

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),

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),

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

**UNIVERSITY OF NORTH DAKOTA AEROSPACE FOUNDATION'S
 REPLY BRIEF**

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

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

*Attorneys for Respondent/Cross-Appellant
 University of North Dakota Aerospace Foundation*

(Additional Counsel continue on following page)

Sam Hanson (#0041051)
Diane B. Bratvold (#018696X)
Amie E. Penny (#389874)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

Edward J. Matonich, Esq. (#68603)
Darrold E. Persson, Esq. (#85364)
David Arndt, Esq. (#149330)
MATONICH & PERSSON, CHTD.
2031 Second Avenue East
P.O. Box 127
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*

Philip Sieff, Esq. (#169845)
Vincent J. Moccio, Esq. (#184640)
ROBINS, KAPLAN, MILLER
& CIRESI LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

*Attorneys for Appellant/Cross-Respondent
Rick Glorvigen, as trustee for the next-of-kin of
James Kosak*

Bruce Jones, Esq. (#179553)
Daniel Connolly, Esq. (#197427)
Dan Herber, Esq. (#386402)
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

-and-

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

*Attorneys for Respondent
Cirrus Design Corporation*

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*

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*

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

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

Mark B. Rotenberg (#126263)
William P. Donohue (#23589)
UNIVERSITY OF MINNESOTA
OFFICE OF GENERAL COUNSEL
360 McNamara Alumni Center
200 Oak Street S.E.
Minneapolis, MN 55455-2006
(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
State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

Attorneys for State of Minnesota

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

-and-

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

-and-

Kenneth M. Mead, Esq.
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue N.W.
Washington, D.C. 2004-2400
(202) 639-7744

Attorneys for Amicus Curiae
Aircraft Owners and Pilots Association

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. THE SPECULATIVE EXPERT TESTIMONY IS NOT LEGALLY SUFFICIENT TO SUPPORT A VERDICT ON CAUSATION.....	1
A. The Court’s Review Is <i>De Novo</i>	2
B. Walters’ Testimony Did Not Constitute Legally Competent Evidence for Sending the Case to the Jury	3
C. Appellants’ Cited Cases and Facts Bear No Relevance to the Causation Issue.....	5
II. THE DISTRICT COURT LACKED A LEGAL BASIS TO ORDER ENTRY OF JUDGMENT AGAINST UNDAF	8
A. The Court’s Review Is <i>De Novo</i>	8
B. The District Court Lacked a Legal Basis to Order Entry of Judgment Against UNDAF	9
C. Claims Against UNDAF Were Barred by the Three-Year Wrongful-Death Statute of Limitations, Which UNDAF Has Never Waived	10
D. Public Policy Considerations Support Ordering That Judgment Be Entered in Favor of UNDAF.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases:

	Page
<i>Cabanne v. Graf</i> , 87 Minn. 510, 92 N.W. 461 (1902)	9
<i>City of Willmar v. Short-Elliott-Hendrickson, Inc.</i> , 512 N.W.2d 872 (Minn. 1994)	12
<i>Do v. Am. Family Mut. Ins. Co.</i> , 779 N.W.2d 853 (Minn. 2010)	9
<i>Gerster v. Wedin</i> , 294 Minn. 155, 199 N.W.2d 633 (1972)	2, 3, 4, 7
<i>Hardwick v. Ickler</i> , 71 Minn. 25, 73 N.W. 519 (1897)	11
<i>Johnson v. Consolidated Freightways, Inc.</i> , 420 N.W.2d 608 (Minn. 1988)	13
<i>Konen Constr. Co. v. U.S. Fid. & Guar. Co.</i> , 401 P.2d 48 (Or. 1965)	15, 16
<i>Langeslag v. KYMN Inc.</i> , 664 N.W.2d 860 (Minn. 2003)	2, 3, 7
<i>Miss. Valley Dev. Corp. v. Colonial Enters., Inc.</i> , 300 Minn. 66, 217 N.W.2d 760 (1974)	11
<i>Oganov v. Am. Family Ins. Group</i> , 767 N.W.2d 21 (Minn. 2009)	14
<i>Page v. Klein Tools, Inc.</i> , 610 N.W.2d 900 (Mich. 2000).....	2
<i>Rochester Wood Specialties, Inc. v. Rions</i> , 286 Minn. 503, 176 N.W.2d 548 (1970)	3
<i>Rummel v. Yazoo Manufacturing Co.</i> , 583 N.E.2d 19 (Ill. Ct. App. 1991)	13

Sister Elizabeth Kenny Found. v. National Found.,
267 Minn. 352, 126 N.W.2d 640 (1964) 15

State v. Kaml,
181 Minn. 523, 233 N.W. 802 (1930) 11

Tayam v. Executive Aero, Inc.,
283 Minn. 48, 166 N.W.2d 584 (1969) 6

Thiele v. Stich,
425 N.W.2d 580 (Minn. 1998) 11

Statutes:

Minn. Stat. § 573.02 10, 13

Minn. Stat. § 604.01 8

State Rules:

Minn. R. Civ. P. 3 9

Minn. R. Civ. P. 8 10

Minn. R. Civ. P. 24 9

INTRODUCTION

This Court granted cross-review to University of North Dakota Aerospace Foundation (“UNDAF”) on two legal issues:

First, did Plaintiffs present legally sufficient evidence to support the jury’s verdict that inadequate pilot training caused the crash?

Second, did the district court have a valid legal basis to order entry of judgment against UNDAF, when Plaintiffs never sued UNDAF?

Since the Court reviews these legal issues *de novo*, Appellants’ fact-based responses largely miss the mark.

The only facts relevant to the causation issue revolve around James Walters’ speculation and self-described “assumptions” about Gary Prokop’s transition training. The only facts relevant to the entry-of-judgment issue are undisputed, including (1) Plaintiffs’ failure to assert any claims against UNDAF, (2) the fact that the statute of limitations had long since expired for any claims against UNDAF, and (3) Plaintiffs’ pre-verdict affirmations that “we didn’t sue UND” and “we only sued Cirrus.” These facts, when measured against controlling law, demonstrate the district court erred by ordering that judgment be entered against UNDAF in favor of Plaintiffs.

ARGUMENT

I. THE SPECULATIVE EXPERT TESTIMONY IS NOT LEGALLY SUFFICIENT TO SUPPORT A VERDICT ON CAUSATION

The close relationship between causation and the educational malpractice doctrine bears careful attention. Uncertainties about causation are an *inherent* consideration in

any case alleging improper or incomplete training. *See Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 903 (Mich. 2000) (citing “[i]nherent uncertainties about causation” as factor underlying educational malpractice bar) (quoting *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999)). When claims challenge the quality, thoroughness, and/or content of instruction, the jury can only “speculate about whether such negligence was a proximate cause” of a physical injury. *Id.* at 906. Such speculation permeated this case.

A. The Court’s Review Is *De Novo*

Plaintiff Rick Glorvigen offers no independent response to UNDAF’s causation arguments. Plaintiff Thomas Gartland and the Estate of Prokop simply suggest that the Court defer to the verdict. (Gartland Resp. Br. 8; Estate Resp. Br. 5.) But in reviewing whether the district court should have granted UNDAF’s motion for judgment as a matter of law (“JMOL”), the Court does not examine the sufficiency of the evidence or defer to the jury’s credibility determinations. The issue is whether Plaintiffs provided legally sufficient factual basis for the jury to render a verdict on causation *at all*.

When an expert’s opinion is based on facts that do not provide an adequate foundation for the opinion, the district court should grant JMOL in favor of the Defendants. *Gerster v. Wedin*, 294 Minn. 155, 160, 199 N.W.2d 633, 636 (1972). Denial of a JMOL motion is a question of law, reviewed *de novo*. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864, 869-70 (Minn. 2003) (“we review *de novo* the district court’s denial of [a] motion for JNOV”).

B. Walters' Testimony Did Not Constitute Legally Competent Evidence for Sending the Case to the Jury

Plaintiffs' fact-intensive responses to the causation issue fail to identify "competent evidence reasonably tending to sustain the verdict." *Id.* at 864 (emphasis added). An expert's opinion constitutes legally competent evidence only if it is "based on facts sufficient to form an adequate foundation for his opinion." *Gerster*, 294 Minn. at 160, 199 N.W.2d at 636. "[A]n opinion based on speculation and conjecture has no evidentiary value." *Id.*

Plaintiffs and the Estate of Prokop do nothing to demonstrate Walters' opinions were based on anything other than speculation and conjecture. Most tellingly, they fail to confront Walters' testimony that—in his words—he was simply "assuming" Prokop did not know how to use the autopilot. Nor do they address Walters' admission that he had no idea whether Prokop had or had not been adequately trained on the device. Walters lacked facts sufficient to support his opinions about Prokop's training, and therefore lacked a basis for his conclusion that training-related negligence caused the crash.

Gartland and the Estate ignore *Rochester Wood Specialties, Inc. v. Rions*, 286 Minn. 503, 176 N.W.2d 548 (1970), where this Court specifically held a fire-investigation expert's opinions "should not have been received because they were based on assumptions which were not established by the evidence." *Id.* at 509, 176 N.W.2d at 552. The holding applies here in spades, and Appellants' failure to address it is telling.

Gartland and the Estate attempt to distinguish another careless-smoking case, *Gerster v. Wedin*, by suggesting there was "no evidence" or a "complete lack of

evidence” that the decedent had been smoking. (Gartland Resp. Br. 14-15; Estate Br. 9-10.) Actually, there was substantial uncontradicted circumstantial evidence that the decedent was a smoker, that his blood-alcohol content had put him in a “sedated” condition, and that the fire originated near a chair or couch. 294 Minn. at 157, 199 N.W.2d at 634. Still, the Court affirmed judgment notwithstanding the verdict.

Here, Appellants claim the verdict is supported by circumstantial evidence that Prokop was hand-flying the aircraft when it crashed. (Estate Resp. Br. 10.) But Prokop’s *use or nonuse* of the autopilot has no relevance to the lynchpin of Plaintiffs’ case: the bare assumption that Prokop did not know *how to use* the autopilot. Plaintiffs relied on Walters to testify to that, and Walters admitted that his opinion that Prokop did not know how to use the autopilot was simply an “assumption”:

Q: And so you’re saying that because [the training syllabus] doesn’t give a full description of what was taught, you can’t conclude that Mr. Prokop knew how to use the autopilot?

A: Well, in this situation IMC, flying from VFR into IMC.

Q: Well, I think your actual line was, it doesn’t tell you whether he knew how to use the autopilot or whether he didn’t you just don’t know. Is that a fair statement?

A: That’s a fair statement.

Q: So you’re assuming that he didn’t, right?

A: Based on the flight, I am assuming that, correct.

(Tr. 406:9-407:4 (emphasis added).)

The circumstantial evidence in this case is substantially weaker than in *Gerster*. UNDAF cited *Gerster* at length in its post-trial memorandum, and the district court erred by not following that precedent.

Gartland further attempts to distinguish the careless-smoking cases by contending “all of the evidence” pointed to Prokop’s non-use of the autopilot as “being the cause of the power stall and crash.” (Gartland Resp. Br. 15.) But this is not true, evidenced by the jury’s attribution of 25% fault to Prokop—a finding the Defendant Estate of Prokop did not appeal. Further, Walters himself testified about the marginal weather, Prokop’s desire to see his son play hockey, and Prokop’s “poor decision” to go flying that day. Finally, Gartland’s argument ignores Plaintiffs’ theories, reflected in Walters’ testimony, that lack of “scenario-based” training and management “oversight” were causal factors.

Never was this a simple case of an unfulfilled promise to provide in-flight autopilot instruction during flight 4a. Plaintiffs made a broad-based challenge to the quality of flight training from the start. Even viewing the evidence in the light most favorable to the verdict demonstrates it is sheer speculation to blame the crash on that training, on the autopilot or otherwise.

C. Appellants’ Cited Cases and Facts Bear No Relevance to the Causation Issue

Gartland and the Estate cite a litany of facts and case law irrelevant to the legal question of whether the district court erred by denying JMOL. Most of it goes to breach, not causation. For example, Gartland contends the jury “could well have found” Defendants did not reasonably provide autopilot instructions to Prokop, and the jury

“could have found that Cirrus was negligent in administering the training program.” (Gartland Resp. Br. 11.) But such jury “findings” about what training was or was not provided do nothing to demonstrate the alleged inadequate training *caused* the crash.

The Defendant Estate cites to “evidence linking respondents’ negligence to the crash” and generally suggests the jury had a right to disbelieve Yuweng Shipek’s testimony that he had provided Prokop with the in-flight training Plaintiffs allege was not provided. (Estate Br. 8-9.) But again, the question of what training was provided goes to *breach*, not causation.

Gartland further characterizes UNDAF’s causation argument as an “attack [on] Captain Walters’ testimony on foundation,” which Gartland claims was not preserved for appeal. But Defendants’ consistent argument, reflected in their repeatedly overruled “speculation” objections, was that Walters’ speculative conclusions failed to provide a legally sufficient basis for the jury to determine whether a breach caused injury.¹

Gartland cites *Tayam v. Executive Aero, Inc.*, 283 Minn. 48, 166 N.W.2d 584 (1969) to claim “this case is similar to other cases which this Court has affirmed on appeal.” (Gartland Br. 9-11.) But *Tayam* did not include flight training. It involved an aircraft manufacturer and seller who breached duties to warn the pilot about how to operate the aircraft’s specialized engine in icing conditions. UNDAF is not a manufacturer or seller with a duty to warn.

¹ Further, when Cirrus counsel objected to Walters’ speculation and stated “[w]e don’t have a foundation for this,” the Estate’s counsel cut him off and stated: “Objection, Your Honor, I thought we were supposed to have one-word objections” and the district court admonished the parties to “not make arguments.” (Tr. 241:11-21.)

Further, as Gartland acknowledges, the legal issue in *Tayam* was whether the expert was *qualified* to render an expert opinion even though he lacked academic training. (Gartland Resp. Br. 10.) There is no such inquiry here; UNDAF does not challenge James Walters' qualifications. Rather, Walters' qualifications simply demonstrate that reversal without a new trial is required here because it would be impossible for *any* expert to provide competent testimony on which a jury could base a conclusion that training caused the crash.

It is undisputed that there was "no direct evidence of what happened immediately before the plane stalled and crashed." (Gartland Resp. Br. 12.) This reality reflects a not-uncommon characteristic of general-aviation accidents in which there are no survivors: it almost always is impossible to know what, if anything other than pilot error, was a legal cause. Here, it is impossible to know. One can only speculate. That is precisely what Walters did.

To obtain his FAA private-pilot certification, Prokop was required to demonstrate to an FAA examiner that he knew how to escape VFR-into-IMC conditions. Walters provided nothing beyond pure speculation to show Prokop wanted to or tried to use the autopilot on the flight. Plaintiffs failed to provide any competent evidence, through Walters' testimony or otherwise, on which the jury could have based its verdict that flight training caused the crash. *Langeslag*, 664 N.W.2d at 864; *Gerster*, 294 Minn. at 160, 199 N.W.2d at 636. Accordingly, the district court erred by denying UNDAF's motion for JMOL.

II. THE DISTRICT COURT LACKED A LEGAL BASIS TO ORDER ENTRY OF JUDGMENT AGAINST UNDAF

Only Gartland responds to UNDAF's entry-of-judgment issue, and that response still fails to explain why Plaintiffs did not sue UNDAF. It is a question that has never been answered. The flight school's role in Prokop's training was never a secret, evidenced by the name "UND Aerospace" prominently displayed on the flight syllabus' first page. (Appx. 152.) We can only guess whether Plaintiffs' choice not to sue UNDAF was a tactical decision (1) to evade the educational malpractice bar, or (2) to avoid the wrongful-death statute of limitations issue, or (3) both.

What is clear is that Plaintiffs failed to establish any legal basis for the district court's order for entry of judgment against UNDAF. Of course, the Court need reach this cross-review issue only if it holds UNDAF had a duty *and* there was a sufficient basis for the jury to conclude a breach caused harm. However, if necessary, the Court can and should affirm the court of appeals' directive for entry of judgment in favor of UNDAF on this alternative ground.

A. The Court's Review Is *De Novo*

Gartland acknowledges a district court enters judgment "as required by law," and he appears to agree that by ordering entry of judgment against UNDAF the district court applied Minn. Stat. § 604.01 *et seq.* (Gartland Resp. Br. 18.) Yet Gartland urges a deferential standard of review, suggesting the Court merely analyzes the sufficiency of the evidence behind the special verdict to determine whether the district court properly ordered judgment consistent with UNDAF's percentage of fault.

But sufficiency of the evidence and percentage of fault are irrelevant to whether a legal basis existed for the district court to order entry of judgment in the first instance. Where as here the underlying facts are undisputed, “an appellate court will review *de novo* the district court’s application of the law.” *Do v. Am. Family Mut. Ins. Co.*, 779 N.W.2d 853, 856 (Minn. 2010). If there was no legal basis for entering the judgment, it must be set aside without regard to the jury’s findings. *See, e.g., Cabanne v. Graf*, 87 Minn. 510, 514-15, 92 N.W. 461, 462 (1902) (voiding judgment against defendant over whom court had no personal jurisdiction).

B. The District Court Lacked a Legal Basis to Order Entry of Judgment Against UNDAF

Plaintiffs characterize their failure to serve complaints on UNDAF as a mere technicality. But the Minnesota Rules of Civil Procedure required Plaintiffs to serve Complaints without regard to whether Defendant intervened. Minn. R. Civ. P. 3.01-.02; Minn. R. Civ. P. 24. The Rules further required UNDAF’s Notice of Intervention to be accompanied by “a pleading setting forth the nature and extent of every claim or defense as to which intervention is sought and the reasons for the claim of entitlement to intervention,” which in this case was an “intervener’s [sic] answer.” Minn. R. Civ. P. 24.03; Form 18, Minn. R. Civ. P. Appx. of Forms.

That is why UNDAF answered the Complaints, which made claims *only* against Cirrus and demanded judgment *only* from Cirrus. (A1-11.) UNDAF had neither reason nor ability to affirmatively state Plaintiffs were not entitled to judgment against UNDAF because Plaintiffs’ Complaints never demanded judgment from UNDAF. *See* Minn. R.

Civ. P. 8.01 (requiring Complaint to contain a “demand for judgment for the relief sought”). Indeed, the Complaints did not mention UNDAF *at all*.

The Complaints did not satisfy the procedural or substantive requirements for putting UNDAF on notice it could or would be subject to entry of judgment in favor of Plaintiffs. This conclusion is strongly bolstered by Plaintiffs’ pre-verdict representations that “we didn’t sue UND” and “we only sued Cirrus,” as well as by their concessions in this appeal that “Plaintiffs did not sue UNDAF.” (See UNDAF Br. 54; Gartland Br. 27; Glorvigen Br. 36.) The plain language of the Minnesota Rules of Civil Procedure demonstrates the district court lacked a legal basis for ordering entry of judgment against UNDAF.

C. Claims Against UNDAF Were Barred by the Three-Year Wrongful-Death Statute of Limitations, Which UNDAF Has Never Waived

Gartland does not argue a claim against UNDAF could have satisfied the wrongful-death statute of limitations, which expired on January 18, 2006. Minn. Stat. § 573.02, subd. 1. Gartland’s argument is that UNDAF waived its statute-of-limitations defenses. But UNDAF raised the statute-of limitations issue in its post-trial briefing and at the post-trial hearing as soon as Plaintiffs jettisoned their pre-verdict assurances that “we didn’t sue UND” and “we only sued Cirrus.” (UNDAF Br. 55 & n.8.)

Nevertheless, Gartland faults UNDAF for failing “to assert [statute of limitations defenses] in its answer, which it filed and served at the time it intervened.” (Gartland Resp. Br. 18.) But Plaintiffs never served any pleading that made claims against UNDAF to which it could have answered with statute-of-limitations defenses, and it is nonsensical

to suggest UNDAF was supposed to raise limitations defenses to the *timely* claims against Cirrus—the *only* pleaded claims.

Gartland cites cases where statutes of limitations were deemed waived, but the cases did not involve intervening defendants; moreover, in each case the plaintiff *had* actually sued the defendant. See *Miss. Valley Dev. Corp. v. Colonial Enters., Inc*, 300 Minn. 66, 72, 217 N.W.2d 760, 764 (1974) (default judgment against defendant); *State v. Kaml*, 181 Minn. 523, 527, 233 N.W. 802, 804 (1930) (“The [defendant school] district, pursuant to legislative authority, by its vote in effect decided not to avail itself of the limitation defense if it had it.”); *Hardwick v. Ickler*, 71 Minn. 25, 27, 73 N.W. 519, 520 (1897). Notably, in *Hardwick*, the Court held that if there “was no answer ... the rule may be different.” *Id.* Here, there was no answer to claims against UNDAF because there were no claims against UNDAF. This case is decidedly “different.”

Gartland cites *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1998), where the Court held it was error to “consider the applicability of the statute of limitations on appeal ... if it was not passed on by the trial court.” (Gartland Resp. Br. 21 (citing *Thiele*, 425 N.W.2d at 582).) But the issue was not whether a defendant had properly preserved a statute of limitations defense. The issue was whether the *plaintiff* had properly preserved its argument that the action was *not* barred by the statute of limitations. The court of appeals considered the argument, reversed the district court, and remanded for trial. But this Court reversed the court of appeals because it “improperly considered a statute of limitations question never litigated below.” 425 N.W.2d at 582.

Here the district court did not address UNDAF's statute of limitations argument in its memorandum even though UNDAF's written and oral submissions raised it. (UNDAF Br. 55 & n.8.) But *Thiele* cannot stand for the proposition that an intervening defendant waives its statute-of-limitations arguments when a district court fails to apply them and the court of appeals does not address the failure because it reversed a judgment on other grounds.

Finally, Gartland suggests UNDAF waived its statute-of-limitations defenses by its "actions" and "conduct" in participating at trial. (Gartland Resp. Br. 20.) But this ignores the sole reason UNDAF intervened: to guard against potential contribution liability to Cirrus, whose ability to maintain the educational malpractice defense was in doubt given the federal district court's ruling that "Cirrus' primary business is building and selling airplanes, not training pilots." (A57.) It bears repeating: *UNDAF's sole business is training pilots*. UNDAF was the entity best positioned—potentially solely positioned—to maintain the defense, and it did so in a proper forum, in furtherance of judicial economy, and to avoid risk of being estopped from doing so in any subsequent contribution proceeding.

Gartland faults UNDAF for not submitting a contribution claim to the court or jury. (Gartland Resp. Br. 19.) But contribution is an independent cause of action that accrues only after a party has paid "more than its fair share." *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). When this case went to the jury, there was no contribution claim because Cirrus had not paid anything let alone more than its fair share.

A potential contributor who intervenes to litigate a legal issue such as the education malpractice bar does not waive its statute-of-limitations defense. The well-reasoned decision in *Rummel v. Yazoo Manufacturing Co.*, 583 N.E.2d 19 (Ill. Ct. App. 1991) demonstrates this. There, the plaintiff maintained a products liability action against a lawn mower manufacturer, which in turn sought contribution from the school district that employed the defendant and had entered the action as an intervenor as subrogee of the plaintiff. The manufacturer argued that by intervening and attending depositions, the school district waived a one-year statute of limitations applicable to claims against local governmental entities. *Id.* at 19-20.

The Illinois Court of Appeals disagreed, explaining the intervenor had not exhibited “purposeful relinquishment” of the statute-of-limitations defense. *Id.* at 22. Here, likewise, UNDAF’s accepted means for protecting its interests through intervention do not constitute purposeful relinquishment of the three-year wrongful-death statute of limitations. UNDAF cited the statute of limitations as soon as Plaintiffs backed away from their pre-verdict representations that they had not sued UNDAF. Plaintiffs have cited no authority suggesting such an end run around the limitations period is authorized by statute, rule of civil procedure, case law, or otherwise.

Plaintiffs would have had no claim, even against Cirrus, had the Minnesota legislature not enacted Minn. Stat. § 573.02, subd. 1 to abrogate the common law rule that “tort claims die with both the victim and the perpetrator.” *Johnson v. Consolidated Freightways, Inc.*, 420 N.W.2d 608, 610-11 (Minn. 1988). Minnesota’s legislature, like the Illinois legislature in the *Rummel* case involving governmental immunity, made a

policy determination that certain claims are subject to a shortened limitations period when they exist only by legislative authorization. This is a policy determination the Court has neither authority nor reason to upend.

This Court reviews the record *de novo* to determine whether a statute of limitations bars a claim. *Oganov v. Am. Family Ins. Group*, 767 N.W.2d 21, 24 (Minn. 2009). And here the record demonstrates any claims that Plaintiffs might have asserted against UNDAF were legally barred.

D. Public Policy Considerations Support Ordering That Judgment Be Entered in Favor of UNDAF

Gartland characterizes the district court as “understandably bemused by UNDAF’s argument that judgment could not be entered against it.” (Gartland Resp. Br. 18.) But the nine pages of memorandum Judge Ten Eyck dedicated to this problematic threshold issue belie bemusement. (A100-08.) He found the Plaintiffs’ predicament a “troubling one” and practically invited an appellate court to reverse him, concluding he had no authority to overturn Judge Maturi’s initial order authorizing to UNDAF’s intervention and that “redress, if necessary, is properly founded within the jurisdiction of a higher court.” (Add. 100, 108.)

Public policy supports the conclusion it was legal error to order judgment against UNDAF. Intervention is governed by Rule 24 of the Minnesota Rules of Civil Procedure, which authorized—and, as amended in 1968, *encouraged*—UNDAF’s intervention free from fear it might be subject to a judgment making it jointly liable with Cirrus. (UNDAF Br. 51-53.) If the Rule’s drafters and/or advisers desire a return to pre-

1968 procedure to make potential entry of judgment a precondition to intervention, they can do so.² But as it stands, UNDAF was entitled to rely on existing Rules.

Further, it would be in contravention of judicial economy to hold that a Defendant with potential contribution liability risks having judgment entered against it solely because it intervened. Enacting such a rule would encourage would-be intervenors to sit out hearings and trials and then litigate the exact same issues (*e.g.*, applicability of the educational malpractice bar) in subsequent contribution proceedings. This would encourage more litigation, not less. Such a rule also would spur more litigation because it would eviscerate statutes of limitations in general and the wrongful-death limitation period in particular by authorizing end runs around the statute as was accomplished here.

Finally, affirming judgment against UNDAF would thwart UNDAF's reasonable expectation that it could rely on Plaintiffs' pre-verdict statements that "we didn't sue UND" and "we only sued Cirrus." Plaintiffs' change was similar to the about-face in *Konen Construction Co. v. United States Fidelity & Guarantee Co.*, 401 P.2d 48, 50-51 (Or. 1965), where a plaintiff purposefully refused to assert claims against an intervenor and then subsequently sought judgment against the intervenor. In characterizing the

² Gartland suggests the decision in *Sister Elizabeth Kenny Foundation v. National Foundation*, 267 Minn. 352, 126 N.W.2d 640 (1964) "has no application" in this case. (Gartland Resp. Br. 21.) In a sense, Gartland is correct, because the case described the intervention rule that existed before 1968—specifically, that intervenors had to establish they would "gain or lose by the direct legal effect of the judgment therein whether or not they were a party to the action." *Id.* at 357-58, 126 N.W.2d at 634-44. UNDAF cited the case to help demonstrate what Gartland ignores: that the 1968 amendment effectuated a "change in Minnesota law" to permit intervention when direct liability was "possible" but not "necessary." Minn. R. Civ. P. 24.01 Advisory C'mte Note.

plaintiff as being in “no position” to request a judgment “which up to this time it had seemed to regard with disdain,” the Oregon Supreme Court described the change as the “kind of trifling with the judicial process which courts frown upon.”³ *Id.* at 50-51.

So too here. If Plaintiffs envisioned UNDAF would be subject to a judgment in their favor, they should not have not stated “we didn’t sue UND” and “we only sued Cirrus,” and they should have served UNDAF with Complaints—to which UNDAF would have answered with its statute-of-limitations defenses.

CONCLUSION

It is practically impossible for the Court to separate the causation issue from its analysis of whether the educational malpractice doctrine barred Plaintiffs’ claims. Causation is *inherently* uncertain anytime a plaintiff challenges the quality of education delivered, as was the case here. James Walters, while qualified, was unable to articulate an opinion based on facts that were anything other than speculation. And his speculation, in turn, is a legally insufficient basis for the jury’s verdict.

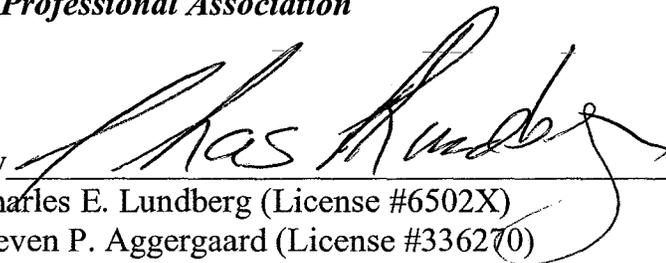
Accordingly, if the Court reverses the court of appeals’ determination that UNDAF owed no legal duty, it should affirm entry of judgment in UNDAF’s favor on the cross-review causation grounds. Alternatively, judgment in favor of UNDAF is required

³ Gartland contends *Konen* involved a “distinctly different factual history” because the plaintiff “steadfastly refused” to seek judgment against the intervenor until after trial. (Gartland Resp. Br. 21-22 & n.4.) The steadfast refusal came “after a partially unfavorable decision” the Oregon Supreme Court had previously issued in the case. *Konen Constr. Co.*, 401 P.2d at 50. Here, it is true Plaintiffs seek to have judgment entered against an intervenor after a *favorable* jury decision, but *Konen’s* admonition against “trifling with the judicial process” still rings true.

because the district court lacked a legal basis for ordering entry of judgment against an intervenor whom Plaintiffs never sued.

BASSFORD REMELE
A Professional Association

Dated: October 17, 2011

By 

Charles E. Lundberg (License #6502X)
Steven P. Aggergaard (License #336270)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
Telephone: (612) 333-3000
Facsimile: (612) 333-8829

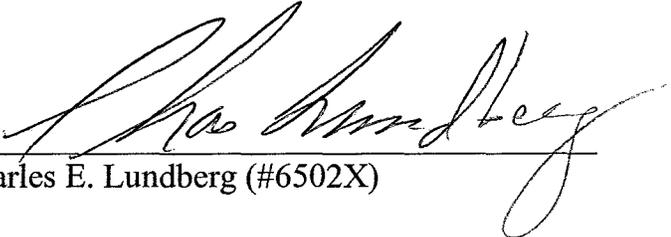
- and -

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

*ATTORNEYS FOR APPELLANT UNIVERSITY OF
NORTH DAKOTA AEROSPACE FOUNDATION*

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: Proportional serif font, 13 point or larger. The length of this brief is 4,292 words. This brief was prepared using Microsoft Word 2003.

By 
Charles E. Lundberg (#6502X)