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Torts: An Alternative Approach to Glorvigen v. Cirrus Design Corp.

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I. INTRODUCTION

In Glorvigen v. Cirrus Design Corp., the Minnesota Supreme Court decided that an airplane manufacturer’s duty to warn does not include a duty to provide training. The court also decided that a manufacturer cannot assume a duty to train when its obligation is created only by contract.

This case note will begin with a brief survey of three areas of law relevant to the Glorvigen decision: the duty to warn, the
economic loss doctrine, and the educational malpractice doctrine. Next, it will provide a summary of the facts, procedural history, and holding from the case. Finally, it will present an argument that although the supreme court correctly decided that the duty to warn does not include the duty to train, the majority erred in its resolution of the assumed-duty issue. Rather than concluding that a contract cannot give rise to liability in tort, the court should have concluded that appellants’ claims were barred by the educational malpractice doctrine. By not resolving the case in this manner, the court missed an opportunity to officially reject educational malpractice as a valid cause of action. Instead, the court created a new precedent that may allow future manufacturers to avoid liability in tort for personal injury simply on the basis of a contract.

II. HISTORY

A. Duty to Warn

In Minnesota, a manufacturer may be liable for harm caused by a defective product. One way that a product can be defective is if it fails to include adequate warnings and instructions for safe use. The general purpose underlying this duty to warn is to provide “incentives for manufacturers to achieve optimal levels of safety.” Some products are unavoidably dangerous, either because achieving absolute safety is impossible or because it is cost prohibitive. A lawnmower, for example, needs sharp blades in order to perform its function of cutting grass. However, without

3. See infra Parts II.A–C.
4. See infra Part III.
5. See infra Part IV.
6. See infra Part IV.
7. See infra Part IV.
10. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a.
11. See id. ("Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable.").
blades, the product is useless. The duty to warn accomplishes the dual purpose of minimizing the risk of injury to the consumer while also preserving the utility and economic viability of the product.\textsuperscript{12}

Minnesota’s approach to the duty to warn has evolved over the last sixty years.\textsuperscript{13} Historically, a person injured as a result of a defective warning could only recover if he or she was in privity of contract with the manufacturer.\textsuperscript{14} This rule, in effect, precluded anyone except for the direct purchaser from bringing a claim for failure to warn.\textsuperscript{15} Liability was also premised solely on theories of negligence, breach of contract, and breach of warranty.\textsuperscript{16}

In 1967 in \textit{McCormack v. Hankscraft Co.}, the Minnesota Supreme Court shifted course and adopted a strict products liability framework.\textsuperscript{17} The plaintiff in \textit{McCormack} was a three-year-old child who suffered severe burns after knocking over a vaporizer filled with boiling water.\textsuperscript{18} In the instruction manual, the manufacturer wrote that the vaporizer was “safe,” “practically foolproof,” and implied that it “could be left unattended in a child’s room.”\textsuperscript{19} Relying on these instructions, the child’s parents positioned the device next to the child’s bed.\textsuperscript{20} At trial, the manufacturer asserted that the plaintiff’s failure to warn claim should be barred because (1) it was not in privity of contract with the child,\textsuperscript{21} and (2) the child’s parents were negligent in causing

\textsuperscript{12} See \textit{id.} ("Society benefits most when the right, or optimal, amount of product safety is achieved.").
\textsuperscript{13} The duty to warn was first recognized in Minnesota in \textit{Hartman v. Nat'l Heater Co.}, 240 Minn. 264, 60 N.W.2d 804 (1953). The court held that “[w]here a manufacturer undertakes by printed instructions to advise of the proper method of using his chattel, he assumes the responsibility of giving accurate and adequate information with respect thereto, and his failure in this respect may constitute negligence.” \textit{id.} at 271–72, 60 N.W.2d at 810.
\textsuperscript{14} See \textit{27 STEENSON, PRINCE & BREW, supra note 9, §§ 1.2–4.}
\textsuperscript{15} See \textit{id.}
\textsuperscript{17} 278 Minn. 322, 323, 154 N.W.2d 488, 491 (1967). Strict products liability, as a general rule, holds manufacturers accountable for injuries without proof of “negligence or intent to harm.” \textit{BLACK’S LAW DICTIONARY} 998 (9th ed. 2009). It is based on the notion that manufacturers have “an absolute duty to make” safe products. \textit{Id.}
\textsuperscript{18} 278 Minn. at 326–27, 154 N.W.2d at 493.
\textsuperscript{19} \textit{Id.} at 325, 154 N.W.2d at 492.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 337, 154 N.W.2d at 499.
the accident. In rejecting these arguments, the supreme court concluded:

[I]n our view, enlarging a manufacturer’s liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

The court’s decision in McCormack corresponded with a concurrent “national shift [towards] strict liability in tort.”

Minnesota’s adherence to strict products liability in failure to warn cases, however, did not last long. Although courts have persisted in using strict liability language, in practice, the duty has been construed according to negligence principles. Courts have

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22. Id. at 341, 154 N.W.2d at 501.
23. Id. at 338, 154 N.W.2d at 500.
26. See Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 926 n.4 (Minn. 1986) (“[T]his court has adopted the position that strict liability for failure to warn is based upon principles of negligence.”); Soule & Moen, supra note 25, at 391 (“[T]he 1980s, Minnesota courts . . . adopted a reasonable care standard for . . . failure-to-warn cases.”); Mike Steenson, A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Tort: Products Liability, 24 WM. MITCHELL L. REV. 1, 22 (1998) (“The supreme court has stated that strict liability principles apply in failure to warn cases and has required claimants to elect between negligence and strict liability theories. Yet, the court has also stated that negligence principles apply in strict liability context. As a result, absent any indication that the court intends to establish real distinctions between negligence and strict liability in failure to warn cases, the underlying basis of recovery is the same, regardless of the label.”); J. David Prince, New Developments in the Duty to Warn: A Recent Minnesota Supreme Court Case Clarified Many Aspects of the Law
recognized the difficulty of imposing liability without at least some consideration for factors such as the foreseeability of harm, the potential severity of the harm, the effectiveness of a warning, and the cost of including a warning relative to its benefits.\textsuperscript{27} Unlike other categories of product defect, there is no objective warning standard.

Presently, the duty to warn in Minnesota is applied as follows: a manufacturer “has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use.”\textsuperscript{29} This “duty to warn includes the duty to give adequate instructions for the safe use of the product.”\textsuperscript{30} Whether or not a duty to warn exists is a question of law for the court.\textsuperscript{31} If a court decides that there is a duty, a jury must determine if the warning was adequate.\textsuperscript{32} An adequate warning is one that “(1) attract[s] the attention of those that the product could harm; (2) explain[s] the mechanism and mode of injury; and (3) provide[s] instructions on ways to safely use the product to avoid injury.”\textsuperscript{33} Like all other negligence claims, a plaintiff must also prove causation and damages.

B. Economic Loss Doctrine

As a general rule, a manufacturer who has breached a contract duty by selling or distributing a defective product cannot be sued in tort for pure economic loss.\textsuperscript{34} Instead, the aggrieved party must

\textsuperscript{27} For model Minnesota jury instructions on the failure to warn incorporating some of these factors, see 4A MICHAEL K. STEENSON & PETER V. KNAPP, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES—CIVIL § 75.25 (5th ed. 2009).

\textsuperscript{28} Cf. Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984) (commenting that in the case of a manufacturing flaw, “an objective standard exists—the flawless product—by which a jury can measure the alleged defect”).

\textsuperscript{29} Gray v. Badger Mining Corp., 676 N.W.2d 268, 274 (Minn. 2004).

\textsuperscript{30} \textit{Id}.

\textsuperscript{31} Germain, 395 N.W.2d at 924; see also Balder v. Haley, 399 N.W.2d 77, 81 (Minn. 1987).

\textsuperscript{32} Balder, 399 N.W.2d at 81.

\textsuperscript{33} Gray, 676 N.W.2d at 274.

\textsuperscript{34} See MINN. STAT. § 604.101, subdiv. 3 (2012) ("A buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer’s tangible personal property other than the goods or to the buyer’s real property."); Hapka v. Paquin...
pursue a remedy for breach of contract or breach of warranty. This requirement is called the economic loss doctrine; its purpose is to “preserve[] the boundary between tort and contract law.” Although the economic loss doctrine has a long and sometimes perplexing history, it has been widely accepted in Minnesota.

A central function of the economic loss doctrine is to promote certainty in contracting. Certainty is desirable because it allows parties, particularly businesses, to accurately forecast and plan for the future. The doctrine fosters certainty by mandating that all disputes involving economic loss be decided according to the rules of contract. When parties know what rules will be applied in advance, they can allocate the risk of loss with knowledge that their

Farms, 458 N.W.2d 683, 691 (Minn. 1990) (holding that “there is no tort liability for the damage to the potato crop grown with the defective seed” because “[t]his is economic loss”), superseded by statute, Minn. Stat. § 604.10(a) (2012), as stated in Kietzer v. Land O’Lakes, No. C1-01-1334, 2002 WL 233746 (Minn. Ct. App. Feb. 19, 2002). See generally Lloyd F. Smith Co., v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 15 (Minn. 1992) (noting that pure economic loss arises when a product “fails to function as it should” and includes “consequential damages for repair and loss of profits resulting from inability to use the defective product during the period of its replacement or repair”); BLACK’S LAW DICTIONARY 589 (9th ed. 2009) (defining economic loss “in a products-liability suit . . . [as] the cost of repair or replacement of defective property, as well as commercial loss for the property’s inadequate value and consequent loss of profits or use”).

35. See Walter E. Judge, Jr. & Eric A. Poehlmann, Breach of a Contract or a Tort? The Economic Loss Rule, FOR DEF., Mar. 2003, at 56 (“Simply stated, the rule provides that where a plaintiff’s loss is purely economic, tort claims are barred and the plaintiff is limited to his or her contractual or warranty remedies.”).

36. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 572 N.W.2d 321, 324 (Minn. Ct. App. 1997); see 80 S. Eighth St. Ltd. P’ship v. Carey-Can., Inc., 486 N.W.2d 393, 395–96 (Minn.) (“Tort actions and contract actions protect different interests. Through a tort action, the duty of certain conduct is imposed by law and not necessarily by the will or intention of the parties. The duty may be owed to all those within the range of harm, or to a particular class of people. On the other hand, contract actions protect the interests in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific parties named in the contract.” (citation omitted)), amended by 492 N.W.2d 256 (Minn. 1992).


38. See Sylvester, supra note 37, at 420 (“The principal policy basis for the doctrine is maintaining a uniform and predictable body of commercial law.”).

39. See id. at 418.

40. See id. at 420–21.
bargained-for allocation will be “give[n] effect.” This supports marketplace efficiency.

Tort claims are generally excluded from actions involving economic loss because they “interfere with enforcement of the contract terms.” Agreements to limit or disclaim liability for economic loss, for example, would lose all effect if parties were nevertheless permitted to sue the breaching party in tort. The Uniform Commercial Code (UCC), which governs commercial transactions, “would become nothing more than a fallback position, the residual remedies to which parties and courts resort when no tort theory quite fits.” The economic loss doctrine thus safeguards contract terms “by excluding tort remedies from broad categories of commercial [and consumer] disputes.”

The doctrine’s tort bar does not, however, cover claims involving personal injury. A party injured by a defective product is permitted to sue the manufacturer in tort, notwithstanding the contract. This exception, which has been recognized by the Minnesota Supreme Court and legislature, is based on three principal public policy considerations.

41. Id. at 423.
42. Id.
43. See Judge & Poehlmann, supra note 35 (“[T]ort law should not be used to redress grievances relating to whether a product met the performance expectations of the purchaser.”).
44. Sylvester, supra note 37, at 421. The UCC has specific rules that govern the time limit to bring a claim, how to give notice of a claim, and what remedies may be sought. See generally Minn. Stat. § 336.2 (2012). A tort claim would, in essence, constitute an end-run around these requirements.
45. Sylvester, supra note 37, at 421.
46. See Ralph A. Anzivino, The False Dilemma of the Economic Loss Doctrine, 93 Marq. L. Rev. 1121, 1121 (2010) (commenting that a manufacturer can be sued in tort if its “defective product causes personal injury”).
47. Minn. Stat. § 604.101, subdiv. 2 (providing that the economic loss doctrine “does not apply to claims for injury to the person”); 80 S. Eighth St. L.P. v. Carey-Can., Inc., 486 N.W.2d 393, 396 (Minn.) (“[E]conomic losses that arise out of commercial transactions, except those involving personal injury . . . are not recoverable under the tort theories of negligence or strict products liability.” (quoting Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981))), amended by 492 N.W.2d 256 (Minn. 1992); Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (“[T]here is reason . . . to preserve tort remedies for personal injuries arising out of commercial transactions, as well as those arising out of consumer transactions . . . .”); see also D & A Dev. Co. v. Butler, 357 N.W.2d 156, 159 (Minn. Ct. App. 1984) (citing Minneapolis Soc’y of Fine Arts v. Parker-Klein Asocs. Architects, Inc., 354 N.W.2d 816, 819–20 (Minn. 1984)) (noting that the economic loss doctrine in “Minnesota does allow the recovery of economic damages when they accompany personal injury”); Restatement (Third) of Torts:
First, courts and legislatures have determined that “[s]ocial interests in health and safety may outweigh the commercial interests” of certainty and predictability. When a consumer purchases a product in the market, it may be fair to hold that he or she has assumed the risk of economic loss; however, “[a] consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury.” If manufacturers could contractually disclaim liability for physical injuries without any possibility of liability in tort, the marketplace would be flooded with dangerous products. Holding manufacturers accountable for physical injuries provides a substantial incentive for the creation of products that are reasonably safe. Manufacturers are in the best position to assume this burden because they control product design, the

PRODS. LIAB. § 21 cmt. c (1998); Brunmeier, supra note 37, at 872 (“The economic loss doctrine generally permits recovery only in contract for ‘economic losses’ arising from defective products, while both contract and tort recovery are available for ‘noneconomic losses.’”).

48. Sylvester, supra note 37, at 422; see also Lloyd F. Smith Co., v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 16 (Minn. 1992) (“[W]hen the defective product causes personal injury, an injury which may occur many years after the sale, the law’s concern for compensating personal injury outweighs the commercial need for a relatively short limitation period and traditional tort remedies are permitted.”); Superwood Corp., 311 N.W.2d at 162 (“Limiting the application of strict products liability to consumers’ actions or actions involving personal injury will allow the UCC to satisfy the needs of the commercial sector and still protect the legitimate expectations of consumers.”), overruled by Hapka, 458 N.W.2d at 688 (Minn. 1990); Mike Steenson, The Character of the Minnesota Tort System, 33 WM. MITCHELL L. REV. 239, 255–56 (2006) (“The economic loss doctrine . . . balances two conflicting societal goals. One encourages marketplace efficiency through the voluntary allocation of economic risks, and the other discourages conduct that leads to physical harm.” (footnotes omitted)).

49. Sylvester, supra note 37, at 420 (quoting Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965)). As California Supreme Court Justice Traynor wrote in his oft-cited concurring opinion in Escola v. Coca Cola Bottling Co. of Fresno:

“[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.


50. Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 328, 188 N.W.2d 426, 431 (1971) (“[M]aximum legal protection should be afforded the consumer to promote product safety . . . .”).
manufacturing process, warnings, and instructions, and they can pass the cost on to consumers.51 Without the personal injury exception to the economic loss doctrine, the risk of injury and all associated burdens would be placed solely on the shoulders of individual consumers.

A second policy consideration is that consumers often lack bargaining power relative to manufacturers. The reason for this disparity is twofold. First, manufacturers have greater financial resources than individual consumers. Second, most products are delivered to the marketplace in take-it or leave-it form. Consumers “have little opportunity to inspect a product for potential hazards”52 or to make suggestions for improvements to the manufacturer.53 Because of this, consumers are generally unable to “protect themselves by contractually shifting the risk of loss.”54 The personal injury exception levels the playing field by automatically allocating liability onto manufacturers.

A third and final policy consideration underlying the exception is that contract damages are usually inappropriate for claims involving personal injury.55 Under the rules of tort, a plaintiff can liberally recover consequential damages,56 damages for mental suffering and emotional distress,57 and punitive damages.58

51. Id. (“[T]he burden of loss caused by placing a defective product on the market should be borne by the manufacturer, who is best able to distribute it by insuring against inevitable hazards as a part of the cost of the product . . . .”); Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 387 (Minn. Ct. App. 2004) (commenting that it is appropriate to “impose the costs of defective products upon the maker, who presumably profits from the product” (quoting In re Shigellosis Litig., 647 N.W.2d 1, 6 (Minn. Ct. App. 2002))).
52. Sylvester, supra note 37, at 422.
53. Id. (commenting that if a consumer noticed something that “he or she thought would make the product safer, the manufacturer would be unlikely to respond”).
54. Id.; see also Lee, 290 Minn. at 327–28, 188 N.W.2d at 431 (“The public interest in safety will be promoted by discouraging the marketing of defective products which constitute a menace to consumers not equipped to protect themselves from products they are induced to purchase through modern advertising methods by persuasive representations that the product is suitable and safe for its intended use.”).
56. Id. at 398 (“Tort victims are generally denied consequential damages only if ‘there was nothing in the situation to suggest to the most cautious mind’ that the consequence would occur.” (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928))).
57. See Dornfeld v. Oberg, 503 N.W.2d 115, 118 (Minn. 1993) (“Minnesota has allowed recovery for injuries resulting from fear for one’s own safety.”).
Contract damages, on the other hand, are significantly more limited. Consequential damages for breach of contract are only awarded if they were reasonably “in contemplation of both parties, at the time they made the contract, as a probable result of the breach of it.” This is a very high standard. Furthermore, damages for mental suffering and emotional distress are almost never permitted “except in exceptional cases where the breach [of the contract] is accompanied by an independent tort.” Punitive damages, meanwhile, are similarly almost never permitted. If the economic loss doctrine barred tort claims for contract breaches that resulted in personal injury, injured parties would consistently be deprived of adequate compensation.

In summary, the economic loss doctrine prohibits tort claims when the breach of a contract results in pure economic loss. For public policy reasons, however, the doctrine’s tort prohibition has not been interpreted to extend to claims involving personal injury.

C. Educational Malpractice Doctrine

The educational malpractice doctrine, as a matter of law, bars “claims that attack the general quality of education provided to students.” Although a teacher or school may be liable for

58. See Minn. Stat. § 549.20 (2012) (outlining when punitive damages are permitted in civil actions).

59. Dorff, supra note 55, at 398 (“[T]he foreseeability rule is applied more loosely in tort than in contract.”).

60. Id. (quoting Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Exch.).)

61. Cf. id. at 406 (“[T]he foreseeability test is applied more loosely in tort than in contract. In tort, the foreseeability test is applied from the time of the injury, looking backwards. In contract, the focus is on the time the agreement was made; defendants are only liable for consequential damages within the contemplation of the parties at the time of contract formation. Because the focus in tort is closer in time, consequential damages are generally more foreseeable than in contract cases.”).


63. See Jacobs v. Farmland Mut. Ins. Co., 377 N.W.2d 441, 445 (Minn. 1985) (“Even if a contract is breached maliciously, punitive damages will not lie unless the maliciousness constitutes an independent tort.”); Barr/Nelson, Inc. v. Tonto’s, Inc., 336 N.W.2d 46, 52 (Minn. 1983) (holding that punitive damages are not allowed except “where the breach is accompanied by an independent tort”). See generally Restatement (Second) of Contracts § 355 (1981).

negligent supervision,\textsuperscript{65} or for maintaining defective premises or equipment,\textsuperscript{66} the educational malpractice doctrine provides that there is no commensurate liability for failing to effectively educate.\textsuperscript{67}

Educational malpractice was first tested, and rejected, as a cause of action in 1976 in Peter W. v. San Francisco United School District.\textsuperscript{68} In this seminal case, a recent high school graduate sued his local school district alleging that the district’s negligence caused him to fall short of basic academic benchmarks in reading and writing.\textsuperscript{69} The California Court of Appeals dismissed the plaintiff’s claim, concluding that “the failure of educational achievement may not be characterized as an ‘injury’ within the meaning of tort law.”\textsuperscript{70} The court reached this conclusion on two grounds. First, the court pointed out that there is “no readily acceptable standard[] of care” for an educator because of the wide, and often conflicting, range of viewpoints on pedagogy and teaching methodology.\textsuperscript{71} Second, the court noted that there are too many factors “outside the formal teaching process, and beyond the control of its ministers” that affect a student’s academic achievement, making causation tenuous at best.\textsuperscript{72}

In the wake of Peter W., the educational malpractice doctrine was adopted by many other jurisdictions nationwide.\textsuperscript{73} In the malpractice doctrine).

\textsuperscript{65} E.g., Sheehan v. St. Peter’s Catholic Sch., 291 Minn. 1, 2, 188 N.W.2d 868, 869 (1971).

\textsuperscript{66} E.g., Tiemann v. Indep. Sch. Dist. No. 740, 331 N.W.2d 250, 251 (Minn. 1983); Kingsley v. Indep. Sch. Dist. No. 2, 312 Minn. 572, 574, 251 N.W.2d 634, 635 (1977).

\textsuperscript{67} There are three basic types of educational malpractice claims: “(1) the student alleges that the school negligently failed to provide him with adequate skills; (2) the student alleges that the school negligently diagnosed or failed to diagnose his learning or mental disabilities; or (3) the student alleges that the school negligently supervised his training.” Dall. Airmotive, Inc. v. FlightSafety Int’l, Inc., 277 S.W.3d 696, 699 (Mo. Ct. App. 2008) (citing Moore v. Vanderloo, 386 N.W.2d 108, 113 (Iowa 1986)).

\textsuperscript{68} 131 Cal. Rptr. 854 (Ct. App. 1976).

\textsuperscript{69} Id. at 856.

\textsuperscript{70} Id. at 862.

\textsuperscript{71} Id. at 860.

\textsuperscript{72} Id. at 861.

\textsuperscript{73} See, e.g., Christensen v. S. Normal Sch., 790 So. 2d 252, 254–55 (Ala. 2001) (“Alabama does not recognize a cause of action for educational malpractice.”); Page v. Klein Tools, Inc., 610 N.W.2d 900, 906 (Mich. 2000) (“[C]laims alleging negligent instruction, whether those claims are brought against public schools, institutions of higher learning, or private proprietary and

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beginning, the rule was applied primarily to “traditional classroom schools.” Over time, however, it was extended to include “other educational experiences, like residency training for physicians and surgeons or trade or technical schools.” Presently, nearly all jurisdictions that have “considered the issue[] [have] found that educational malpractice claims are not cognizable.”

In Minnesota, educational malpractice was first considered in 1999 in Alsides v. Brown Institute, Ltd. There, a group of students sued Brown Institute, a for-profit trade school, alleging, among other things, that courses were ineffectively taught. In rejecting the plaintiffs’ claim, the court of appeals cited precedent from other jurisdictions and concluded that educational malpractice is not a viable cause of action. The court focused on public policy arguments, noting that it would be too difficult to establish an acceptable “standard of care by which to evaluate an educator” and to prove causation. Furthermore, recognition of educational malpractice would “embroil the courts into overseeing the day-to-day operations of schools” and expose educators to a “flood of litigation.” Since Alsides, Minnesota courts have continued to recognize and apply the educational malpractice doctrine. However, it has never been expressly considered by the supreme court.


74.  DORBS, HAYDEN & BUBLICK, supra note 64, § 333.
75.  Id.
77.  592 N.W.2d 468, 472 (Minn. Ct. App. 1999) (“The question of whether courts should recognize a claim for educational malpractice is one of first impression in Minnesota.”).
78.  Id. at 470–71.
79.  Id. at 473.
80.  Id. at 472.
81.  Id.
III. THE GLORVIGEN V. CIRRUS DESIGN CORP. DECISION

A. Facts and Procedure

On January 18, 2003, Gary R. Prokop and James Kosak were killed in an airplane crash. Mr. Prokop was piloting an SR22, which he had purchased from Cirrus—the manufacturer—in December 2002. As a part of the purchase price, Cirrus committed to provide Mr. Prokop with transition training to help him become familiar with the airplane. Providing training to a new owner is a standard practice within the general aviation industry. Cirrus contracted with the University of North Dakota Aerospace Foundation (UNDAF) to run the program.

Mr. Prokop began transition training on December 9, 2002. The program consisted of corresponding ground and in-flight lessons. The UNDAF training instructor was required to complete a syllabus assessing Mr. Prokop’s mastery of all lessons taught. A key part of the training was Flight Lesson 4a, which involved an emergency maneuver known as “Recovery from VFR into IMC (auto-pilot assisted).” This maneuver allows a pilot, with the help of the autopilot function, to recover safely after inadvertently flying into an area of low visibility. Flight Lesson 4a was particularly important to Mr. Prokop because he was only licensed to fly in high-visibility conditions, and he did not have prior experience using an autopilot function.

84. Id. at 575.
85. Id. at 576.
86. Id.
87. Id.
88. Id. at 578.
89. Id. at 576–77.
90. Id. at 578.
91. VFR stands for “visual flight rule.” Id. at 577. “VFR conditions are weather conditions in which visibility is three miles or greater and the pilot is able to see the ground.” Id. (internal quotation marks omitted).
92. IMC stands for “instrument meteorological conditions.” Id. “In IMC, a pilot is deprived of visual ground references and must rely on instruments to fly the airplane.” Id.
93. Id. at 577–78.
94. Id.
95. Id. at 577.
96. Id. at 575–76. Mr. Prokop’s previous airplane was a 1968 Cessna 172 Sky Hawk. Id. at 575.
Although Mr. Prokop completed the training program, he never received the in-flight portion of Flight Lesson 4a as promised. According to the syllabus, this part of the lesson was omitted. Mr. Prokop’s only exposure to the emergency maneuver came from a PowerPoint presentation that he watched during a ground lesson and from several written training manuals provided by Cirrus. He never had the opportunity to practice the maneuver in the air.

Several weeks later, on January 18, 2003, Mr. Prokop and passenger Mr. Kosak embarked on a flight from Grand Rapids to St. Cloud. Shortly after departing, they experienced turbulence. As Mr. Prokop attempted to deal with the turbulence, the airplane entered low-visibility conditions. This resulted in an emergency situation identical to the one that was supposed to be covered in Flight Lesson 4a. Mr. Prokop, for reasons unknown, failed to engage the autopilot and did not attempt to perform the Recovery from VFR into IMC maneuver. Shortly thereafter, the airplane entered into an accelerated stall and crashed into the ground. Both Mr. Prokop and Mr. Kosak were killed on impact.

After the accident, Thomas Gartland, as trustee for the next of kin of Mr. Prokop, and Rick Glorvigen, as trustee for the next of kin of Mr. Kosak, commenced negligence actions against Cirrus. The plaintiffs alleged that Cirrus breached its duty to warn by failing to provide adequate training. Specifically, the plaintiffs argued that if Mr. Prokop had received the promised in-flight
training, he would have engaged the autopilot, performed the Recovery from VFR into IMC maneuver, and stabilized the aircraft. \(^{109}\) Because the crash was a foreseeable result of this deficient training, Cirrus had a duty to provide the omitted in-flight lesson. \(^{110}\)

After weighing the evidence, the trial court ultimately found in favor of the plaintiffs and awarded nearly $20,000,000 in damages. \(^{111}\) Cirrus and UNDAF appealed \(^{112}\) and a divided court of appeals overturned the verdict. \(^{113}\) The court concluded that Cirrus’s duty to warn “did not include the provision of transition training.” \(^{114}\) Citing Alsides, \(^{115}\) the court also concluded that Cirrus did not voluntarily assume a duty to train when it offered transition training because “Minnesota does not recognize the duty to effectively educate.” \(^{116}\) Such a claim, the court noted, is “barred under the educational-malpractice doctrine.” \(^{117}\) Mr. Glorvigen and Mr. Gartland appealed and the Minnesota Supreme Court granted review. \(^{118}\)

**B. The Minnesota Supreme Court’s Holding**

In 2012, the Minnesota Supreme Court affirmed the decision of the court of appeals, but utilized different reasoning. \(^{119}\) The court echoed the lower court in holding that the duty to warn does not include a duty to train. \(^{120}\) The supreme court reasoned that the imposition of a duty to train would extend the duty to warn to unacceptable lengths, representing “an unprecedented expansion of the law.” \(^{121}\) The majority wrote: “While we agree that foreseeability guides our determination of whether a duty to warn

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109. See Glorvigen, 816 N.W.2d at 578.
110. Gartland Complaint, supra note 107, ¶ 5; Glorvigen Complaint, supra note 107, ¶ 9–10, 17.
111. Glorvigen, 816 N.W.2d at 580.
113. Id. at 558.
114. Id. at 552.
116. Glorvigen, 796 N.W.2d at 556.
117. Id.
119. Id. at 584.
120. Id. at 583.
121. Id.
exists, we do not agree that foreseeability leads to a conclusion that Cirrus’s duty to warn included an obligation to provide training.”

In deciding whether or not Cirrus voluntarily assumed a duty to train, however, the court declined to consider the educational malpractice doctrine. Instead, the court indirectly invoked the economic loss doctrine and concluded that “when a contract provides the only source of duties between the parties, Minnesota law does not permit the breach of those duties to support a cause of action in negligence.” In other words, the breach of a contract duty alone cannot give rise to liability in tort. Under this framework, the court reasoned that Cirrus did not assume a duty to train because its obligation was created only by the purchase agreement.

The court’s decision in Glorvigen was not unanimous. The dissent, penned by Justice Paul Anderson and joined by Justice Page, rejected both portions of the majority’s holding. The dissent first argued that the question of training should be left to a jury. In other words, a jury should determine, as a matter of adequacy, whether a written warning was sufficient or whether additional training was required. Second, the dissent argued that the purchase agreement should not have shielded Cirrus from assuming a duty to train. To justify this position, the dissent noted that the appellants’ claims fit squarely within the personal injury exception to the economic loss doctrine.

Overall, the dissent cautioned that the court’s decision and reasoning would have “far-reaching consequences.” As Justice Anderson explained:

By holding that a supplier of a dangerous product . . . is never required to provide anything beyond written

122.  Id.
123.  Id. at 584.
124.  Id. (quoting United States v. Johnson, 853 F.2d 619, 622 (8th Cir. 1988)).
125.  Id.
126.  Id. at 585–87 (Anderson, J., dissenting).
127.  Id. The dissent pointed out that “[t]he jury’s determination will vary from case to case, based on the facts of the case and the type of product the supplier provides.” Id. at 586.
128.  Id. at 587.
129.  See id. at 589 (“While we have rightly limited tort liability when the relationship of the parties is governed purely by contract, we have never foreclosed—indeed, we have specifically accommodated—tort liability when personal injury or non-economic-loss damages are asserted.”).
130.  Id.
instructions—even if the supplier has promised to provide nonwritten instructions—the majority has essentially held that no consumer of a dangerous product may ever hold a supplier liable for personal injury arising out of defective nonwritten instructions.\footnote{Id.}

IV. ANALYSIS

The Minnesota Supreme Court reached the right conclusion in \textit{Glorvigen}, but its approach was inconsistent. The majority correctly decided (1) that the duty to warn does not include the duty to train,\footnote{See infra Part IV.A.} and (2) that Cirrus did not voluntarily assume a duty to train.\footnote{See infra Part IV.B.} However, in addressing the assumed-duty issue, the court erred by holding—in essence—that the breach of the contract could not lead to liability in tort.\footnote{See infra Part IV.B.} This holding was unnecessary and does not comport with Minnesota precedent regarding the economic loss doctrine.\footnote{See infra Part IV.B.} To avoid this outcome, the court should have adopted the reasoning of the court of appeals and applied the educational malpractice doctrine.

A. Rejection of a Duty to Train: The Right Result

As the supreme court noted, appellants did not cite any “case—from any court—in which the supplier or manufacturer was obligated to provide training in order to discharge its duty to warn.”\(^\text{137}\) In fact, acceptance of the appellants’ claims would require either the creation of “a new common law duty to train or [an] expansion of the duty to warn to include training.”\(^\text{138}\) For the reasons discussed below, these are not desirable options.

Imposing a duty to train would place an undue burden on manufacturers, both in terms of cost and exposure to liability. Manufacturers already have a duty to warn of reasonably foreseeable dangers.\(^\text{139}\) A supplemental duty to train could, in some instances, make manufacturers both guarantors of absolute product safety and insurers for injured consumers.\(^\text{140}\) This would not be a just result. Manufacturers cannot be solely responsible for user competency. Some of this burden should fall upon the consumer, who ultimately chooses whether or not to purchase a dangerous product.\(^\text{141}\)

A duty to train would also have a negative impact on the marketplace. Manufacturers may elect not to produce important but dangerous products, to the detriment of society.\(^\text{142}\) The cost of providing training and litigating claims would be passed to consumers, resulting in higher prices.\(^\text{143}\) Manufacturers may decide

\(^{137}\) Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 583 (Minn. 2012).

\(^{138}\) Id.

\(^{139}\) E.g., Gray v. Badger Mining Corp., 676 N.W.2d 268, 274 (Minn. 2004).

\(^{140}\) See Brief and Addendum of Respondent Cirrus Design Corp. at 35, Glorvigen, 816 N.W.2d 572 (Nos. A10-1242, -1243,-1246, -1247), 2011 WL 9518487 (“Because the nature of flying means that almost any task a pilot undertakes could ‘foreseeably’ cause a crash if improperly performed, the duty Plaintiffs urge here would effectively make an aircraft manufacturer the guarantor of the overall competence of any pilot who buys its plane.”); Brief and Appendix of Amicus Curiae Product Liability Advisory Council, Inc. at 7, Glorvigen, 816 N.W.2d 572 (Nos. A10-1242, -1243, -1246, -1247), 2011 WL 9518489 (arguing that a duty to train would unreasonably require manufacturers to “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”).

\(^{141}\) See Brief and Appendix of Amicus Curiae Product Liability Advisory Council, Inc., supra note 140, at 8 (“There is a line between the duty to warn/provide instructions and the duty to learn. The former duty rests with the product manufacturer or seller. The latter duty belongs to the product user.”).

\(^{142}\) Id. at 16.

\(^{143}\) Id. at 17.
to stop selling their products in Minnesota to avoid potential liability and the burden of providing training.\textsuperscript{144}

If a consumer, after being warned and instructed on how to safely use a product, continues to desire actual training, he or she should be permitted to bargain with the manufacturer to receive this training. But, training should not be imposed as a blanket tort duty. A blanket duty would interfere with the freedom to contract, as not all consumers will want training.\textsuperscript{145} If a duty to train is ever imposed, it should be industry specific and it should be regulated by the legislature or administrative agencies. Courts and juries simply do not have the necessary experience, expertise, or authority to determine when training is needed or whether training is effective.\textsuperscript{146} Instead, manufacturers, consumers, agencies, and lawmakers should be afforded the opportunity to work together to develop training protocols that are sensible and equitable.\textsuperscript{147}

The strongest, although still failing, argument in favor of a duty to train is that the provision of training should be a question of adequacy for a jury.\textsuperscript{148} As Justice Anderson explained in his dissent, “once the state district court determined that Cirrus owed a duty to warn, it was up to the jury—not the court, and certainly not our court—to determine whether Cirrus provided an adequate

\textsuperscript{144} Id.

\textsuperscript{145} It is a well-established rule that if a manufacturer offers an optional safety device and a consumer declines to purchase it, the manufacturer is not relieved of liability for subsequent injuries. See Bilotta v. Kelley Co., 346 N.W.2d 616, 624–25 (Minn. 1984). This rule is based on the principle that a manufacturer cannot “delegate its duty to design a reasonably safe product.” Id. at 624. Because product safety is a non-delegable duty, it stands to reason that manufacturers would be prohibited from delegating training options to consumers. The consequence of this is that consumers would likely lose the ability to make their own choices regarding training.

\textsuperscript{146} It is fundamental that the power to create laws and regulations resides solely with the legislative branch. See Smith v. Holm, 220 Minn. 486, 489, 19 N.W.2d 914, 915 (1945) ("[T]he initiative in legislation lies entirely in the legislature . . . .").

\textsuperscript{147} This type of cooperation already occurs within the aviation industry. The Federal Aviation Administration (FAA), for example, has enacted specific rules governing individual pilot and flight school certification. See 14 C.F.R. § 61 (2013). The FAA has also established specific airplane manufacturing standards. See id. § 23.

\textsuperscript{148} Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 587 (Minn. 2012) (Anderson, J., dissenting) ("[T]he majority mistook whether Cirrus owed a duty to warn, which was for court resolution, for the question [of] whether Cirrus adequately discharged its duty to warn, which was for jury resolution.").
warning or whether Cirrus breached its duty to warn.”

This line of reasoning, however, does not align with Minnesota precedent.

First, making training a jury question would implicate many of the concerns associated with the educational malpractice doctrine. Second, the Minnesota Supreme Court has succinctly defined what constitutes a legally adequate warning, and Cirrus met this threshold by providing written instructions that (1) attracted Mr. Prokop’s attention, (2) detailed the risks of inadvertently entering into IMC, and (3) explained how to recover using the autopilot. Because legal adequacy was achieved short of providing training, there was no basis to conclude that Cirrus had a duty to train.

Overall, the court’s decision to reject an independent duty to train was the correct one. Enlarging the duty to warn to include training would place too great of a burden on manufacturers. This would hamper economic activity in Minnesota and interfere with the freedom to contract. Furthermore, a duty to train would place the court system into a supervisory role that is best occupied by legislatures and agencies. The duty to warn is an appropriate middle ground that protects both manufacturers and consumers. There is no compelling reason to disturb this balance.

B. Rejection of an Assumed Duty to Train: The Right Outcome but an Inconsistent Approach

The Glorvigen court was also correct to conclude that Cirrus did not assume a duty to train by undertaking to provide transition training. Ordinarily, it should be noted, a party can assume a duty

149. Id. at 585.
150. For example, how can a jury be tasked with assessing training if there is no duty to effectively educate? What is the appropriate standard of care for a flight school? How does a party prove causation?
151. See supra text accompanying note 33.
152. Glorvigen, 816 N.W.2d at 583.
153. See id. There is a counterargument to be made that the court’s reasoning is circular. The court created the standard for evaluating a warning’s adequacy and is now using this standard to justify its present rejection of a duty to train. Although this counterargument is true in part, it does not undermine the court’s decision. One of the supreme court’s main roles is to “help develop, clarify or harmonize the law.” Minn. R. Civ. App. P. 117, subdiv. 2(d). The court accomplished this purpose when it determined what constitutes a legally adequate warning. The criteria have helped lower courts adjudicate failure to warn claims with greater consistency and uniformity. Here, the Glorvigen court simply adhered to its own precedent, which it was justified in creating.
of reasonable care by voluntarily undertaking to act. However, the impact of holding that a manufacturer can assume a duty to train would have unacceptable consequences for society. On policy grounds alone, the court’s decision was the right one.

Training is often provided to consumers in a wide range of industries, either for free or as a part of the purchase price of a product. It is offered to create good will and to promote product safety. Very often, it achieves both of these ends. Nonetheless, if providing training constituted an assumption of duty in tort, most manufacturers would likely stop offering training altogether. The risk of liability would have a chilling effect. Illogically, manufacturers that continued to offer training would be penalized for their socially responsible behavior. Without available training, public health and safety would suffer. A doctor, for obvious reasons, should not be expected to learn how to use a new medical device simply by reading an instruction manual. Based on such an example, it is clear that the law should encourage, not discourage, the provision of voluntary training.

The court’s approach to rejecting an assumed duty to train, however, was inconsistent at best. While the economic loss doctrine clearly prohibits tort claims for pure economic loss, it has never been interpreted to extend to cases that, as here, involve personal injury. The justification for this distinction, as discussed earlier, is that manufacturers have a stand-alone duty, irrespective of any contract, to avoid conduct that may cause physical injury. This duty, which is a foundation of products liability law, is based on the principle that public health and safety prevail over contractual interests of uniformity and marketplace efficiency, particularly

154. See Isler v. Burman, 305 Minn. 288, 295, 232 N.W.2d 818, 822 (1975) ("It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.").

155. Harley-Davidson, for example, offers its customers the opportunity to enroll in a “Rider’s Edge” training course. For a description of this course and all other Harley-Davidson training programs, see Learn to Ride, HARLEY-DAVIDSON, http://www.harley-davidson.com/en_US/Content/Pages/learn-to-ride/learn-to-ride.html (last visited Sept. 7, 2013).

156. See supra notes 46–63 and accompanying text.

157. Cf. 80 S. Eighth St. Ltd. P’ship v. Carey-Can., Inc., 486 N.W.2d 393, 396 (Minn.) ("The economic loss doctrine provides a balance between two conflicting societal goals: that of encouraging marketplace efficiency through the voluntary contractual allocation of economic risks with that of discouraging conduct that leads to physical harm."), amended by 492 N.W.2d 256 (Minn. 1992).
when there is a disparity of bargaining power between the parties.\textsuperscript{158}

It is also founded on the notion that “contract damages are generally inadequate and ill-suited for personal injury claims.”\textsuperscript{159}

The majority seemingly ignored this precedent by holding that “Cirrus did not assume a duty to provide Flight Lesson 4a outside of its contract with [Mr.] Prokop . . . .”\textsuperscript{160} Cirrus undertook to train Mr. Prokop on how to fly the SR22, but failed to provide all of the training that it promised.\textsuperscript{161} This breach reputedly resulted in appellants’ death,\textsuperscript{162} which is the most severe form of personal injury. The appellants were not seeking remediation for pure economic loss, such as damage to the airplane. Furthermore, the case implicates all of the relevant public policy considerations that have been used to justify the personal injury exception. Pilot and passenger safety unquestionably outweigh any aviation marketplace considerations. Additionally, there was a substantial disparity in bargaining power between Cirrus and Mr. Prokop. Cirrus is a multinational corporation with intimate knowledge of the SR22.\textsuperscript{163} Mr. Prokop, conversely, was a relatively new pilot with no experience using an autopilot. Lastly, contract damages are plainly inadequate for claims involving the untimely deaths of two husbands and fathers. Based on the foregoing, the contract should not have been treated as a bar to appellants’ tort claims.

The supreme court’s reasoning to the contrary raises significant questions for the future of tort law in Minnesota. Minnesota courts have consistently held that a party can assume a duty in tort even where “there [was] no duty in the first instance.”\textsuperscript{164}

The existence of a contract should not alter this principle when the claim involves personal injury. As Justice Paul Anderson argued in his dissent:

If the mere presence of a contract foreclosed all tort liability, medical malpractice claims would cease to exist.

\begin{itemize}
\item \textsuperscript{158} See \textit{supra} notes 46–63 and accompanying text.
\item \textsuperscript{159} \textit{Glorvigen v. Cirrus Design Corp.}, 816 N.W.2d 572, 589 (Minn. 2012) (Anderson, J., dissenting).
\item \textsuperscript{160} \textit{Id.} at 584 (majority opinion).
\item \textsuperscript{161} \textit{Id.} at 577–78.
\item \textsuperscript{162} Gartland Complaint, \textit{supra} note 107, ¶¶ 3–10; Glorvigen Complaint, \textit{supra} note 107, ¶¶ 19–20.
\item \textsuperscript{163} As the manufacturer, Cirrus was unquestionably in a better position to foresee the potential dangers and risks of operating the SR22.
\end{itemize}
A passenger injured in a car accident while riding in a taxi cab would have only a breach of contract claim against the cab driver and cab company. A paid babysitter who failed to prevent injury to a child would be liable only in contract. The list goes on.  

Although Justice Anderson’s examples are extreme, he makes a cogent point. A defendant should not be “‘immunize[d] . . . from tort liability for his wrongful acts,’ just because those acts ‘grow out of’ or are ‘coincident’ to a contract.” Yet by rejecting that Cirrus assumed a duty to train because of the contract, the court appears, whether intentionally or not, to have adopted this position.

C. An Alternative Approach: The Educational Malpractice Doctrine

To avoid this inconsistent result, the court could have, and should have, employed the educational malpractice doctrine. The facts were well suited for the application of this legal theory. Training is a form of education. If there is no duty to effectively educate, then it follows that there should be no duty to effectively train. As the court of appeals noted, assessing the effectiveness of the transition-training program “would involve an inquiry into the nuances of the educational process, which is exactly the type of determination that the educational-malpractice bar is meant to avoid.”

Further, the facts of Glorvigen trigger most of the relevant public policy concerns described in Alsides. Causation, for example, is speculative at best. Because the recovery maneuver was taught during a ground lesson, it is impossible to say whether additional in-flight instruction would have prevented the crash. Other factors also potentially played a role in the accident, including Mr. Prokop’s aptitude for flying and the turbulence. Allowance of a claim in this instance would make the Minnesota court system an overseer of flight training schools. Experts within the industry and field, not the judiciary, should make decisions

165. Glorvigen, 816 N.W.2d at 589 (Anderson, J., dissenting).
166. Id. (quoting Eads v. Marks, 249 P.2d 257, 260 (Cal. 1952)).
168. Id. (citing Alsides, 592 N.W.2d at 473–74).
169. See supra notes 80–81 and accompanying text.
170. Glorvigen, 816 N.W.2d at 577.
regarding curriculum and methods. Lastly, the flood of litigation resulting from a claim of this nature would be vast. Any recipient of training in any field thereafter injured would include, as a matter of course, a claim for educational malpractice. The door would also potentially be open to third-party claims. Would an injured passenger have a cause of action against the pilot’s flight school for deficient training? Would a car crash victim have a claim against a driving school? Would an injured patient be able to sue a medical school or an aggrieved client a law school? The examples are almost endless.

On top of this, there is precedent from other jurisdictions to support the application of the educational malpractice doctrine to flight training. In *Dallas Airmotive, Inc. v. FlightSafety International, Inc.*, for example, a Missouri pilot was killed in a crash shortly after completing a training program offered by the defendant. It was alleged that the defendant negligently caused the crash because its flight simulator was “unrealistic” and its “curriculum inadequately prepared the pilot” for flight. Invoking the educational malpractice doctrine, the court held that the plaintiff’s claim was not cognizable because it “attack[ed] the quality of the instruction.” In particular, the court noted that the claim implicated all of “the public policy reasons underlying the refusal to recognize a claim of educational malpractice,” including the speculativeness of causation and the preference for “schools, and their regulating, accrediting, and certifying agencies, not courts . . . to make curriculum decisions.”

In *Waugh v. Morgan Stanley & Co.*, the Illinois Appellate Court reached a similar conclusion on similar facts. There, the court held that neither a flight school nor an individual instructor could be held liable in tort where the gravamen of a wrongful

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171. Third party educational malpractice claims have been attempted and rejected in several other jurisdictions. See, e.g., Moss Rehab v. White, 692 A.2d 902, 909 (Del. 1997) (“A third-party claim for educational malpractice against a driving school is not a cognizable common-law cause of action in Delaware.”); Moore v. Vanderloo, 386 N.W.2d 108, 114–15 (Iowa 1986) (holding that an injured patient could not maintain a cause of action against her doctor’s chiropractic college for educational malpractice).
173. *Id.* at 700–01 (quotation marks omitted).
174. *Id.* at 701.
175. *Id.*
177. *Id.* at 543–47.
death claim related to the “poor quality of the education or training.” The court concluded that claims attacking the quality of flight instruction “are claims of educational malpractice and are barred, therefore, as a matter of law.”

Utilizing the educational malpractice doctrine in Glorvigen would have achieved two important ends. First, the court could have avoided bringing into question the personal injury exception to the economic loss doctrine. The existence of a contract should not be treated as a shield to tort liability, particularly for claims involving personal injury. Second, the court could have definitively established that the educational malpractice doctrine is the law in Minnesota, providing clarity for future cases.

D. Counterarguments to the Educational Malpractice Doctrine

There are three main counterarguments to rebut the application of the educational malpractice doctrine in Glorvigen: (1) appellants’ claims did not actually challenge the quality of flight training but rather that a promised in-flight lesson was omitted; (2) Cirrus and UNDAF are not educational institutions and therefore their conduct does not fall within the purview of the doctrine; and (3) use of the doctrine in this context would insulate flight schools and other training programs from liability for negligent or wrongful conduct. These arguments, although facially persuasive, ultimately lack merit.

First, as the court of appeals pointed out in Alsides, a claim for educational malpractice arises “[w]here the essence of the complaint is that the school failed to provide an effective education.” No matter how the appellants’ claims are packaged, their essence is that Mr. Prokop was inadequately trained to handle IMC-like conditions. Whether this was the result of an omitted lesson or deficient training is of little consequence, as either would require the court to assess the quality of the ground lesson that Mr. Prokop did receive, and to evaluate the reason for and the impact

178. Id. at 554.
179. Id.
180. See infra notes 183–188 and accompanying text.
181. See infra notes 189–190 and accompanying text.
182. See infra notes 191–194 and accompanying text.
of the “instructor’s failure to provide flight training.”

Furthermore, it is a fairly well-established principle that items listed in a curriculum or checklist do not automatically establish a standard of care in tort. In Larson v. Independent School District No. 314, Braham, for example, the Minnesota Supreme Court held that a school district’s curriculum, although relevant did not create “mandatory affirmative duties for teachers, principals, or superintendents.” In Canada v. McCarthy, the court similarly held that a contractor’s safety checklist did not “establish a standard of care,” even though all of the items in the checklist were agreed upon ahead of time by both parties. These holdings illustrate that Cirrus’s failure to deliver Flight Lesson 4a was not, on its own, the breach of a duty of care owed to the appellants.

Next, the fact that neither Cirrus nor UNDAF are educational institutions does not take the case out of the scope of the educational malpractice doctrine. Courts from other jurisdictions have consistently held that the doctrine extends to any institution that “assume[s] educational responsibilities,” regardless of the context or setting. Here, both Cirrus and UNDAF assumed educational responsibilities by undertaking to provide transition training to Mr. Prokop. Even though Cirrus is an airplane manufacturer, the appellants’ claims require “an inappropriate review of educational policy and procedures.”

Finally, the assertion that the educational malpractice doctrine would insulate flight schools and other training programs from liability for negligent and wrongful conduct is unfounded. First, the

185. See infra notes 186–188 and accompanying text.
186. 289 N.W.2d 112 (Minn. 1979).
187. Id. at 117 n.8.
188. 567 N.W.2d 496, 504 (Minn. 1997); see also Mervin v. Magney Constr. Co., 416 N.W.2d 121, 125 (Minn. 1987) (“This court has consistently held that the standard of care owed to others by a contracting party is not fixed by the terms of the contract.”).
doctrine does not prohibit claims for injuries occurring during the course of instruction. Training programs and instructors, like traditional schools and teachers, still have a duty to exercise reasonable care to prevent injuries to students.\textsuperscript{191} Second, a student would still be allowed to bring an action “for breach of contract, fraud, or misrepresentation, if it is alleged that the institution failed to perform on specific promises,” such as “the failure to offer classes in a particular subject or to provide a promised number of hours of instruction.”\textsuperscript{192} The educational malpractice doctrine does not apply to such claims because “the essence of the plaintiff’s complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all.”\textsuperscript{193} Lastly, ineffective training schools undoubtedly would be subjected to marketplace penalties, even without corresponding civil liability. If a training school offered deficient programming and employed incompetent teachers, it would struggle to satisfy accreditation requirements.\textsuperscript{194} Likewise, members of the public would not attend a training school that offered subpar instruction.

Overall, the educational malpractice doctrine is a viable alternative that the court should have considered in Glorvigen. While the doctrine is not without its criticisms, its application to the


\textsuperscript{192} Alsides, 592 N.W.2d at 472–73.

\textsuperscript{193} Id. at 473 (quoting Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992)). Other jurisdictions that have adopted the educational malpractice doctrine have permitted these types of claims. See, e.g., CenCor, Inc. v. Tolman, 868 P.2d 396, 400 (Colo. 1994) (holding that a school that “obligated itself to provide modern equipment in good working condition, qualified instructors, and computer training for all students, but did not fulfill those obligations” could be sued for breach of contract because such a claim was not necessarily one of educational malpractice); Ryan v. Univ. of N.C. Hosp., 494 S.E.2d 789, 791 (N.C. Ct. App. 1998) (allowing the plaintiff to bring a breach of contract claim against a medical school for failing to offer a gynecological rotation on grounds that the claim “would not require an inquiry into the nuances of educational process and theories” (quoting Ross, 957 F.2d at 417)); Malone v. Acad. of Court Reporting, 582 N.E.2d 54, 58–59 (Ohio 1990) (holding that a school’s failure to maintain accreditation for paralegal program sounded in fraud, misrepresentation and breach of contract, and not educational malpractice).

\textsuperscript{194} For FAA flight school and flight instructor certification and licensure requirements, see 14 C.F.R. § 61 (2013).
facts of the case would have been substantially more consistent with Minnesota precedent than the court’s actual holding.

V. CONCLUSION

In Glorvigen, the Minnesota Supreme Court was confronted with the question of whether an airplane manufacturer, Cirrus, breached a duty in tort by failing to provide adequate training for the safe use of its product. In answering this question, the court properly concluded that the duty to warn does not include the duty to train. However, as this case note argues, the court employed inconsistent reasoning in determining that Cirrus did not voluntarily assume a duty to train. The court resolved the assumed-duty issue by concluding that the breach of a contract duty cannot create liability in tort. This reasoning contradicts settled precedent concerning the economic loss doctrine. To avoid this result, the court should have concluded that the appellants’ claims were barred by the educational malpractice doctrine. By not reaching the issue of educational malpractice, the court missed an opportunity to definitively hold that there is no duty to effectively educate in Minnesota. In its place, the court created new precedent that may allow manufacturers of dangerous products to avoid liability in tort for personal injury simply by virtue of a contract.