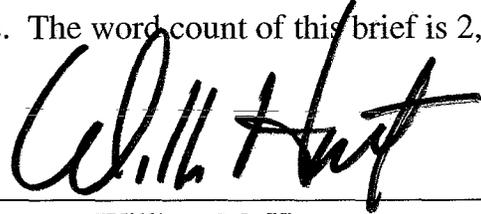
William M. Hart, No. 150526
Damon L. Highly, No. 0300044
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

**Attorneys for Amici Curiae
Minnesota Private College Council,
Minnesota Career College Association and
Minnesota Defense Lawyers Association**

FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 2,841.

Dated: September 13, 2011

A handwritten signature in black ink, appearing to read "William M. Hart", written over a horizontal line.

William M. Hart