

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

**STATE OF MINNESOTA
IN SUPREME COURT**

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

and

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

vs.

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

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

and

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

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Does Minnesota law impose upon a product manufacturer or seller a duty to train the product user to safely use the product?

The trial court did not address this issue. The Court of Appeals held that Minnesota law does not impose a duty to train on a product manufacturer or seller.

Most apposite cases:

Gray v. Badger Min. Corp., 676 N.W.2d 268 (Minn. 2004)

Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426 (Minn. 1971)

Rients v. Int'l Harvester Co., 346 N.W.2d 359 (Minn. Ct. App. 1984)

2. If a product manufacturer or seller provides product training to a product user, can the product user or other third parties hold the product manufacturer or seller liable in tort for negligently providing the training?

The trial court held that such a claim was cognizable as a negligent performance of contract. The Court of Appeals rejected this claim because Minnesota law does not impose a duty to train or educate on a product manufacturer or seller.

Most apposite cases:

Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007) (dissent)

Vermes v. Am. Dist. Tel. Co., 251 N.W.2d 101 (Minn. 1977)

INTEREST OF PRODUCT LIABILITY ADVISORY COUNCIL¹

The Product Liability Advisory Council (“PLAC”) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's interests are both public and private in nature. PLAC seeks to enhance the competitiveness of manufacturing companies in Minnesota and around the United States by insuring the development of laws and jurisprudence that fairly account for manufacturers' legal rights. PLAC members are sincerely concerned about unwarranted and unnecessary expansion of common law tort theories.²

¹ As required by Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, PLAC certifies that no person other than counsel for PLAC authored any part of this brief and that no person or entity other than PLAC made a monetary contribution to the preparation or submission of this brief.

² A list of PLAC's corporate members is attached as Appendix A.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that Minnesota law does not provide that a product manufacturer or seller has a duty to train a product user to safely use a product. This Court should affirm the Court of Appeals' holding. In the nearly sixty years since this Court announced that a manufacturer or seller who provided written instructions concerning the use of a product had a duty to provide adequate and accurate written instructions, *Hartmon v. Nat'l Heater Co.*, 60 N.W.2d 804, 810 (1953), no court has expanded that duty to impose a duty to train the user on how to apply provided instructions. This Court should decline to do so now because such a duty would make a product manufacturer or supplier an insurer of a product's safe use and transform a manufacturer's well-established product-misuse defense into a failure-to-train claim. Both results would offend long-standing Minnesota law and create serious adverse consequences.

Likewise, no tort duty to train exists even if a product manufacturer or seller voluntarily provides product training. Under most circumstances, a manufacturer who voluntarily provides training will not undertake to train to competency, increase the risk of use of the product, or supplant a user's independent duty to learn to use a product safely. As such, there should be no tort liability for voluntarily offered training.³

³ Because this Court should find that there is no product liability duty to train, it need not reach the issue of whether Plaintiffs' claim is barred by the educational malpractice doctrine.

ARGUMENT

I. A PRODUCT MANUFACTURER OR SELLER HAS NO DUTY TO SUPPLEMENT ADEQUATE WARNINGS AND INSTRUCTIONS WITH PRODUCT TRAINING.

There is no authority for a duty to train in Minnesota or elsewhere. It is well-established Minnesota law that a product manufacturer or supplier “has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use.” *Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 274 (Minn. 2004). This duty “includes the duty to give adequate instructions for the safe use of the product.” *Id.* “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.” *Id.*

In this case, the sufficiency of the written instructions regarding the operation of the product is not in dispute. *See Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 552 (Minn. Ct. App. 2011); *Glorvigen Br.* at 41. Thus, to reverse the Court of Appeals, this Court must find that Minnesota law imposes upon a product manufacturer or seller not only a duty to provide warnings and instructions, but also a duty to train the end user on how to heed and follow the provided warnings and instructions. No such duty exists under Minnesota law.⁴

⁴ The Court should also reject Plaintiffs’ effort to equate a duty to provide adequate instructions with an obligation to train. No court has ever found those terms to be synonymous.

Plaintiffs have not cited a single case applying Minnesota law in which the duty to provide warnings and instructions has been extended to require a product manufacturer or supplier to train a person on how to use the product safely.⁵ The cases cited by Plaintiffs merely deal with the uncontroversial duty to warn and provide instructions for safe use. *See Gray*, 676 N.W. 2d at 271 (addressing whether a supplier of silica sand had a duty to warn or instruct that a “double cartridge half-mask respirator,” as opposed to a disposable respirator, was necessary for the safe use of product containing free silica); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 829 (Minn. 1988) (addressing whether tire supplier lived up to its post-sale duty to warn concerning rims it had been making since the 1920s by disseminating safety films, posters, manuals, advertising, and promotion of OSHA standards concerning the dangers associated with those rims once they became worn); *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (declining to address whether Honeywell negligently failed to warn of dangers associated with its gas valve); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (addressing whether hydraulic press manufacturer had the legal duty to warn users of the dangers of using the press when the safety bar was not properly attached); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 274 (Minn. 1984) (addressing whether adhesive manufacturer was negligent in not including an eye irritant warning on bottle of adhesive); *Bigham v. J. C. Penney Co.*, 268 N.W.2d 892, 895 (Minn. 1978) (addressing

⁵ Although it does not appear that Plaintiffs ever litigated a product liability claim in the trial court, Plaintiffs are now advancing a product liability duty to train claim and this brief therefore addresses the merits of such a claim. This brief does not address the issue of whether Cirrus had a duty to warn because of the sophisticated user defense. *See Glorvigen*, 796 N.W.2d at 551 n.4.

whether clothing seller failed to warn that work clothes were flammable and if ignited would produce a “melt and cling” effect that would lead to unusually severe burns); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977) (holding that a space heater supplier had a duty to warn that a space heater could not be safely used in a poorly ventilated area such as a trailer); *McCormack v. Hanksraft Co.*, 154 N.W.2d 488, 492 (Minn. 1967) (addressing whether vaporizer’s instruction manual, which represented product “could be left unattended in a child’s room,” adequately warned of scalding dangers); *Johnson v. W. Fargo Mfg. Co.*, 95 N.W.2d 497, 500 (Minn. 1959) (addressing whether instructions furnished with grain elevator adequately warned that stop hooks should not be used to support the elevator during assembly); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 79 N.W.2d 688, 691 (Minn. 1956) (addressing whether instruction book furnished with a tractor adequately warned that it was dangerous to drive the tractor at speeds exceeding book’s recommended maximum speed); *Dosdall v. Smith*, 415 N.W.2d 332, 333 (Minn. Ct. App. 1987) (addressing whether herbicide fact sheet warning that herbicide should not be applied “within three weeks of tasseling” adequately warned that yield reductions could occur if applied within three weeks before tasseling).

Plaintiffs’ failure to cite Minnesota authority for an alleged duty to train is not surprising.⁶ Under Minnesota law, “strict liability does not mean that the defendant is held liable as an insurer of [its] product regardless of [the] circumstances.” *Lee v. Crookston Coca-Cola Bottling Co.*, 188 N.W.2d 426, 432 (Minn. 1971). Yet this is

⁶ *Amicus Curiae* Minnesota Association for Justice also cites no authority for such a duty.

precisely what the duty urged by Plaintiffs would require product manufacturers and suppliers to do: insure not only that consumers are warned about product dangers and provided instructions regarding safe product use, but also insure through supplemental training that consumers implement these warnings and instructions in an applied setting.

Moreover, Minnesota law has long recognized that a product-user's knowing misuse of a product provides a defense to a manufacturer in a products liability case. To recover against the manufacturer or seller of a product, it is the plaintiff's burden to prove that the "injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff." *Magnuson v. Rupp Mfg., Inc.*, 171 N.W.2d 201, 206 (Minn. 1969); *see also Waite v. American Creosote Works*, 204 N.W.2d 410, 412 (Minn. 1973). "To meet this requirement, the plaintiff must prove: 'that he made proper use of the product, that he was in the exercise of due care for his own safety, that he was not aware of the defect and that he did not mishandle the product.'" *Rients v. Int'l Harvester Co.*, 346 N.W.2d 359, 363 (Minn. Ct. App. 1984) (citation omitted); *see also Moe v. MTD Products, Inc.*, 73 F.3d 179, 183 (8th Cir. 1995) ("A plaintiff asserting strict liability must also show that the injury was not caused by mishandling of the product."). Were this Court to impose a duty to train, every case in which the manufacturer or seller provided concededly accurate and adequate instructions and the plaintiff misused a product to his or her detriment would be transformed into a failure-to-train case.

There is a line between the duty to warn/provide instructions and the duty to learn.⁷ The former duty rests with the product manufacturer or seller. The latter duty belongs to the product user.⁸ While supplemental training may be beneficial to the learning process, Minnesota law has never imposed a duty on a product supplier to supply such supplemental training and the Court should not recognize that duty here.⁹

⁷ Aristotle teaches, “For the things we have to learn before we can do them, we learn by doing them.” Oxford Dictionary of Scientific Quotations 21:9 (2005).

⁸ The division between the duty to warn/provide instructions and the duty to learn can be illustrated by the example of antilock brake systems (ABS), a common component of many modern automobiles. Automotive manuals for vehicles containing ABS warn of the dangers associated with wheel lockup in emergency braking situations, particularly on slippery road surfaces. Wheel lockup causes a driver to lose directional stability and steering control. Before automobiles were equipped with ABS, prudent drivers knew to avoid the dangers of wheel lockup by pumping the brakes. To help a driver transition to a vehicle equipped with ABS, automotive manuals instruct that drivers should not pump the brakes in response to an emergency braking situation but instead to place their feet firmly on the brakes and allow the ABS to automatically pump the brakes. By providing this instruction, the automobile manufacturer or seller has discharged its product liability duty to warn/provide instructions. The driver may need to become familiar with the ABS by practicing emergency braking. Whether or not the driver does this, he or she may revert to his or her old behavior in an emergency braking situation, pump the brakes, lose the directional stability and steering control that ABS provides, and crash his or her car. Even though more or better practice or training could have helped the driver use ABS in an emergency situation, a manufacturer or seller of a car equipped with ABS does not have a duty to train the driver to use ABS. If a driver crashes his or her car after receiving warnings on wheel lockup and instructions on ABS, the crash is his or her responsibility for not learning to use the product, not the manufacturer’s or seller’s for failing to train.

⁹ Even if there were some hypothetical justification for the imposition of such a duty in some situation, there is clearly no justification to do so in this situation, where the comprehensive regulatory scheme of the Federal aviation regulations already provides comprehensive and detailed standards to ensure that every pilot demonstrates sufficient knowledge, experience, judgment, and competence to be able to operate a given category of aircraft with a reasonable degree of safety.

Having not cited any Minnesota or foreign authority imposing a duty to train on a product manufacturer or supplier, Plaintiffs urge that “manufacturers have long been held liable for inadequate warnings or instruction given in non-written form.” *Glorvigen Br.* at 29 n.9. Plaintiffs’ domestic and foreign authority for the proposition that warnings and instructions need not be in writing to be actionable is inapposite because those cases do not involve negligent training. *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 829 (Minn. 1988), did not address whether a tire manufacturer had a duty to train tire installers on how to recognize dangers presented by old, worn tire rims. Rather, it addressed whether the manufacturer lived up to its post-sale duty to warn by disseminating safety films, posters, manuals, advertising, and promotion of OSHA standards concerning the dangers associated with those rims once they became worn. Similarly, *In re Mentor Corp. ObTape Transobturator Sling Products Liab. Litig.*, 711 F. Supp. 2d 1348, 1377-78 (M.D. Ga. 2010), merely denied summary judgment where there was evidence that a device manufacturer failed to warn that the device at issue carried more risk than competing devices and that adverse reactions were frequent rather than rare. *Id.* Even though the manufacturer relied on videos and sales representative presentations to show the warnings that it gave, the case had nothing to do with the device manufacturer’s efforts to train physicians on the use of the device. Similarly, *Clark v. Oshkosh Truck Corp.*, No. 07-0131, 2008 WL 2705558, at *4-5 (S.D. Ind. Jul. 10, 2008), addressed no more than whether an adequate warning was given to a tow truck operator who was injured while walking on the truck bed where neither the operator’s manual nor a safety video included with a vehicle warned users not to walk on a truck

bed. Cases involving warnings or instructions provided in non-written form are not instructive when the issue is whether a product manufacturer or seller has a duty to train.

In fact, cases from other jurisdictions that have addressed whether a duty to train exists have expressly declined to recognize such a duty. *See Adeyinka v. Yankee Fiber Control, Inc.*, 564 F. Supp. 2d 265, 285-86 (S.D.N.Y. 2008) (“[P]laintiff has failed to cite any case wherein a seller . . . has been found to owe a duty to train the users . . . of its products on the operation of the products at issue, and there appears to be an absence of persuasive authority from courts applying New York law to support the existence of such a duty.”); *York v. Union Carbide Corp.*, 586 N.E.2d 861, 871 (Ind. Ct. App. 1992) (“no authority for the proposition that a manufacturer has a legal duty to train the employees of its buyers”); *Antcliff v. State Emp. Credit Union*, 290 N.W.2d 420, 425 (Mich. Ct. App. 1980), *aff’d sub nom.* 327 N.W.2d 814 (1982) (“Plaintiffs argue that Michigan law imposes a duty to instruct in proper use of a product, separate and apart from the duty to warn of dangers created by improper use. We disagree.”); *Hale v. Dywidag Sys. Int’l USA, Inc.*, No. 01-73166, 2003 WL 1867912, at *5 (E.D. Mich. Mar. 24, 2003) (same).

Finally, at least some of the Plaintiffs and *Amici* contend that there is not only a duty to train, but also a duty to train to proficiency. This is an even more far-reaching and unprecedented liability theory that the Court of Appeals soundly rejected. This Court should likewise decline to impose such an obligation on product manufacturers and sellers.¹⁰

¹⁰ If the Court refuses to recognize a duty to train, there is no risk that product manufacturers or sellers will avoid liability by delegating the duty to warn to others.

II. A PRODUCT MANUFACTURER OR SELLER THAT PROVIDES SUPPLEMENTAL TRAINING DOES NOT ASSUME TORT DUTIES TO PROVIDE TRAINING ON PRODUCT USE.

It is apparent that this case was not tried as an assumed duty case. The jury was never asked to determine the extent of, nor did the trial court instruct the jury as to the scope of, the duty assumed by the Defendants. See *In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig.*, 113 F.3d 1484, 1493 (8th Cir. 1997) (pointing out that the existence and scope of a duty need to be determined either by the court as a matter of law or by the jury as a matter of fact). However, to the extent that the Court might consider such an argument, PLAC addresses this theory because a product manufacturer or seller does not assume a tort duty of reasonable care by providing product training to a product user.

While a product manufacturer or seller does not have a legal duty to train a buyer on how to use a product, the manufacturer or seller may assume a contractual obligation to provide training. Any liability for failing to perform such an obligation sounds in contract, not tort. *Vermes v. Am. Dist. Tel. Co.*, 251 N.W.2d 101, 103-04 (Minn. 1977) (The contract forms the “boundaries on [the] legal relationship.”). But, even if the Court were inclined to disregard this barrier, a product manufacturer or seller does not assume a tort duty to train by providing training pursuant to a contract under this Court’s adoption

Manufacturers or sellers remain responsible for the duty to warn despite such delegation. Similarly, there is no risk that product manufacturers will be able to avoid liability by simply incorporating required instructions for use in supplemental training courses. Manufacturers still have to show they complied with the duty to warn whether or not they provide supplemental training.

of the relevant sections of the Restatement (Second) of Torts. *See* Restatement (Second) Torts §§ 323 (liability to the one to whom services were rendered)¹¹ & 324A (liability to third persons);¹² *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001) (holding landlord did not assume a duty to maintain security under § 323); *Bjerke v. Johnson*, 742 N.W.2d 660, 675 (Minn. 2007) (Anderson, J., dissenting) (concluding that homeowner did not assume a duty to protect from abuse under § 324A); *see also C-N-P Nw., Ltd. v. Sonitrol Corp.*, No. 06-2516, 2008 WL 251816, at *1-2 (D. Minn. Jan. 29, 2008) (refusing to use Restatement (Second) Torts § 323 to bypass prohibition on claims for negligent breach of contract).

Three current Justices of this Court have provided a succinct and thoughtful analysis of liability under Section 324A, an analysis that is equally applicable to liability under Section 323. *See Bjerke*, 742 N.W.2d at 675 (G. Anderson, J., dissenting and joined by Page & Gildea, JJ.). Pursuant to this analysis, the threshold question is the

¹¹ “One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” Restatement (Second) Torts § 323.

¹² “One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.” Restatement (Second) Torts § 324(A).

scope of the duty assumed: “An actor’s specific undertaking of the services allegedly performed without reasonable care is a threshold requirement to Section 324A liability.” *Id.* at 677 (quoting *In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig.*, 113 F.3d at 1493). And “the scope of the duty is limited by the extent of the undertaking.” *Id.* (citation omitted).

In many instances a product manufacturer or seller may provide product-use training to supplement a product’s written or non-written warnings and instructions. In providing such product-use training, a manufacturer or seller may legitimately define the scope of its undertaking and disclaim an obligation to train the user on all product applications or to train the user to competency in order to leave the duty of safe use where it normally resides: with the user. A limited contractual undertaking that explicitly declines to train on a specific application or to competency should be enforced and should prevent a tort duty from attaching under an assumed duty theory. *See Bjerke*, 742 N.W.2d at 678 (concluding that no duty was assumed because defendant did not undertake to protect the plaintiff from third parties).

Even if the scope of a product manufacturer’s or seller’s undertaking encompasses the duty to train the user on a specific application and the product manufacturer or seller fails to do so, an omission fails to decrease, but does not increase, the risk of harm to the user or third parties. “[T]he test under section 324A(a) ‘is not whether the risk was increased over what it would have been if the defendant had not been negligent. Rather, a duty is imposed only if the risk is increased over what it would have been had the defendant not engaged in the undertaking.’” *Id.* at 679 (quoting *Myers v. United States*,

17 F.3d 890, 903 (6th Cir. 1994)). While a product manufacturer's efforts to train a user on the safe use of its product may *prevent* a user from suffering harm, a failure to train "is a failure to decrease, not increase, the risk of harm." *Id.* (citation omitted); *see also Prelvitz v. Milsop*, 831 F.2d 806, 809-10 (8th Cir. 1987) (applying Minnesota law) (declining to find liability where the defendant's actions did not increase risk of harm). Because a failure to decrease the risk of harm by failing to perform an assumed duty is not actionable under Minnesota law, an omission to provide training cannot form the basis for assumed duty liability.

Nor should liability be imposed on a product manufacturer or seller for failing to train a product user on the basis that the product manufacturer or seller has undertaken to perform a duty owed by the product user to other third persons. *See* Restatement (Second) Torts § 324A(b). "A superficial reading of subsection (b) would lead one to believe that *any* endeavor to help another in the performance of his duty would lead directly to liability." *Bjerke*, 742 N.W.2d at 679-80 (citation omitted). But, such a superficial reading is incorrect and liability under subsection (b) can only be found if the defendant *completely assumes* the duty owed by the other to the third person. *Id.* at 680. A product user will always retain an independent duty to third parties to use reasonable care and so a product manufacturer or seller who *supplements*, but does not *supplant*, that independent duty may not be held liable merely by providing product training.

A person who uses a product that he or she knows to be dangerous has a duty to follow warnings, heed instructions, and learn to safely use the product before exposing one's self and others to harm from the product. By accepting training from a product

manufacturer or seller, such a person does not surrender to the trainer his or her control of, or responsibility for, safe use. Such a person remains a voluntary user of the product with the responsibility to use the product according to the provided warnings and instructions. Because training provided by a product manufacturer or seller merely supplements a product user's independent duty to use reasonable care, no assumed duty liability can be imposed on a reliance theory. *See* Restatement (Second) Torts § 324A(c). “[F]or liability to be imposed under section 324A(c), ‘there must be proof of actual reliance on a contractual undertaking or representations by the defendant that resulted in acts or omissions by the party relying on the defendant’s undertaking.’” *Bjerke*, 742 N.W.2d at 680 (citation omitted). “[C]ase law applying this section generally focuses on reliance in the form of altering the precautions that might otherwise have been taken without the defendant’s undertaking.” *Id.* at 681 (citation omitted); *see also Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-07 & n.9 (Minn. 1979) (requiring reliance to be reasonable). Unlike a captain of a disabled ship who surrenders command of his ship in favor of a tow, a product user cannot reasonably rely on a product manufacturer’s or seller’s product training to forgo other actions necessary to fulfill his or her independent duty to safely use the product. The product user remains in control over the use of the product and responsible for its safe use.

Accordingly, under Minnesota law, a product manufacturer or seller that has not specifically undertaken to train a user of its product to competency, cannot face tort liability for negligent training.

III. THERE ARE SERIOUS ADVERSE CONSEQUENCES OF IMPOSING A DUTY TO TRAIN UPON PRODUCT MANUFACTURERS AND SELLERS.

As technology advances, consumers in Minnesota demand an ever-growing variety of increasingly complex products. Manufacturers and sellers respond by providing the products that Minnesota consumers demand and that complement the lifestyles of average Minnesotans. These products include watercraft, snowmobiles, ATVs, and firearms that people use to enjoy the State's trademark natural resources, as well as home improvement products and medical devices. As the complexity of these products has increased, manufacturers and sellers have responded by providing product training to supplement the written warnings and instructions that accompany these products. Outdoor expositions give consumers exposure to the use of new watercraft and firearms and provide a beneficial supplement to State licensing and safety requirements. Home improvement warehouses provide workshops for consumers that demonstrate how new products can be used to remodel Minnesotans' homes. Medical device manufacturers routinely provide physician demonstrations and trainings on a myriad of life saving and improving treatments.

If a duty to train is imposed upon product manufacturers and sellers, such companies will be forced to respond in a variety of ways, such as: (1) stop offering complicated products that a reasonable person may have trouble safely using with reference to the written warnings and instructions alone; (2) stop offering supplemental training regarding such products; or (3) raise the price of such complicated products to offset the increased training costs and inevitable liability risks. Such a result would

unfairly deter the most conscientious product manufacturers and sellers, and also punish the Minnesota consumers who want to use complex products and who seek to learn to use such products properly before exposing themselves and others to harm through use.

In addition to punishing Minnesota consumers by restricting choices and increasing prices, imposition of a duty to train will hamper economic activity in Minnesota as the increased prices will lower demand and thus sales of complicated products. Since a duty to train has not been recognized in other states, the recognition of a duty to train in Minnesota may encourage product manufacturers to leave the state and focus on selling and distributing their products in jurisdictions rejecting a duty to train. The accompanying loss of jobs and tax revenue would be a further stress on Minnesota's economy.

The imposition of a duty to train under Minnesota product liability law will cause a flood of litigation and dramatically alter product manufacturers' and sellers' costs of doing business in Minnesota. This alone is enough to counsel this Court to use caution and restraint before imposing a duty to train. *See Homer v. Pabst Brewing Co.*, 806 F.2d 119, 121 (7th Cir. 1986) ("The imposition of a duty is an act of judicial policymaking" that courts should engage in with "caution and restraint.").

Defining the scope of the duty is also quite complicated: should the duty be imposed on everyone in the chain of distribution? How far should such liability exposure extend after completion of the training? Is the manufacturer or seller liable if the training is contracted to a third party? Of what significance is the existence of a comprehensive regulatory scheme already in existence establishing the amount of training and the

competence of operators of the equipment? Is it good public policy to impose greater liability on a manufacturer who offers training than on one who does not?

Are these not precisely the kinds of value judgments that should be determined by the Legislature? See *Prelvitz v. Milsop*, 831 F.2d 806, 809-10 (8th Cir. 1987) (applying Minnesota law) (declining to recognize a duty that would discourage socially beneficial actions); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001) (refusing to recognize a duty that might decrease the risk of harm to the public when imposition would discourage socially beneficial actions); *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990) (before a court recognizes a new tort, “a broader segment of our society should study, debate and consider this action, and if such a tort is to be adopted, decide how broad its scope and how far reaching its award of damages will be.”).

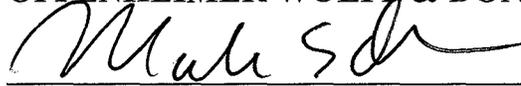
All of these adverse consequences outweigh the societal benefit of providing compensation to injured persons who fail to exercise the care necessary to learn to use a product safely before exposing their selves and others to harm. Accordingly, this Court should not recognize a duty to train.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals and decline to recognize a duty to train under Minnesota law.

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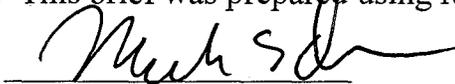
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Times New Roman 13 point. The length of this brief is 6,479 words. This brief was prepared using Microsoft Word 2003.

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