

CASE NOS. A10-1242, A10-1243, A10-1246 and A10-1247

STATE OF MINNESOTA
IN COURT OF APPEALS

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

Thomas M. Gartland, as Trustee for the next-of-kin of decedent Gary R. Prokop,
Respondent (A10-1243, A10-1247),

vs.

Cirrus Design Corporation,
*Respondent (A10-1242, A10-1243),
Appellant (A10-1246, A10-1247),*

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

University of North Dakota Aerospace Foundation,
*Appellant (A10-1242, A10-1243),
Respondent (A10-1246, A10-1247).*

BRIEF OF AMICUS CURIAE
MINNESOTA ASSOCIATION FOR JUSTICE

BIRD, JACOBSEN & STEVENS, PC

Andrea B. Niesen (#343493)
300 Third Avenue SE, Suite 305
Rochester, MN 55904
(507) 282-1503

*Attorneys for Amicus Curiae
Minnesota Association for Justice*

ROBINS, KAPLAN, MILLER &

CIRESI, LLP

Philip Sieff
Vincent J. Moccio
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

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

Additional Counsel Listed on Following Pages

BRIGGS AND MORGAN

Eric J. Magnuson
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

-and-

**MATONICH & PERSSON,
CHARTERED**

Edward J. Matonich
Darrold E. Persson
David Arndt
2031 Second Avenue East
P.O. Box 127
Hibbing, MN 55746
(218) 263-8881

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

FAEGRE & BENSON, LLP

Bruce Jones
Daniel Connolly
Dan Herber
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

-and-

REED SMITH, LLP

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

*Attorneys for Respondent Cirrus Design
Corporation*

BASSFORD REMELE, P.A.

Charles E. Lundberg
Steven P. Aggergaard
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
(612) 333-3000

-and-

LEIB & KATT, LLC

William J. Katt
River Bank Plaza, Suite 600
740 North Plankinton Avenue
Milwaukee, WI 53203
(414) 276-8816

*Attorneys for Appellant University of
North Dakota Aerospace Foundation*

**FLYNN, GASKINS & BENNETT,
LLP**

Timothy Schupp
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
(612) 333-9500

*Attorneys for Respondent Estate of Gary
Prokop, by and through Katherine
Prokop as personal representative*

MEAGHER & GEER, PLLP

William M. Hart
Damon L. Highly
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

*Attorneys for Amicus Curiae
Minnesota Defense Lawyers Association*

HAJEK & BEAUCLAIR, LLC

Robert J. Hajek

601 Carlson Parkway, Suite 1050

Minnetonka, MN 55305

(612) 801-5067

-and-

YODICE ASSOCIATES

Ronald D. Golden

Raymond D. Speciale

411 Aviation Way

Frederick, MD 21701

(301) 695-2300

Attorneys for Amicus Curiae

Aircraft Owners and Pilots Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
ARGUMENT	1
1. A Supplier Of A Dangerous Product Has A Duty To Provide Adequate Instructions For The Safe Use Of The Product	2
2. A Provider Of Education/Training Services Is Liable For Damages Resulting From Its Failure To Follow Its Own Prescribed Curriculum	4
CONCLUSION	7
CERTIFICATE OF COMPLIANCE	8

TABLE OF AUTHORITIES

CASES

<i>Alsides v. Brown Inst., Ltd.</i> , 592 N.W.2d 468 (Minn. App. 1999)	6, 7
<i>Anderson v. Anoka Hennepin Ind. Sch. Dist. 11</i> , 678 N.W.2d 651 (Minn. 2004)	6
<i>Carcraft v. City of St. Louis Park</i> , 279 N.W.2d 801 (Minn. 1979).....	5
<i>Clark v. Rental Equip. Co.</i> , 220 N.W.2d 507 (Minn. 1974)	3
<i>Frey v. Montgomery Ward & Co.</i> , 258 N.W.2d 782 (Minn. 1977)	2, 3
<i>Gray v. Badger Mining Corp.</i> , 676 N.W.2d 268 (Minn. 2004)	2
<i>Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.</i> , 493 N.W.2d 146 (Minn. App. 1992)	2
<i>Hartmon v. National Heater Co.</i> , 60 N.W.2d 804 (Minn. 1953).....	3
<i>Isler v. Burman</i> , 232 N.W.2d 818 (Minn. 1975).....	5
<i>Johnson v. West Fargo Manufacturing Co.</i> , 95 N.W.2d 497 (Minn. 1959)	3
<i>Krahn v. J. L. Owens Co.</i> , 145 N.W. 626 (Minn. 1914)	5
<i>Larson v. Ind. Sch. Dist. No. 314, Braham</i> , 289 N.W.2d 112 (Minn.1979)	6
<i>Lubbers v. Anderson</i> , 539 N.W.2d 398 (Minn. 1995).....	2
<i>Mikel v. Aaker</i> , 99 N.W.2d 76 (Minn. 1959)	3
<i>Minneapolis Employees Retirement Fund v. Allison-Williams Co.</i> , 519 N.W.2d 176 (Minn. 1994)	2
<i>Walsh v. Pagra Air Taxi, Inc.</i> , 282 N.W.2d 567 (Minn. 1979).....	5
<i>Yunker v. Honeywell, Inc.</i> , 496 N.W.2d 419 (Minn. Ct. App. 1993).....	2

OTHER AUTHORITIES

Restatement (Second) of Torts § 324A 5

Restatement of Torts § 388 (1934)..... 3

Restatement (Second) of Torts § 388 (1965) 3

INTRODUCTION

Minnesota Association for Justice (MAJ) submits this *amicus curiae* brief¹ on two related issues:

- I. Whether negligence claims against suppliers of dangerous products may be barred by the educational malpractice doctrine?
- II. Whether providers of education/training services have a duty, sounding in tort theories, to provide the education and training that the entities themselves have already deemed reasonable and necessary?

ARGUMENT

Contrary to the arguments of the Appellant and Minnesota Defense Lawyers Association (MDLA), affirming the district court's decision would not portend a flood of litigation. Minnesota's negligence law is well developed and clear, suppliers of dangerous products and providers of education/training services are liable for damages resulting from their failure to exercise reasonable care. Affirming the district court's decision would not alter the case law landscape in Minnesota.

Minnesota litigants must have the ability to seek personal injury damages, including wrongful death damages, when a supplier of a dangerous product or a provider of education/training fails to meet its own established standard of reasonable care.

¹ Pursuant to Minn. R. Civ. App. Prac. 129.03, neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case. Neither MAJ nor the writer of this brief have any financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

I. A Supplier Of A Dangerous Product Has A Duty To Provide Adequate Instructions For The Safe Use Of The Product.

The elements of a traditional negligence claim are: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn.1995). Duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Minneapolis Employees Retirement Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn.1994). Whether a duty exists depends on the relationship among the parties and the foreseeability of harm to others. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 421 (Minn.Ct.App.1993).

Minnesota negligence law on a supplier's duty to warn is well developed. Minnesota law requires a supplier "to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use." *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn.2004). This duty to warn includes the corresponding duty to provide "adequate instructions for the safe use of the product." *Id.* (stating that when "the manufacturer or seller of the product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to give warnings of such dangers" (quotation omitted)); *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146, 151 (Minn.App.1992), *review denied* (Minn. Feb. 12, 1993); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn.1977). If the supplier undertakes to advise of the proper use to be made of a product, it has a duty to use reasonable care in giving accurate and adequate instructions with respect to the dangers inherent in the use

of the product in some other manner. *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782 (Minn.1977); *Johnson v. West Fargo Manufacturing Co.*, 95 N.W.2d 497 (Minn.1959); *Hartmon v. National Heater Co.*, 60 N.W.2d 804 (Minn.1953).

Minnesota has adopted the broad statement of principles contained in the Restatement (Second) of Torts § 388 (1965), with respect to suppliers of goods:

One who supplies directly or through a third person a chattel for another to use, *is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use*, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

- (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;
- (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts, which make it likely to be so.

(Italics added); *See, Clark v. Rental Equip. Co.*, 220 N.W.2d 507, 511 (Minn.1974); *Mikel v. Aaker*, 99 N.W.2d 76, 79-80 (Minn.1959) (quoting Restatement of Torts § 388 (1934), which is identical to Restatement (Second) of Torts § 388).

Cirrus is an airplane manufacturer and supplier of a potentially dangerous product.² As a supplier of a potentially dangerous product, Cirrus had a duty to warn purchasers of those dangers. To discharge its duty to warn, Cirrus was required to

² Cirrus is not an educational institution. While UNDAF is an educational institution, it acted as an agent of an airplane manufacturer in instructing on the proper use of a product sold by Cirrus. The activity of providing adequate instructions for the safe use of the product is not the type of activity protected by the educational malpractice doctrine.

provide purchasers adequate instructions for the safe use of the product. Cirrus created a prescribed training course, which Cirrus deemed reasonable and necessary to adequately instruct on the safe use of the product. Cirrus, through its agent, UNDAF, failed to follow the prescribed training course. Thus, Cirrus failed to adequately discharge its duties and must remain liable for foreseeable damages resulting from that failure.

A supplier of a dangerous product that fails to adequately discharge its duty to warn is liable for damages to the purchaser of the product and others foreseeably endangered by the use of the product. The duty arises from an obligation imposed by law, to use due care for the protection of others, and is not an obligation under a purchase contract. To analyze this case under a contract theory would eviscerate the duty placed on suppliers of dangerous products to warn of dangers and instruct on proper use. Suppliers of dangerous products in Minnesota must not be insulated from damages caused by the supplier's failure to use reasonable care for the protection of the foreseeable end-user of the product.

II. A Provider Of Education/Training Services Is Liable For Damages Resulting From Its A Failure To Follow Its Own Prescribed Curriculum.

Even if Cirrus was an educational institution, which it is not, negligence claims are not barred where physical injury damages result from a failure to provide education and training that the educational institution itself deemed necessary. An entity that contracts to provide education/training services must be held liable for damages resulting from a complete failure to perform on specific promises made to a student.

The liability for negligence is “independent of any contractual relation.” *Krahn v. J. L. Owens Co.*, 145 N.W. 626 (Minn.1914). Where an entity undertakes a duty, that duty must be appropriately discharged:

“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.”

Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567 (Minn.1979) (citing, Restatement (Second) of Torts § 324A). One who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so. *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975); *Carcraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn.1979) (“[O]nce a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance.”).

An entity that contracts to provide education/training services deemed necessary to prevent personal injuries, assumes a duty to exercise reasonable care in providing that service. Failure to exercise reasonable care will result in liability for bodily injury caused by the failure to appropriately discharge that duty. While the duty to exercise reasonable

care arises when a provider assumes the duty, by entering into the contract, the proper analysis is under common law negligence and not contract theories.

The Minnesota Supreme Court has permitted the inquiry into whether an educator instituted the prescribed curriculum in a negligent manner. *See, Larson v. Ind. Sch. Dist. No. 314, Braham*, 289 N.W.2d 112 (Minn.1979), *Anderson v. Anoka Hennepin Ind. Sch. Dist. 11*, 678 N.W.2d 651 (Minn.2004).³ In *Larson* the student was severely injured while performing a headspring over a rolled mat, which was a required activity in his eighth grade physical education class. 289 N.W.2d at 115. Plaintiffs claimed that the instructor was negligent in failing to teach the necessary preliminary progressions of less advanced gymnastic exercises which were designed for the safety of the student. *Id.* at 116. Plaintiffs further claimed that a curriculum bulletin prescribed the course of study that the district had prescribed as reasonable and necessary. *Id.* at 117. The court recognized that “evidence of the manual’s provisions was relevant for the jury’s determination whether defendants breached the duty of care owed to [the student].” *Id.* at n.8.

Alsides did not overrule the inquiry permitted by *Larson*. A provider of education/training services is not insulated from common law negligence claims. Appellants incorrectly argue that *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. App. 1999) should be read to prohibit all claims of negligence against the provider of

³ In *Anderson*, where it was alleged that there was a failure to teach a portion of the curriculum which was necessarily designed for safety, the Minnesota Supreme Court recognized, “we also expressed concern about creating a shield against malpractice liability” 678 N.W.2d 651 at 661.

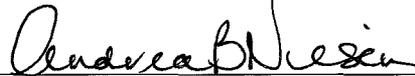
education/training services. *Alsides* must not be so broadly interpreted. *Alsides* did not address a claim for negligence resulting in a personal injury. Further, *Alsides* expressly permits claims for breach of contract, fraud, or misrepresentation when the claims do not “attack the general quality of education provided to students” but allege that the institution failed “to perform that service at all.” *Id.* at 472-73. *Alsides* held that a provider of education/training may be liable for damages resulting from the provider’s failure to “perform on specific promises it made to the student and the claim would not involve an inquiry into the nuances of educational processes and theories.” *Id.* at 476. Providers of education/training services must be liable for the full extent of damages in failing to perform on specific promises made to the students, so long as the claim does not involve a comprehensive inquiry into the nuances of education theory or procedure.

CONCLUSION

Where a provider of education/training services creates its own training course which it prescribes as reasonable and necessary to protect students and third-persons from bodily harm, the provider must be held liable for the full extent of damages resulting from its failure to follow its own reasonable and necessary training course.

Dated: November 3, 2010

BIRD, JACOBSEN & STEVENS, P.C.



Andrea B. Niesen (#343493)
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

*Attorneys for Amicus Curiae
Minnesota Association for Justice*

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(a)(1) in that it is printed in a 13 point, proportionately spaced typeface, and contains 1931 words, excluding the Table of Contents and Table of Authorities. The brief was prepared using Microsoft Word 2007.

Dated: November 3, 2010

BIRD, JACOBSEN & STEVENS, P.C.



Andrea B. Niesen (#343493)

305 Ironwood Square

300 Third Avenue SE

Rochester, MN 55904

(507) 282-1503

Attorneys for Amicus Curiae

Minnesota Association for Justice