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Educational Malpractice and the Liability of Flight Training Providers

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EDUCATIONAL MALPRACTICE AND THE LIABILITY OF FLIGHT TRAINING PROVIDERS

PETER M. LINDBERG*

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I. INTRODUCTION

THE SCENARIO is all too common: a pilot completes flight school or transition training and is eager to show off his or her new skills. Predictably, the pilot quickly gets in over his or her head, crashes, and causes injury or death. The bulk of the fault appears to lie with the pilot. But, what about the parties who undertook to train the pilot? Can they be held responsible for the occurrence of this accident? In essence, this is a claim sounding in educational malpractice.

Typically, educational malpractice claims boil down to a simple argument: the pilot was not taught what he needed to know to be able to safely fly the aircraft.¹ In these cases, the plaintiffs claim that their injury was proximately caused by the flight school or seller's negligence in instructing the pilot in general or specific skills necessary to prevent the accident. Flight instruction and pilot training pose an interesting subset of the issues presented in cases sounding in general educational malpractice. These claims present thorny questions regarding the judiciary's ability to properly assess the sufficiency of a particular course of education. Recovery on such claims is surprisingly difficult.

Not surprisingly, the cases from around the country examining the conduct of flight schools and other providers of pilot training have arrived at diametrically opposed conclusions. In order to understand this tension, it is important to look at the nature and history of educational malpractice claims in general and examine the reasons why they are traditionally disfavored

¹ Educational malpractice claims can actually fall into three categories: (1) the student alleges that the school failed to provide him with adequate skills; (2) the student alleges that the school negligently diagnosed or failed to diagnose his or her learning or developmental disabilities; and (3) the school negligently supervised his training. See *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986). This article focuses on the first category of claim: that the educator failed to provide the student with adequate skills. The other types of educational malpractice claims involving failure to diagnose learning disabilities or negligent supervision of training are conceptually different and are beyond the scope of this article. Although claims involving negligent supervision of training can and do arise in the aviation world, these actions are really a traditional negligence action examining the reasonableness of an educator's actions in protecting students from known physical risks *while still participating in the course of education*. See *Linam v. Murphy*, 232 S.W.2d 937, 942-43 (Mo. 1950) (flight instructor crashes plane during instructional flight); see also *Farish v. Canton Flying Servs.*, 58 So. 2d 915, 918 (Miss. 1952) (finding flight school negligent when it knew student pilot was unqualified, but let him take plane for solo flight anyway); *DeRienzo v. Morristown Airport Corp.*, 146 A.2d 127 (N.J. 1958) (finding flight school negligent in allowing student pilot to take-off alone while controls were locked in place).

before comparing and contrasting the cases involving aviation instruction.

II. ELEMENTS OF AN EDUCATIONAL MALPRACTICE CLAIM

No matter what language the plaintiffs use to frame their claim, any time the court is asked to measure the quality of education or evaluate the reasonableness of an educator's conduct, the claim is properly characterized as one of educational malpractice.² In *Vogel v. Maimonides Academy of Western Connecticut, Inc.*, the court determined that a claim that defendant breached a duty to educate effectively sounds in educational malpractice.³ In *Lawrence v. Lorain County Community College*, it was determined that any claim that the educational services provided were inadequate, substandard, or ineffective constitutes a claim of educational malpractice.⁴ In *Andre v. Pace University*, the court commented that whenever it is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an institution, that claim sounds in educational malpractice.⁵

Although such a claim is traditionally asserted by the student himself, a third party can assert that they were injured by the school's negligent teaching of the student.⁶ In *Moss Rehab v. White*, the plaintiff motorists were injured when their car was struck by a driver who had recently completed training at the Moss Rehab School for the Disabled.⁷ The Supreme Court of Delaware rejected the claim against the driving school on the basis that although the plaintiffs were not actual students who had studied with the defendant, their claims were nevertheless barred as claims sounding in educational malpractice.⁸

² Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001).

³ Vogel v. Maimonides Acad. of W. Conn., Inc., 754 A.2d 824, 828 (Conn. App. Ct. 2000).

⁴ Lawrence v. Lorain Cnty. Cmty. Coll., 713 N.E.2d 478, 480 (Ohio Ct. App. 1998).

⁵ Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (N.Y. App. Div. 1996).

⁶ See, e.g., Moss Rehab v. White, 692 A.2d 902, 905 (Del. 1997).

⁷ *Id.*

⁸ *Id.* at 909.

III. EDUCATIONAL MALPRACTICE CLAIMS ARE TRADITIONALLY DISFAVORED

Educational malpractice claims are traditionally disfavored by the courts. To date, only Montana recognizes this tort as a cognizable cause of action.⁹

In any negligence action, the plaintiff must establish that: (1) the defendant owed him a duty; (2) the defendant breached that duty; (3) the breach caused the plaintiff's damages; and (4) the existence and extent of damages.¹⁰ As to the first factor, the existence of the duty owed by the defendant is a matter of law to be determined by the court.¹¹ For the reasons articulated below, courts commonly decide that public policy prohibits them from evaluating the existence and nature of the duty to educate.¹²

As seen in *Alsides v. Brown Institute, Ltd.*, claims regarding the quality of the education provided invariably entail a review of the instructional materials and pedagogical methods employed.¹³ Moreover, this analysis invariably involves "a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into consideration of whether the method of instruction . . . was appropriate."¹⁴ Such an undertaking is beyond the purview of the courts, and as noted in *Alsides*, the "courts have refused to become 'overseers of both the day-to-day operation of [the] educational process as well as the formulation of its governing policies.'"¹⁵ In doing so, the courts have declined to find a duty on the part of educators, and have rendered claims for educational malpractice nonviable.¹⁶ The concerns articulated by the court in *Alsides* are well summarized in *Page v. Klein Tools, Inc.*:

- (1) [T]he lack of a satisfactory standard of care by which to evaluate an educator;
- (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's

⁹ *B.M. v. State*, 649 P.2d 425, 427 (Mont. 1982).

¹⁰ *See, e.g., Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

¹¹ *See id.*

¹² *See Sheesley v. Cessna Aircraft Co.*, No. CIV. 02-4185-KES, 2006 WL 1084103, at *17 (D.S.D. Apr. 20, 2006).

¹³ *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999).

¹⁴ *Id.* at 472 (quoting *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779-80 (N.Y. App. Div. 1996)).

¹⁵ *Id.* (quoting *Hunter v. Bd. of Educ.*, 292 Md. 481, 439 A.2d 582, 585 (1982)).

¹⁶ *See Andre*, 655 N.Y.S.2d at 780.

attitude, motivation, temperament, past experience, and home environment;

- (3) the potential for a flood of litigation against schools; and
- (4) the possibility that such claims will “embroil the courts into overseeing the day-to-day operations of schools.”¹⁷

With these difficulties looming, courts commonly dispose of educational malpractice cases by summary judgment on the basis that there is simply “no legal duty upon which to premise the claim of negligence.”¹⁸

As seen in some of the cases involving flight training, there is some disagreement about the existence and extent of any duty owed by an educator. However, educational malpractice cases commonly present another fatal flaw: it is difficult to establish causation.¹⁹ In a nutshell, it is virtually impossible to tell if the defendant’s instruction on a certain subject would have prevented the plaintiff’s damages. Moreover, even if the instruction is adequate, there are a variety of reasons why the plaintiff might not have learned the subject matter. For instance, the defendant could be the best teacher in the world, but if the plaintiff does not listen, does not apply himself, or is simply not able enough, he or she will not learn the material.²⁰

These concerns apply to bar educational malpractice claims “against public schools, institutions of higher learning, or private proprietary and trade schools.”²¹ However, some states (particularly New York) have drawn a fundamental difference between providers of general education (i.e., public schools) and providers of specialized career training on the basis that the sorts of public policy considerations inherent in assessing the

¹⁷ *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 903 (Mich. 2000) (quoting *Alsides*, 592 N.W.2d at 472).

¹⁸ *Dall. Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696, 701 (Mo. Ct. App. 2008).

¹⁹ *See, e.g., Page*, 610 N.W.2d at 904.

²⁰ Although not usually an issue in aviation cases, it can also be extremely difficult to properly evaluate damages in educational malpractice claims, particularly in cases brought by students against providers of general education. For example, did the lost earning capacity result from a failure to educate properly? Such damages are extremely difficult to prove with any degree of certainty. *See Sheesley v. Cessna Aircraft Co.*, No. CIV. 02-4185-KES, 2006 WL 1084103, at *17 (D.S.D. Apr. 20, 2006). *But see Newman v. Socata SAS*, 924 F. Supp. 2d 1322, 1329–30 (M.D. Fla. 2013).

²¹ *Page*, 610 N.W.2d at 905.

general education of children were simply not present in a privately offered course of specialized career training.²²

IV. TREATMENT OF CLAIMS AGAINST FLIGHT TRAINING PROVIDERS

Because pilot training is so important and the consequence of poor training can be so catastrophic, the aviation world provides fertile ground for cases sounding in educational malpractice. Since nearly all states refuse to recognize claims sounding in educational malpractice, claims asserted against flight training providers are commonly barred by the educational malpractice doctrine.²³ In lawsuits where claims against flight training providers are allowed to proceed, the courts use a variety of tactics to justify why the particular claim asserted by the plaintiff simply does not constitute a claim of educational malpractice.²⁴ Analysis of the leading cases follows.

A. *SHEESLEY V. CESSNA AIRCRAFT CO.*²⁵

This case involved a 1977 Cessna 340A aircraft that had undergone series of upgrades to increase engine power.²⁶ These upgrades included aftermarket modifications to the turbocharger exhaust system, which were undertaken years before the plaintiff purchased the aircraft.²⁷ After purchasing the aircraft, the plaintiff underwent flight training with FlightSafety, Inc.²⁸ The plaintiff received five days worth of classroom and flight simulator training as part of this program.²⁹ With regard to emergency maneuvers, FlightSafety's curriculum included "only the emergency procedures contained in the Pilot Operating Handbook issued by Cessna for a 340A."³⁰

The aircraft crashed shortly after takeoff on August 22, 2000.³¹ Subsequent investigation revealed that a crack had developed in the turbocharger wastegate elbow, allowing super-

²² See *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, No. 09-MD-2085, 2010 WL 5185106, at *6 (W.D.N.Y. Dec. 12, 2010).

²³ See *infra* Parts IV.A, IV.C.

²⁴ See *infra* Parts IV.B, IV.D.

²⁵ No. CIV. 02-4185-KES, 2006 WL 1084103 (D.S.D. Apr. 20, 2006).

²⁶ *Id.* at *1.

²⁷ *Id.*

²⁸ *Id.* at *2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

heated gases to enter the engine assembly and vaporize the fuel, thereby causing the left engine to stall.³² The pilot was unable to compensate for the stalled engine and crashed.³³

The plaintiffs sued both Cessna and FlightSafety.³⁴ Of interest here are the claims against FlightSafety. More specifically, the plaintiffs “asserted a negligence claim contending that FlightSafety negligently trained [the pilot] by failing to include emergency procedures relating to exhaust system failures in its curriculum and by using a flight simulator that failed to accurately replicate a Cessna 340A.”³⁵

The plaintiffs tried to have their claims characterized as common law negligence claims rather than generalized educational malpractice claims by relying on *Doe v. Yale University*.³⁶ In *Doe*, a medical student in his residency program contracted HIV while performing a risky medical procedure.³⁷ He sued Yale “for negligently failing to provide [him with] sufficient training” and for negligently failing to supervise him while performing the procedure.³⁸ The Connecticut Superior Court determined that the plaintiff had not implicated the defendant’s overall educational program or alleged that it had failed to teach him to be a good doctor, and instead made out a precise common law negligence claim based on a failure to educate him on the proper needle technique and a failure to supervise the plaintiff as he practiced needle technique during his residency.³⁹

In doing so, the *Doe* court analogized the plaintiff’s situation to that of an architectural student who successfully sued for negligent supervision when he was injured by a saw in the school woodshop.⁴⁰ As can be seen throughout aviation cases involving educational malpractice, *Doe* has encouraged plaintiffs to couch their claims against educational institutions as specific acts of negligence rather than a generalized attack on the quality of the educational process and curriculum as a whole.⁴¹

³² *Id.*

³³ *Id.* at *3.

³⁴ *Id.*

³⁵ *Id.* at *14.

³⁶ No. CV 9003053655, 1997 WL 766845 (Conn. Super. Ct. 1997).

³⁷ *Sheesley*, 2006 WL 1084103, at *16.

³⁸ *Id.*

³⁹ *Id.* (quoting *Doe*, 1997 WL 766845, at *2).

⁴⁰ *Id.*

⁴¹ See, e.g., *id.*; *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 909–10 (Mich. 2000).

However, the court in *Sheesley* rejected the arguments presented in *Doe*.⁴² First, the court noted that the plaintiff in *Doe* was able to recover because he was injured while still participating in the course of education.⁴³ The plaintiff in *Sheesley* had already completed the course of education at the time the accident occurred⁴⁴—the common fact setting in these cases.

Second, the court disagreed with *Doe*'s differentiation between claims alleging a failure to educate on a specific topic versus claims attacking the quality of the educational process and curriculum as a whole.⁴⁵ "In both instances, the plaintiff is alleging that the school did not teach the student what he or she needed to know."⁴⁶ The court adroitly observed that:

The gravamen of plaintiff's claims are that FlightSafety negligently trained [the pilot] by failing to provide him the skills necessary to detect and safely land following an exhaust system failure. Specifically, plaintiffs allege that FlightSafety negligently created its curriculum by failing to include emergency procedures relating to an exhaust system failure. Further, plaintiffs contend that FlightSafety used negligent teaching techniques by employing a simulator that does not accurately replicate the handling of a Cessna 340A. In other words, plaintiffs are contesting the substance and manner of FlightSafety's training. Plaintiffs' claims "encompass the traditional aspects of education," and thus, sound in educational malpractice.⁴⁷

Third, the court set forth the policy reasons for why the judicial system was poorly equipped to adjudicate cases regarding educational malpractice.⁴⁸ The court noted the difficulty in "establishing the appropriate standard of care to evaluate flight training schools," and noted that the "court would have to decide '[h]ow much was [FlightSafety] required to teach.'"⁴⁹ Accordingly, the court determined that "[s]chools, not courts, are in a better position to determine what should be taught."⁵⁰ The court noted that should it pass judgment on the curriculum and techniques used by FlightSafety, there would be "no principled basis to stop it from determining what curriculum should be

⁴² *Sheesley*, 2006 WL 1084103, at *16.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Page*, 610 N.W.2d at 905).

⁴⁷ *Id.* (citing *Moss Rehab v. White*, 692 A.2d 902, 905 (Del. 1997)).

⁴⁸ *See id.* at *17–18.

⁴⁹ *Id.* at *17 (quoting *Page*, 610 N.W.2d at 906).

⁵⁰ *Id.*

taught at medical schools, paramedic schools, commercial truck driving schools, and innumerable other technical and higher education facilities.”⁵¹

Since pilot error is a factor in many aviation accidents, the court was concerned that “if the court recognizes educational malpractice in this case, virtually every future plane crash will raise the specter of negligent training against the flight school or aviation training center,” potentially leading to a flood of lawsuits.⁵² The court also was concerned with the causation problems inherent in educational malpractice claims: “Did the school negligently train the student? Did the student pay attention? Was the student tired, ill, distracted? Too many factors contribute to the quality of a student’s education, and recognizing educational malpractice invites speculation [as to causation].”⁵³

Although this was an issue of first impression in South Dakota, the U.S. District Court for the District of South Dakota predicted that “the South Dakota Supreme Court [would] follow the overwhelming majority rule and refuse to recognize educational malpractice as a cause of action” and granted Flight-Safety’s motion for summary judgment.⁵⁴

B. *IN RE CESSNA 208 SERIES AIRCRAFT PRODUCTS
LIABILITY LITIGATION*⁵⁵

This case involved the crash of a Cessna 208B (also known as a Cessna Caravan) upon encountering in-flight icing conditions near Parks, Arizona, on November 8, 2002.⁵⁶ In June 2002, the two pilots involved had attended FlightSafety’s Cessna Caravan Pilot Initial Course at the FlightSafety Cessna Learning Center in Wichita, Kansas.⁵⁷ Although the two pilots received slightly different training (one was instrument rated, the other was not), it was undisputed that both received instruction and flight simulator training on how to handle icing conditions in the Cessna Caravan.⁵⁸

⁵¹ *Id.* at *18.

⁵² *Id.* at *17.

⁵³ *Id.*

⁵⁴ *Id.* at *18.

⁵⁵ 546 F. Supp. 2d 1153 (D. Kan. 2008).

⁵⁶ *Id.* at 1156.

⁵⁷ *Id.* at 1156–57.

⁵⁸ *Id.* at 1157.

The plaintiffs sued FlightSafety alleging that they had "(1) negligently failed to instruct Cessna Caravan pilots on how to avoid ice accumulation, how accumulation could affect aircraft performance, or exercise reasonable care in performing flight training services; (2) fraudulently failed to disclose information about icing conditions in the Cessna Caravan; and (3) had breached express and implied warranties concerning FlightSafety's training and the safety instructions and the aircraft itself."⁵⁹

The plaintiffs initially sued in the District Court of Tarrant County, Texas.⁶⁰ Cessna removed the case to U.S. District Court for the Northern District of Texas, and the Judicial Panel on Multidistrict Litigation transferred this case to U.S. District Court for the District of Kansas.⁶¹

Prior to removal to federal court, FlightSafety made a motion for summary judgment on the basis that the plaintiffs' claims sounded in educational malpractice, and were not recognized under Texas law.⁶² The Tarrant County District Court Judge denied the defendants' motion for summary judgment relying on *Doe* and recognizing a "claim for breach of common law duty not to cause physical injury by negligent conduct during the course of instruction."⁶³ This conclusion is somewhat puzzling, and would make more sense if the accident had occurred *during* the course of instruction, which it did not. In reaching this conclusion, the court also relied upon the dissent in *Page*, which also recognized the difference between providing objectively incorrect instruction on a particular subject versus a mere failure to provide instruction on that subject.⁶⁴

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1157-58.

⁶³ *Id.* at 1158.

⁶⁴ *Id.* at 1158-59 (citing *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 909 (Mich. 2000) (Kelly, J., dissenting)). In her dissenting opinion in *Page*, Justice Kelly opined that the "plaintiff asserted a distinct claim of negligence, *i.e.* that defendant taught improper techniques for how to use a particular piece of equipment for climbing utility poles, which did not fall within the disfavored realm of educational malpractice." *Id.* Justice Kelly also "distinguished the case from one involving general educational instruction and inquiry into the nuances of educational theories. [The dissent] reasoned that based on the manufacturer's instructions and user experience, the jury had a standard of care to ascertain whether the specific technique which defendant taught was reasonable." *Id.* at 1159 (citing *Page*, 610 N.W.2d at 909-10 (Kelly, J., dissenting)).

Upon transfer to the U.S. District Court for the District of Kansas, FlightSafety again moved for summary judgment.⁶⁵ District Judge Kathryn H. Vratil determined that Judge Crosby's earlier ruling "was a reasonable application of Texas law and is supported by *Doe v. Yale University* and the dissenting opinion in *Page*" and denied FlightSafety's motion for summary judgment on the basis of the educational malpractice bar.⁶⁶

However, the court did grant FlightSafety's motion for summary judgment on the breach of implied warranty claims. "An implied warranty that services will be performed in a good and workmanlike manner" applies only to cases involving "repair or modification of existing tangible goods or property."⁶⁷ Foreshadowing *Glorigen v. Cirrus Design Corp.*,⁶⁸ the plaintiffs claimed that "FlightSafety flight training services were provided in connection with a tangible good, i.e. FlightSafety training materials which modified the Cessna Pilot Operating Handbook."⁶⁹ The court disagreed, noting that "[f]light training materials such as textbooks or guidelines are tangible goods, but providing flight [education] services does not relate to the 'repair or modification' of those goods or of the Cessna Pilot Operating Handbook."⁷⁰ The court declined to extend the implied warranty of good and workmanlike performance, and granted FlightSafety's motion for summary judgment on this point.⁷¹

C. *DALLAS AIRMOTIVE, INC. V. FLIGHTSAFETY
INTERNATIONAL, INC.*⁷²

The factual scenario in *Dallas Airmotive* is similar to that in *Sheesley*. In *Dallas Airmotive*, a mechanical defect in a component part caused the plane's left engine to stall.⁷³ Further mechanical

⁶⁵ See *id.* at 1157.

⁶⁶ *Id.* In determining that the plaintiffs had stated a distinct claim of negligence (rather than a generalized attack on the quality of the education and curriculum), the court also determined that the negligence claims against FlightSafety were not barred by the federal preemption doctrine. See *id.* at 1159–61. Similarly, the court determined that state law remedies for breach of express warranty were also not preempted by federal law. See *id.* at 1162–63.

⁶⁷ *Id.* at 1161 (citing *Rocky Mountain Helicopters, Inc. v. Lubbock Cnty. Hosp. Dist.*, 978 S.W.2d 50, 52–53 (Tex. 1998)).

⁶⁸ 816 N.W.2d 572 (Minn. 2012).

⁶⁹ *In re Cessna*, 546 F. Supp. 2d at 1162.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 277 S.W.3d 696 (Mo. Ct. App. 2008).

⁷³ *Id.* at 698.

failure prevented the pilot from being able to halt windmilling or "feather" the propeller on the stalled engine.⁷⁴ These mechanical failures caused a high drag condition for which the pilot was unable to compensate, and ultimately led to the crash of the aircraft.⁷⁵

Families of the deceased pilot and passengers successfully sued Dallas Airmotive, who had done maintenance work on the engines before the accident.⁷⁶ Dallas Airmotive sought contribution from FlightSafety, where the pilot had completed his turbo-prop training only nine days before the accident.⁷⁷ This training consisted of both ground school and simulator training.⁷⁸ Although engine-out conditions were replicated in the simulator program used, FlightSafety personnel admitted that prior to the accident they were aware that the simulator did not properly replicate the "high-drag forces associated with an unfeathered propeller," and that the pilot experienced "unrealistically low feedback as to the drag forces involved and their effect on the airplane's handling."⁷⁹

The plaintiff tried to rely on *Doe* and couch its claims as a "very precise negligence claim," rather than a generalized attack on the overall quality of the education.⁸⁰ The plaintiff asserted specific acts of negligence in FlightSafety's failure "to alert and warn [the pilot] of the known dangers of shutting down an engine in flight without the ability to properly feather the propeller."⁸¹ Furthermore, the plaintiff claimed that "FlightSafety knew its . . . simulator did not accurately replicate the extreme drag experienced and that it nonetheless continued to use the simulator."⁸²

The Missouri Court of Appeals rejected the plaintiff's argument, observing that "[t]his is a case about the quality of the instruction."⁸³ "The fact that FlightSafety was aware of the deficiencies in its training program does not change the nature of the complaint."⁸⁴ The plaintiff's claims boiled down to an asser-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 698-99.

⁷⁸ *Id.* at 698.

⁷⁹ *Id.*

⁸⁰ *Id.* at 700.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 701.

⁸⁴ *Id.*

tion that “FlightSafety failed to teach the pilot that which he needed to know in the situation leading to the crash.”⁸⁵ It went on to note that Missouri had previously determined that “educational malpractice claims are not cognizable because there is no duty,” and examined the four policy concerns articulated in *Page* in explaining why such claims are not cognizable.⁸⁶ Ultimately, the court of appeals went on to affirm the district court’s grant of FlightSafety’s motion for summary judgment.⁸⁷

D. *IN RE AIR CRASH NEAR CLARENCE CENTER, NEW YORK,
ON FEBRUARY 12, 2009*⁸⁸

On February 12, 2009, Continental Connection Flight 3407 crashed upon approach to Buffalo Niagara International Airport, killing all forty-nine people aboard and one person on the ground.⁸⁹ Investigation revealed that this crash was likely caused by the pilots’ improper response to airframe ice accumulation.⁹⁰ The ice accumulation slowed airspeed, nearly causing the plane (a Bombardier Dash 8-Q400) to stall.⁹¹ The automatic anti-stall system disconnected the autopilot and the stick pusher mechanism nosed the aircraft down to gain airspeed.⁹² The pilots fought this input and pitched the aircraft sharply up, exacerbating the stall and causing a catastrophic crash moments later.⁹³

The plaintiffs sued airlines Colgan Air, Inc., Pinnacle Airlines Corp., Continental Airlines, Inc., and flight training provider FlightSafety International, Inc.⁹⁴ Of primary interest here are the claims asserted against FlightSafety.⁹⁵ The plaintiffs made both negligence and breach of contract claims against FlightSafety. The plaintiffs’ negligence claim appeared to be a straightforward claim of educational malpractice: FlightSafety did not train the pilots “on how to use the stick pusher mechanism in the Dash 8-Q400,” and trained the pilots “using simula-

⁸⁵ *Id.*

⁸⁶ *Id.* at 699, 701.

⁸⁷ *Id.* at 701.

⁸⁸ No. 09-MD-2085, 2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010).

⁸⁹ *Id.* at *1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

tors and equipment that did not accurately represent the performance of the Dash 8-Q400.”⁹⁶

Although initially sued out in New York state court, the defendants removed the case to U.S. District Court for the Western District of New York under 28 U.S.C. §§ 1331 and 1332(a)(1).⁹⁷ The plaintiffs made a motion for remand to state court, claiming that the presence of FlightSafety destroyed complete diversity and that their claims against FlightSafety were not preempted by federal law.⁹⁸

The defendants opposed remand, claiming that the plaintiffs had fraudulently joined FlightSafety in an effort to destroy complete diversity.⁹⁹ In order to determine if a party has been fraudulently joined, the court must determine that “(1) the plaintiff committed fraud in the pleadings, or (2) there is no possibility, based on the pleadings, that the plaintiffs can state a cause of action against the non-diverse party in state court.”¹⁰⁰ First, there was no evidence that the plaintiffs committed fraud in their pleadings.¹⁰¹ Turning to the second prong of the test, counsel for the defendants alleged that the plaintiff’s claims sounded in educational malpractice and were not cognizable causes of action in New York.¹⁰²

Thus, in order to determine if this case would stay in federal court, the court was forced to examine the viability of educational malpractice claims under New York law.¹⁰³ In doing so, the court acknowledged that in traditional settings, educational malpractice claims were not cognizable under New York law for the typical policy reasons.¹⁰⁴

However, the court determined that “the specific policy considerations underlying New York’s educational malpractice decisions are not present here to such a degree that this Court can definitively conclude that Plaintiffs have no chance of successfully asserting their claims.”¹⁰⁵ In reaching this conclusion, the

⁹⁶ *Id.* at *2.

⁹⁷ *Id.* at *3.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998)).

¹⁰¹ *See id.* at *4.

¹⁰² *Id.* at *6.

¹⁰³ *Id.* at *6–7.

¹⁰⁴ *Id.* at *5 (citing *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 442–44 (N.Y. 1979)).

¹⁰⁵ *Id.* at *6.

court analyzed a series of policy considerations.¹⁰⁶ First, the court noted that FlightSafety's role in the educational process was markedly different than traditional educational providers.¹⁰⁷ FlightSafety was "a private corporation engaged in the business of providing specialized training, thus a New York court may reasonably determine that it is not being tasked with assessing 'the validity of broad educational policies.'"¹⁰⁸ Second, the court determined that since the world of commercial aviation instruction is fairly small, there was no threat of "a glut of suits challenging the day-to-day implementation of educational policies."¹⁰⁹ Third, the court noted that the state was not nearly as involved in regulating specialized commercial educators, as it was with regulating general providers of education.¹¹⁰ Thus, intervention in this case would not "interfere in the constitutional and statutory duties of state administrative agencies to administer the public school system."¹¹¹ Finally, the court noted that *Donohue* "explicitly stated that a cause of action resembling educational malpractice could possibly be pled within the strictures of a traditional negligence or malpractice action."¹¹² As such, the court determined that the "educational malpractice bar does not necessarily prevent the Plaintiffs from maintaining their causes of action [against FlightSafety] in state court."¹¹³

In determining that the plaintiffs did not fraudulently join FlightSafety and that remand to New York state court was appropriate, the court also found that the plaintiffs' *breach of contract* claims stood a chance of success in state court.¹¹⁴ Additionally, the court determined that state court remedies were not preempted by federal law, and no federal question jurisdiction existed.¹¹⁵

The court's treatment of the breach of contract claim in *In re Air Crash Near Clarence Center* illuminates another potential avenue to establish the liability of flight training providers. The plaintiffs brought a breach of contract claim alleging that "the passengers of Continental Connection Flight 6407 relied on

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *Id.* (quoting *Donohue*, 47 N.Y.S.2d at 445).

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.* at *7.

¹¹³ *Id.*

¹¹⁴ *See id.* at *7-8.

¹¹⁵ *See id.* at *8-11.

FlightSafety's performance of its contractual obligations to Colgan, Pinnacle, and/or Continental, but that FlightSafety negligently performed the flight training it was obligated to provide."¹¹⁶ Furthermore, they alleged that they were entitled to sue as the intended third-party beneficiaries of the contract between FlightSafety and Colgan, Pinnacle, and/or Continental.¹¹⁷

The court determined that under New York law, "a contractual obligation, standing alone, does not give rise to tort liability in favor of a non-contracting third party."¹¹⁸ However, New York law provides an exception "where the contracting party, in failing to exercise reasonable care in the performance of his duties, '[l]aunches a force or instrument of harm.'"¹¹⁹ The court also found that this claim stood a possibility of succeeding in New York state court, further evidence that the joinder of FlightSafety was not fraudulent.¹²⁰

While *In re Air Crash Near Clarence Center* appears to support claims sounding in educational malpractice, it is important to remember that this decision is concerned primarily with the propriety of federal jurisdiction. The court's true holding is that the plaintiffs' negligence and breach of contract claims against FlightSafety were not necessarily prohibited by New York law, and therefore joinder of FlightSafety was not fraudulent. Although the court remanded this case to New York state court, the issue of educational malpractice was not litigated in subsequent state court action.¹²¹

¹¹⁶ *Id.* at *2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *7.

¹¹⁹ *Id.* (quoting *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 (N.Y. 2002)).

¹²⁰ *See id.* at *8.

¹²¹ Subsequent litigation in this case generated debate about the proper standard of care for state law claims. *See In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, 798 F. Supp. 2d 481, 484–86 (W.D.N.Y. 2011). Through the adoption of the Aviation Act, Congress had intended federal regulations to preempt all state regulations in the air safety field, including state standards of care, although under the Aviation Act's savings clause, "[s]tate law causes of action and remedies remain available." *See id.* at 486 (citing 49 U.S.C. § 40120(c)). However, the ruling in *In re Air Crash Near Clarence Center* may prove problematic to flight education providers. If federal law preempts all state regulation regarding air safety (by operation of field preemption), must the conduct of flight education providers necessarily be measured against the federal standards enacted by Congress? Neither the U.S. Code nor the Code of Federal Regulations contain any language specifically regulating the conduct of flight educators.

E. *WAUGH V. MORGAN STANLEY & CO.*¹²²

Waugh involved the crash of a Cessna 421B outside of Wheeling, Illinois.¹²³ Although pilot Mark Turek was fully licensed and had significant experience with twin-engine aircraft, he was relatively new to the Cessna 421B.¹²⁴ Approximately one month prior to the accident, the pilot had received flight simulator training through Arr-ow II, Inc. (Arr-ow), flight instruction from Recurrent Flight Training Center, Inc. (Recurrent), and five hours of flight observation from Howard Levinson, who was a certified flight instructor and part owner of the accident aircraft.¹²⁵

The defendants sought summary judgment on the basis that the plaintiffs' claims were barred by the educational malpractice doctrine.¹²⁶ The trial court granted the defendants' motion, concluding that the plaintiffs' claims were not cognizable, and the plaintiffs appealed.¹²⁷

The court quickly determined that the plaintiffs' claims were in essence, an assertion that these defendants failed to train the pilot what he needed to know in order to safely pilot and land the plane.¹²⁸ Although the dissent sought to classify these claims as claims for ordinary negligence, the court found that they "would require a jury at trial to analyze the quality and methods of instruction provided to [the pilot], as well as an evaluation of the course of instruction and the soundness of teaching methods."¹²⁹

Having first determined that the claims sounded in educational malpractice, the court next set out to determine whether or not such claims were cognizable under Illinois law, an issue of first impression.¹³⁰ The court noted that educational malpractice claims were inherently beset with the policy and causation issues as articulated in *Alsides* and *Page*.¹³¹ The court examined trends in case law around the country before deciding that claims for educational malpractice were not cognizable under

¹²² 966 N.E.2d 540 (Ill. App. Ct. 2012).

¹²³ *Id.* at 543–44.

¹²⁴ *Id.* at 544.

¹²⁵ *Id.*

¹²⁶ *Id.* at 543.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 550.

¹³⁰ *Id.* at 546.

¹³¹ *Id.* at 549.

Illinois law.¹³² In doing so, the court heavily relied on *Dallas Air-motive* to show that claims revolving around the quality of flight instruction provided were barred by the educational malpractice doctrine.¹³³

The court rejected the plaintiffs' reliance on both *In re Air Crash Near Clarence Center* and *Doe*.¹³⁴ The court noted that *In re Air Crash Near Clarence Center*'s holding (that there was a *possibility* that the educational malpractice bar *might* not apply in that particular factual situation) was extremely limited.¹³⁵ The court also distinguished *Doe*, observing that the case at hand did not involve "an injury sustained by a student during the course of instruction from a danger created by the instructor."¹³⁶

The plaintiffs also advanced the theory that the relationship between Turek and Levinson "was 'much closer and immediate' than that of an ordinary school and student," and that the educational malpractice bar should not apply.¹³⁷ The plaintiffs argued that Levinson did not provide any flight instruction on a formal basis and, as such, their claims were not barred by the educational malpractice doctrine.¹³⁸

The court disagreed, relying on *Glorvigen v. Cirrus Design Corp.*¹³⁹ for the proposition that no matter the precise labels applied to the parties, "whenever the defendant enter[s] into an educational relationship" with the plaintiff, the educational malpractice bar applies.¹⁴⁰ The correct analysis, the court noted, is "based on the nature of the claim [asserted against the defendant] rather than the nature of the defendant."¹⁴¹ Ultimately, the court determined that claims for educational malpractice were not cognizable under Illinois law, and all claims against flight education providers Arr-ow, Recurrent, and Levinson were barred.¹⁴²

However, Justice Pucinski wrote a dissenting opinion, contending that the plaintiffs had asserted traditional negligence claims, rather than claims sounding in educational malpractice,

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 554.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 796 N.W.2d 541, 554–55 (Minn. Ct. App. 2011).

¹⁴⁰ *Waugh*, 966 N.E.2d at 555.

¹⁴¹ *Id.*

¹⁴² *Id.*

and that claims asserted against Levinson should not be prohibited by the educational malpractice doctrine.¹⁴³ The dissent noted that Levinson was not a traditional provider of flight training, and did not charge Turek for his services.¹⁴⁴ Instead, Levinson conducted the observation flights because he had a vested interest in doing so as part owner of the aircraft and to help satisfy insurance coverage provisions.¹⁴⁵

More specifically, the dissent pointed out that Section 323 of the Restatement (Second) of Torts sets forth a basis for liability for a voluntary undertaking that is performed negligently:

§ 323. Negligent Performance of Undertaking to Render Services
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.¹⁴⁶

According to Justice Pucinski, Section 323 could be used to determine the duty that Levinson owed to Turek.¹⁴⁷

The dissent also stated that Section 324A of the Restatement (Second) of Torts "provides for limited liability to third persons based on the negligent performance of a service or undertaking where the provision of the services results in physical harm."¹⁴⁸ Section 302A provides that defendants may be held liable for harm caused by third parties when "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."¹⁴⁹ Finally, the dissent pointed out that Section 390 of the Restatement (Second) of Torts creates liability when a defendant provides a chattel for use by a third party known to be incompetent:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to

¹⁴³ *Id.* at 557 (Pucinski, J., dissenting).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 558.

know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.¹⁵⁰

The dissent used these sections of the Restatement (Second) of Torts to argue to establish that the flight education was an undertaking that was performed negligently, thereby causing injury to the plaintiffs.¹⁵¹ In doing so, he disagreed with *In re Cessna's* and *Doe's* findings that the plaintiffs must be injured by a danger created by the instructor during the course of instruction, not after its completion.¹⁵² Such a finding "improperly removes the well-established tort principles of foreseeability and proximate cause from the negligence analysis and would allow parties to escape the foreseeable consequences of their negligence."¹⁵³ Furthermore, the dissent noted that Section 324A makes it clear that "liability may attach when the undertaking is negligently performed and injures a third party later, after the negligent actor is no longer present."¹⁵⁴

Justice Pucinski determined that the plaintiffs had set out a discrete claim of negligence against Levinson much like in *In re Cessna* and *Doe*.¹⁵⁵ The plaintiff did not allege "a mere failure to provide a better education," a generalized attack on the quality of the education.¹⁵⁶ Instead, the plaintiffs claimed that "[w]hat occurred in this case is that Levinson undertook to instruct Turek and allowed Turek to fly Levinson's airplane, but negligently failed to train him how to properly operate that specific airplane."¹⁵⁷ Justice Pucinski observed that further application of the educational malpractice bar in this case would set "bad precedent in allowing owners and operators of aircrafts to avoid liability for their failure to exercise reasonable care in training and/or allowing others to fly their airplanes."¹⁵⁸ Justice Pucinski closed by noting that "the fact that negligence in this case oc-

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 560.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

curred under the guise of providing instructions or training does not vitiate liability for ordinary negligence.”¹⁵⁹

F. *MURPHY V. CIRRUS DESIGN CORP.*¹⁶⁰

Murphy involved a Cirrus SR-22 aircraft that encountered in-flight icing conditions and crashed near Cleveland, Ohio, on April 28, 2009.¹⁶¹ The pilot, Michael H. Doran, had purchased the aircraft in 2008, and as part of the purchase agreement he received transition training from Cirrus, subcontracted out to the University of North Dakota Aerospace Foundation (UNDAF).¹⁶² After completing transition training in October 2009, he received ongoing flight instruction from Steven Kaplan, a certified Cirrus Standardized Instructor Pilot in Buffalo, New York.¹⁶³

Murphy’s procedural posture is virtually identical to that in *In re Air Crash Near Clarence Center*.¹⁶⁴ The plaintiffs sought remand claiming that their joinder of flight instructor Steven Kaplan destroyed complete diversity, thereby necessitating remand to state court.¹⁶⁵ In response, the defendants argued that Kaplan had been fraudulently joined solely to destroy diversity jurisdiction, and any claims against him asserted in state court would necessarily fail.¹⁶⁶

In determining the validity of claims against flight training providers, the court heavily relied on the ruling from *In re Air Crash Near Clarence Center* for the proposition that “a New York court may find that the commercial specialized training of air-men is not necessarily akin to the general education of children, and is unlikely to result in a glut of suits challenging the implementation of educational policies.”¹⁶⁷ The court relied on *Clarence Center* for the proposition that “the New York Court of Appeals has explicitly stated that a cause of action resembling educational malpractice could possibly be pled within the strictures of a traditional negligence or malpractice action.”¹⁶⁸ The

¹⁵⁹ *Id.*

¹⁶⁰ No. 11-CV-4955, 2012 WL 729263 (W.D.N.Y. Mar. 6, 2012).

¹⁶¹ *Id.* at *1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *2.

¹⁶⁵ *Id.* at *1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at *2.

¹⁶⁸ *Id.*

court determined that the plaintiffs' claims against Kaplan could possibly (though not certainly) succeed, and ordered remand to New York state court.¹⁶⁹

It does not appear that the educational malpractice issue was further litigated following remand to state court. In the wake of *In re Air Crash Near Clarence Center and Murphy*, the New York courts continue to hold out the possibility that negligence claims asserted against flight training providers may be cognizable under New York law, at least to stave off claims of fraudulent joinder.

G. *GLORVIGEN V. CIRRUS DESIGN CORP.*¹⁷⁰

Pilot Gary Prokop purchased a Cirrus SR22 aircraft in December 2002.¹⁷¹ Mr. Prokop was a relatively inexperienced pilot but had earned the high performance endorsement necessary to pilot the SR22.¹⁷² However, he was not instrument flight rated and was only licensed to fly under visual flight rules (VFR).¹⁷³ On January 18, 2003, Prokop took off under visual flight conditions.¹⁷⁴ Shortly after takeoff, he entered instrument meteorological conditions (IMC), became disoriented, and crashed, killing himself and one passenger.¹⁷⁵

As part of the purchase contract, the manufacturer/seller, Cirrus, agreed to provide Prokop with two days of transition training, although such services were subcontracted out to the UNDAF.¹⁷⁶ This transition training consisted of five separate lessons, each with a classroom component and actual in-flight instruction practicing certain maneuvers.¹⁷⁷ Students' progress through the five-lesson curriculum was noted on a checklist, and flight instruction personnel graded each student's performance

¹⁶⁹ *Murphy* also raised issues about the agency relationship between the Cirrus defendants and the flight instructor Steven Kaplan. *See id.* at *4. The defendants argued that Kaplan was not a proper party, and his acts should be attributed to the Cirrus defendants. *Id.* at *3. However, under New York law, "it is well settled that an agent can be held liable for his own negligent acts," and the court determined that Kaplan had been properly joined. *Id.* (quoting *Reliance Ins. Co. v. Morris Assocs., P.C.*, 200 A.D.2d 728, 730 (N.Y. App. Div. 1994)).

¹⁷⁰ 816 N.W.2d 572 (Minn. 2012).

¹⁷¹ *Id.* at 576.

¹⁷² *Id.* at 575.

¹⁷³ *Id.* at 576.

¹⁷⁴ *Id.* at 577.

¹⁷⁵ *Id.* at 578.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 576.

on each of the five lessons as unsatisfactory, marginal, satisfactory, or excellent.¹⁷⁸

Of particular interest here is "Flight Lesson 4a," which taught the "[r]ecovery from VFR into IMC (auto-pilot assisted)."¹⁷⁹ This lesson was designed to instruct non-instrument rated pilots on proper procedure when inadvertently entering instrument flight conditions while aloft.¹⁸⁰ Upon entering instrument flight conditions, VFR-only pilots were instructed to activate the autopilot and execute a 180-degree turn in order to return to visual flight conditions.¹⁸¹ This procedure was set out in the Pilot's Operating Handbook and the Autopilot Operating Handbook, which were provided to Prokop.¹⁸² Additionally, this procedure was described in the Cirrus SR22 Training Manual, along with associated diagrams, which were also provided to Prokop.¹⁸³ It was undisputed that this procedure was taught as part of the classroom curriculum, and was detailed on a series of Microsoft PowerPoint slides exhibited to students during the classroom session.¹⁸⁴

Finally, flight instructors were supposed to practice this maneuver with students during flight instruction and grade their performance.¹⁸⁵ Cirrus/UNDAF flight instructor Yu Weng Shippek testified that he had practiced this maneuver with Prokop.¹⁸⁶ However, a review of Prokop's course syllabus and pilot's log revealed that this maneuver was not checked off as completed and no grade was entered.¹⁸⁷ According to the syllabus itself, a failure to check off a particular maneuver indicated that that lesson had been skipped or left incomplete at the instructor's discretion.¹⁸⁸

The plaintiffs brought suit against Cirrus and UNDAF on traditional negligence and product liability theories.¹⁸⁹ These claims alleged that "Cirrus had a duty to train Prokop by virtue of including transition training as part of the purchase price of

¹⁷⁸ *Id.* at 576-77.

¹⁷⁹ *Id.* at 577.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 578.

¹⁸³ *Id.* at 577.

¹⁸⁴ *Id.* at 577-78.

¹⁸⁵ *Id.* at 578.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 577.

¹⁸⁹ *Id.* at 578-79.

the SR22.”¹⁹⁰ The case was tried to a jury in Minnesota state court.¹⁹¹ The jury allocated fault as: Prokop 25%, Cirrus 37.5%, and UNDAF 37.5%, with damages totaling \$19,400,000.¹⁹²

Following the adverse jury verdict, the Cirrus defendants brought a motion for judgment as a matter of law, which the district court denied.¹⁹³ The defendants appealed, and the Minnesota Court of Appeals determined that defendants Cirrus and UNDAF were entitled to judgment as a matter of law because the claims asserted against them were prohibited by the educational malpractice doctrine.¹⁹⁴ The plaintiffs appealed to the Supreme Court of Minnesota on the theory that their claims truly sounded in product liability rather than educational malpractice and were not barred by the educational malpractice doctrine.¹⁹⁵

It is settled Minnesota law that educational malpractice claims are prohibited.¹⁹⁶ As shown by other cases, public policy arguments militate against imposing a duty to educate effectively.¹⁹⁷ Accordingly, the plaintiffs took pains to avoid characterizing their claims as simply assertions that the defendants did not teach the pilot what he needed to know.¹⁹⁸ To get around the educational malpractice doctrine bar, the plaintiffs attempted to couch their claim as either a products liability action or as negligence in a voluntary undertaking.¹⁹⁹

The Minnesota Supreme Court began by examining the plaintiffs’ products liability theory.²⁰⁰ The plaintiffs alleged that “Cirrus and UNDAF owed a duty to Prokop and Kosak to give Flight Lesson 4a because, as a supplier and manufacturer, Cirrus owed a duty to give adequate instructions in the safe use of its airplane.”²⁰¹ Under Minnesota product liability law, failure to warn claims are treated much like a typical negligence claim.²⁰² As

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 580.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 584.

¹⁹⁶ *See Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999).

¹⁹⁷ *See id.*

¹⁹⁸ *See Glorvigen*, 816 N.W.2d at 578.

¹⁹⁹ *Id.* at 579.

²⁰⁰ *Id.* at 581.

²⁰¹ *Id.* at 580.

²⁰² *See Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 215 (Minn. 1982) (“As a practical matter, where the strict liability claim is based on . . . failure to warn . . . there is essentially no difference between strict liability and negligence.”).

such, the court must determine the existence and nature of duty as a matter of law before submitting the case to the jury.²⁰³

In Minnesota, “a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use.”²⁰⁴ This duty to warn actually comprises two separate duties “(1) [t]he duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage.”²⁰⁵ To be sufficient, the warnings should “(1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury.”²⁰⁶ Practically, this means affixing warning signs and providing purchasers with literature detailing proper usage.²⁰⁷

Instead, the plaintiffs sought to expand the manufacturer’s duty to warn to include a duty to properly train purchasers on proper product usage.²⁰⁸ The Minnesota Supreme Court was quick to point out that:

[T]here is no duty for suppliers or manufacturers to *train* users in safe use of their product. Indeed, imposing a duty to train would be wholly unprecedented. Appellants cite no case—from any court—in which a supplier or manufacturer was obligated to provide training in order to discharge its duty to warn.²⁰⁹

As such, the court declined to extend the duty to warn to include a duty to train.²¹⁰ Further, the materials that Cirrus undisputedly provided to Prokop²¹¹ “(1) attract[ed] the attention of those that the product could harm; (2) explain[ed] the mechanism and mode of injury; and (3) provide[d] instructions on ways to safely use the product to avoid injury.”²¹² This led the

²⁰³ *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924–25 (Minn. 1986).

²⁰⁴ *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004).

²⁰⁵ *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977).

²⁰⁶ *Gray*, 676 N.W.2d at 274.

²⁰⁷ *See id.*

²⁰⁸ *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 583 (Minn. 2012).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Cirrus provided Prokop with descriptions of emergency maneuvers upon inadvertently entering icing conditions in the *Pilot’s Operating Handbook*, *Autopilot’s Operating Handbook*, and *Cirrus SR22 Training Manual*, which were undisputedly provided to Prokop. *Id.* at 576. It was also undisputed that this procedure was taught as part of the classroom curriculum, and was detailed on a series of Microsoft PowerPoint slides exhibited to students during the classroom session. *Id.* at 577.

²¹² *Id.* at 583.

court to determine that Cirrus had "adequately discharged its duty to warn."²¹³

In the alternative, the plaintiffs claimed that "Cirrus may have assumed a duty to provide Flight Lesson 4a by undertaking to provide the lesson."²¹⁴ It is settled law 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."²¹⁵ However, Minnesota law also provides that there can be no tort liability when the duty allegedly breached arises solely in contract: "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."²¹⁶

In this case, the court already determined that a manufacturer's duty to warn does not include a duty to train and that "Cirrus does not owe a duty imposed by law to provide Flight Lesson 4a."²¹⁷ Instead, the duty to provide Flight Lesson 4a "could only have arisen from the contract," thereby prohibiting the plaintiffs from recovering in tort.²¹⁸ The Minnesota Supreme Court thus affirmed the ruling of the court of appeals, and found that the plaintiffs' claims were barred by the educational malpractice doctrine.²¹⁹

Two justices dissented largely on the basis that Cirrus's decision to provide training constituted a voluntary undertaking, which must be performed with due care.²²⁰ Although the majority correctly stated that "when the gravamen of [a] case . . . is contractual" and "[a]ny duties between the parties arose out of contracts," then "a party cannot be held liable in negligence," the dissent noted that the gravamen of the plaintiffs complaints

²¹³ *Id.*

²¹⁴ *Id.* at 584.

²¹⁵ *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975).

²¹⁶ *United States v. Johnson*, 853 F.2d 619, 622 (8th Cir. 1988) (citing *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983)).

²¹⁷ *Glorvigen*, 816 N.W.2d at 584.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 585 (Anderson, J., dissenting). Justice Anderson also argued that the adequacy of the warning was a question for the jury. *Id.* In Justice Anderson's opinion, the jury found that Cirrus's warning was inadequate by initially returning a verdict that Cirrus was negligent. *Id.* Accordingly, it was inappropriate for the court to overturn this result and substitute its judgment for the jury's. *Id.* at 587.

sounded in tort (not contract), and that Cirrus's duty to warn arose in tort (not contract).²²¹

The dissent relied heavily on Section 323 of the Restatement (Second) of Torts, which provides that a party can assume a duty in tort even if undertaken for consideration:

Restatement (Second) of Torts § 323

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.²²²

According to the dissent, "[t]hat a person can undertake a duty in tort 'for consideration' indicates that a person can assume a duty in tort through contract."²²³ This conclusion is supported by Minnesota contractual law, which provides for recovery in tort despite the existence of a contractual relationship when the alleged damages include personal injury or non-economic loss.²²⁴

Relying on Section 323 of the Restatement (Second) of Torts as well as *80 S. Eighth Street*, the dissent disagreed with the majority's ruling that any duty owed by Cirrus was purely contractual and recovery in tort was prohibited.²²⁵ In short, "a party 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."²²⁶

The dissent contended that the duty owed by Cirrus was imposed by both contract and tort law, and involved personal injury and non-economic-loss damages.²²⁷ The dissent concluded that "by promising to provide Flight Lesson 4a, Cirrus did as-

²²¹ *Id.* (citing *Lesmeister*, 330 N.W.2d at 102).

²²² *Id.* at 587-88.

²²³ *Id.* at 588 (citing *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001); *State v. Philip Morris, Inc.*, 551 N.W.2d 490, 493-94 (Minn. 1996)).

²²⁴ See *80 S. Eighth St. Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 396 (Minn. 1992).

²²⁵ *Glorigen*, 816 N.W.2d at 587 (Anderson, J., dissenting).

²²⁶ *Id.* at 589 (citing *Eads v. Marks*, 249 P.2d 257, 260 (Cal. 1952)).

²²⁷ *Id.* at 588.

sume a duty in tort and may be held liable for breaching that duty.”²²⁸

H. *NEWMAN V. SOCATA SAS*²²⁹

Newman involved the February 2007 crash of a Socata TBM 700B following a missed approach to New Bedford Regional Airport in Massachusetts, which killed pilot Michael Milot and two passengers.²³⁰ Following the missed approach, Milot applied full power for a go-around for the landing.²³¹ The application of full power caused a torque roll to the left, for which the TBM 700B had a known propensity.²³² The torque roll caused Milot to lose control of the aircraft and crash.²³³

Seven months prior to the accident, Milot had received training from Simcom International, Inc.²³⁴ Although Milot successfully completed the training and was fully licensed to fly the TBM 700, the plaintiffs alleged that Simcom did not “warn him of the TBM 700’s known propensity to torque roll when engine power is increased.”²³⁵ At the time the accident occurred, at least fifteen accidents involving torque roll in TBM 700 had been reported to the National Transportation Safety Board and the United Kingdom Air Accidents Investigation Branch.²³⁶ The plaintiffs alleged that “Simcom owed a duty to warn Mr. Milot of the TBM 700’s known propensity to torque roll and to otherwise competently train him regarding flying that type of aircraft,” and that “Simcom breached its duty by failing to inform and warn Mr. Milot of the propensity of the TBM 700 to torque roll,” which presented a foreseeable risk of harm.²³⁷

The case was sued out in the U.S. District Court for the Middle District of Florida, which was to apply substantive Florida law.²³⁸ Defendants Socata and Simcom moved to have the plaintiffs’ claims dismissed on the basis that the plaintiffs’ claims

²²⁸ *Id.*

²²⁹ 924 F. Supp. 2d 1322 (M.D. Fla. 2013).

²³⁰ *Id.* at 1323.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 1323–24.

²³⁵ *Id.* at 1323.

²³⁶ *Id.* at 1324.

²³⁷ *Id.*

²³⁸ *Id.*

sounded in educational malpractice and were not cognizable under Florida law.²³⁹

The court began with the proposition that educational malpractice claims are prohibited under Florida law.²⁴⁰ Prior decisions revolved around sovereign immunity, rendering the court unable to pass judgment on policy level decisions made by other branches of government.²⁴¹ These decisions also refer to (but do not rely on) the policy considerations seen in other cases involving education providers: difficulty in ascertaining the applicable standards of care, causation problems, and the potential of a flood of litigation threatening to deeply embroil the courts in the day-to-day operation of schools.²⁴² Florida courts have also found that these sorts of considerations also bar educational malpractice claims asserted against private providers of general education.²⁴³

However, in *Newman*,²⁴⁴ the court determined that Simcom played a markedly different role than a typical provider of education. More specifically,

[a]llowing the claims at issue—that a for-profit commercial entity, teaching a narrowly-structured course on the operation of a specific type of aircraft, owed a breached a duty to warn and train regarding a known lethal propensity of the aircraft to torque roll—to proceed does not implicate the public policy concerns expressed in *B.J.M.* or other cases imposing the bar.²⁴⁵

In reaching this decision, the court heavily relied on both *In re Cessna 208 Series Aircraft Products Liability Litigation* and *In re Air Crash Near Clarence Center*.²⁴⁶ In its own words, “[t]he public policy considerations that are relied upon to bar traditional educational malpractice claims do not carry over to the flight training setting, at least not on the facts of this case.”²⁴⁷

Instead, “it is likely that Florida courts would find sound policy reasons for allowing the claims against Simcom—founded on

²³⁹ *Id.* at 1323.

²⁴⁰ See *Tubell v. Dade Cnty. Pub. Sch.*, 419 So. 2d 388, 389 (Fla. Dist. Ct. App. 1982); see also *Dep’t of Health & Rehabilitative Servs. v. B.J.M.*, 656 So. 2d 906, 914 (Fla. 1995).

²⁴¹ *Newman*, 924 F. Supp. 2d at 1325.

²⁴² *Id.* at 1326.

²⁴³ See *Armstrong v. Data Processing Inst., Inc.*, 509 So. 2d 1298, 1299 (Fla. Dist. Ct. App. 1987).

²⁴⁴ *Newman*, 924 F. Supp. 2d at 1330.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1328.

²⁴⁷ *Id.*

traditional common law causes of action—to proceed.”²⁴⁸ Moreover, “Simcom has not explained why Florida courts, which have long recognized negligence actions based on failure to warn, would not allow these claims to move forward,” and denied the defendants’ motion to dismiss.²⁴⁹ Note that the court merely denied the defendants’ motion to dismiss on the premise the plaintiffs’ claims *may* stand a chance of success under Florida law.²⁵⁰

V. THE CURRENT STATUS OF EDUCATIONAL MALPRACTICE CLAIMS ASSERTED AGAINST FLIGHT TRAINING PROVIDERS

As noted above, cases against flight training providers go both ways, with a trend toward barring these claims.²⁵¹ *Sheesley*, *Dallas Airmotive*, and *Waugh* flatly prohibit educational malpractice claims against flight training providers.²⁵² In each, the court notes the difficulties in assessing educational curriculum and techniques, policy level concerns in regulating education, and causation problems that simply render such disputes unfit for judicial resolution. *Glorvigen* similarly holds that claims about the quality of flight training cannot be couched as failure-to-warn type products liability claims.²⁵³ Manufacturers have a duty to warn, but no duty to train.²⁵⁴

Future claims will likely continue to recast claims against flight trainers as distinct acts of negligence (a failure to educate on operation of stick-shakers, a failure to warn about a known propensity for torque roll, etc.) rather than a generalized attack on the overall quality of the course of training.²⁵⁵ To date, the courts have rejected this distinction: both claims reduce to an

²⁴⁸ *Id.* at 1330.

²⁴⁹ *Id.*

²⁵⁰ *Newman* also discussed the difficulties in determining damages in the typical educational malpractice action (i.e., how do you measure damages stemming from a failure to properly educate a child?). *Id.* at 1322. Such concerns were not present in this case; however, the damages occasioned by Simcom’s alleged failure to train were readily ascertainable. *Id.* at 1329.

²⁵¹ See, e.g., *Sheesley v. Cessna Aircraft Co.*, No. CIV. 02-4185-KES, 2006 WL 1084103, at *14 (D.S.D. Apr. 20, 2006); *Waugh v. Morgan Stanley & Co.*, 966 N.E.2d 540, 546 (Ill. App. Ct. 2012); *Dall. Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696, 697 (Mo. Ct. App. 2008).

²⁵² See cases cited *supra* note 251.

²⁵³ *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 581 (Minn. 2012).

²⁵⁴ *Id.* at 582.

²⁵⁵ See, e.g., *Newman*, 942 F. Supp. at 1322; *In re Air Crash Near Clarence Ctr. N.Y.*, on Feb. 12, 2009, 798 F. Supp. 2d 481 (W.D.N.Y. 2011).

assertion that the student did not learn what he or she needed to know.²⁵⁶ As in *Sheesley*, these claims will also continue to be undermined by the fact that they typically arise *after* the pilot has completed his training and is no longer actively involved in the course of educational studies.²⁵⁷

In re Air Crash Near Clarence Center as well as the dissents in *Waugh* and *Glorvigen* provide some interesting (if not convoluted) analyses about flight training providers' tort liability growing out of contractual relationships, voluntary undertakings, entrusting a dangerous instrumentality to an inexperienced user, and the duties owed to third parties under tort and contract law.²⁵⁸ Although these theories are not widely accepted, they do represent alternative ways for thinking about the potential liability of flight training providers. It remains to be seen if the courts will use the traditional educational malpractice bar to ban claims asserted under these theories.²⁵⁹

In all cases where claims of educational malpractice were not dismissed out of hand (*In re Cessna*, *Clarence Center*, *Murphy*, and *Newman*), it is important to look at what exactly the court was asked to decide and the extent of the court's ruling.²⁶⁰ In each of these cases, the courts determined that the plaintiffs' claims against flight training providers were not necessarily barred and *may* be cognizable by applicable state law, allowing the plaintiffs to stave off motions to dismiss, claims of fraudulent joinder, or motions for summary judgment.²⁶¹ It does not appear that this issue was fully litigated at trial in any of these cases.²⁶²

²⁵⁶ *Sheesley*, 2006 WL 1084103, at *16.

²⁵⁷ *Id.* at *31.

²⁵⁸ *In re Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, No. 09-MD-2085, 2010 WL 5185106, at *7 (W.D.N.Y. Dec. 12, 2010); *see Glorvigen*, 816 N.W.2d at 585; *see Waugh*, 966 N.E.2d at 557.

²⁵⁹ *See Newman v. Socata SAS*, 924 F. Supp. 2d 1322 (M.D. Fla. 2013); *Murphy v. Cirrus Design Corp.*, No. 11-CV-495S, 2012 WL 729263 (W.D.N.Y. Mar. 6, 2012); *In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, 798 F. Supp. 2d 481 (W.D.N.Y. 2011); *In re Cessna 208 Series Aircraft Products Liab. Litig.*, 546 F. Supp. 2d 1153 (D. Kan. 2008).

²⁶⁰ *See* cases cited *supra* note 259.

²⁶¹ *See* cases cited *supra* note 259.

²⁶² *See* cases cited *supra* note 259.

VI. SHOULD EDUCATIONAL MALPRACTICE CLAIMS
ASSERTED AGAINST FLIGHT TRAINING
PROVIDERS BE RECOGNIZED?

At present, the majority of states have determined that educational malpractice claims should be barred as a matter of law for the sorts of policy reasons articulated in *Page*.²⁶³ The courts have imposed a blanket prohibition on all claims involving the sufficiency of educational services and are either unable or unwilling to adjudicate these disputes.²⁶⁴ Continued reliance on this sort of reasoning certainly leads to consistent and predictable outcomes in cases involving deficient education. But does this continued rejection of educational malpractice claims lead to the *right* outcome? Does the mere mention of claims involving the sufficiency of educational services provided automatically mean that the claim is not fit for judicial resolution? Are *all* educational malpractice claims inherently nonjusticiable?

Ideally, the educational malpractice bar should be construed as a defense to unsolvable policy-level problems regarding the generalized and compulsory education of schoolchildren. These cases do not involve a foreseeable risk of physical harm, but are in essence claims that the educator did not provide the child with skills to develop into a successful adult. The courts would have to make decisions about what should or should not be taught in schools, decisions that *are* truly better left to other branches of government. Claims involving the sufficiency of curriculum and pedagogical techniques would indeed embroil the courts in the day-to-day operations of schools, and could easily result in a flood of litigation from disaffected students. With thorny philosophical questions regarding the very goal of such generalized education, it becomes nearly impossible to cogently discuss the standards of conduct for educators, the breach thereof, the nature of damages, and any causal link between them. Accordingly, it is appropriate to bar the claims of plaintiffs who complain about the quality of education received in public schools or other provider of generalized education.

But applying this sort of blanket prohibition to all claims involving the provision of educational services is overbroad. Although the issue of educational malpractice was not formally litigated through trial in *In re Cessna*, *In re Air Crash Near Clarence Center*, *Murphy*, and *Newman*, these cases may signal a trend to-

²⁶³ *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 903 (Mich. 2000).

²⁶⁴ See cases cited *supra* note 251.

wards establishing liability for flight training providers.²⁶⁵ Each of these cases contained hints that claims alleging that a flight training provider failed to teach the pilot what he or she needed to know *may* succeed in certain circumstances.²⁶⁶

In *In re Air Crash Near Clarence Center, Murphy, and Newman*, the courts seemed to buy into the notion that the commercial education of aviators is fundamentally different from the public education of schoolchildren.²⁶⁷ Cases involving commercial flight training (or other specialized course of technical training teaching a discrete set of safety-critical skills) simply do not present the sort of unsolvable policy-level issues that were articulated in *Page*.²⁶⁸ The typical issues—determining the appropriate standard of care, causation, and damages, as well as the conservation of judicial resources and constitutional separation of powers—just do not weigh heavily enough to warrant the outright prohibition of claims asserted against such training providers.

Developing the standard of care and evaluating curriculum and pedagogical techniques among flight trainers is not an unmanageable task. Although the courts rightly do not want to wade into assessing the sufficiency of generalized education provided to schoolchildren and undergraduates for a variety of policy reasons, they can and should be able to competently evaluate the conduct of “a for-profit commercial entity, teaching a narrowly structured course on the operation of a specific type of aircraft” or other specialized equipment or training.²⁶⁹ While it may be difficult to determine what a school child or college student must be taught, it certainly is not hard to determine that there are discrete principles and skills that a pilot must be taught in order to safely fly an airplane. A failure to competently teach these skills may present a foreseeable risk of physical harm, a key difference from cases involving the general education of schoolchildren.²⁷⁰

²⁶⁵ See generally *Newman*, 924 F. Supp. 2d at 1322; *Murphy*, 2012 WL 729263, at *3; *In re Air Crash Near Clarence Ctr.*, 798 F. Supp. 2d at 481; *In re Cessna*, 546 F. Supp. 2d at 1153.

²⁶⁶ See cases cited *supra* note 265.

²⁶⁷ See *Newman*, 924 F. Supp. 2d at 1328; *Murphy*, 2012 WL 729263, at *2; *In re Air Crash Near Clarence Ctr.*, 798 F. Supp. 2d at 481.

²⁶⁸ *Page*, 610 N.W.2d at 907.

²⁶⁹ *Newman*, 924 F. Supp. 2d at 1329.

²⁷⁰ The proper measure of damages is also difficult to measure in cases involving the generalized education of schoolchildren however, the damages in aviation accidents typically consist of personal injury and property damage. These damages are relatively easy to calculate. See *id.*

Taking *Dallas Airmotive* as an example, there is no compelling policy reason why the court would not be able to assess the conduct of a flight trainer who trained students with a simulator it knew to be inaccurate.²⁷¹ It does not take much imagination to envision other similar cases involving a flight instructor's failure to adequately instruct a student on basic fundamental skills and principles of flight. Looking beyond flight instruction and into other fields of specialized education, analysis of *Page* reveals that there is no compelling policy reason why the court was unfit to adjudicate the claims of a telephone lineman who claimed that the educator failed to teach him safe pole climbing technique.²⁷² It is not hard to see that such a defendant did not use reasonable care in providing instruction to prevent against a clearly foreseeable risk of falls.²⁷³ In the face of such shortcomings, defendants should not be able to assert the educational malpractice bar to shield themselves from obviously negligent conduct. If educational malpractice claims were recognized, aircraft accidents are infrequent enough that it is unlikely that suits against flight training providers would clog the courts.

It should be acknowledged that the recognition of these claims would also have repercussions outside of the world of aviation training. If plaintiffs may recover from flight schools, they should theoretically also be able to recover from other "for-profit commercial entit[ies], teaching a narrowly structured course on the operation of a specific [piece of equipment]" or a specific set of well defined skills.²⁷⁴ Although recognition of such claims may expand the courts' role somewhat, there is no reason why the courts would be unable to competently adjudicate a defendant's failure to provide adequate training on a discrete set of safety-critical skills, particularly when there is an easily foreseeable risk of physical harm. Such claims should not be turned away at the courthouse door simply because they might burden the court system.

Recognizing claims regarding "for-profit commercial entit[ies], teaching a narrowly structured course on the operation of a specific [piece of equipment]" or a discrete set of safety-critical skills does not mean that such claims will often suc-

²⁷¹ *Dall. Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696, 701 (Mo. Ct. App. 2008).

²⁷² *See Page*, 610 N.W.2d at 900.

²⁷³ *See id.*

²⁷⁴ *Newman*, 924 F. Supp. 2d at 1329.

ceed.²⁷⁵ Plaintiffs will still have the burden of proof on all elements of a negligence-based claim in order to recover. Plaintiffs asserting claims against defendant flight instructors may have difficulty convincing a jury that the harm that occurred was truly foreseeable or that there is any causal link between the flight educator's actions and the occurrence of the accident. These factors will likely be difficult to prove in light of the vagaries of student aptitude, focus, and application. Aviation-specific factors such as dynamic weather, equipment failure, and pilot fatigue may also pose issues.

However, it is not impossible for a plaintiff to make out such a claim.²⁷⁶ By initially returning a verdict for \$19 million, the jury in *Glorvigen* clearly thought that the defendant flight training provider was negligent in its failure to instruct on inadvertent entry into instrument flight conditions, which presented a foreseeable risk of harm.²⁷⁷

The acknowledged downside to the recognition of flight-training malpractice claims is that flight trainers will be forced to defend such claims, rather than having them dismissed as a matter of law. Flight trainers will be forced to bear the (not insubstantial) cost of defending these lawsuits, although it may be difficult for a plaintiff to actually recover on such a claim. There is potential long-tail liability for flight schools as long as the given pilot is still active in flying, which may threaten flight training facilities' long-term financial stability. However, the strength of this causal relationship greatly diminishes as time goes along. A jury will likely have a hard time finding a positive causal relationship between the allegedly deficient training and an accident occurring decades later.

The temporal nature of the causal relationship should also weigh in favor of the imposition of liability for accidents occurring shortly after the course of education is concluded. Currently, the law on educational malpractice imposes artificial and illogical temporal restraints on an injured plaintiff's ability to recover from flight training providers: injured plaintiffs may recover from negligent flight training providers if injury occurs *during* the course of flight training under a negligent supervision of training theory,²⁷⁸ but not if it occurs after training is

²⁷⁵ *Id.*

²⁷⁶ See *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 574 (Minn. 2012).

²⁷⁷ *Id.*

²⁷⁸ See *supra* note 1.

concluded.²⁷⁹ If cases involving injuries occurring during the course of training are permitted, why should claims involving foreseeable harm occurring after the conclusion of the education be prohibited? The end of training is no magic talisman; if a failure to provide safety-critical pieces of instruction presents foreseeable risk of harm, it should not matter if the harm occurs during training or afterward.

At the very least, *Glorvigen*²⁸⁰ shows that cases with appropriate measures of proof on all elements should at least be allowed to go to a jury for such determinations, like any other negligence-based case.²⁸¹ They should not be screened out as a matter of law on the fallacious assumption that the court system is simply unable to adjudicate such matters. The courts pass judgment on defendants' conduct every day; they determine if a defendant's actions in the face of foreseeable risks of harm were reasonable under the circumstances. An evaluation of the conduct of flight trainers should be no different. The courts should be able to determine if the duty of reasonable care would require the flight trainer to provide specific pieces of instruction.

In light of the unavoidable truth that certain fields (such as aviation) require the provision of adequate instruction in order to prevent foreseeable personal injury or property damage, the courts' traditional refusal to evaluate the sufficiency of educational curriculum or pedagogical techniques is unpersuasive. To flatly bar negligent-training claims as a matter of law is a grave disservice to plaintiffs who have suffered grievous injury as a result of patently defective training. If nothing else, these claims should be allowed to proceed to a jury. Plaintiffs may not often be able to succeed, but justice requires that they be given a chance.

VII. CONCLUSION

As seen in *Sheesley*, *Dallas Airmotive*, *Waugh*, and *Glorvigen*, educational malpractice claims remain disfavored. The courts have routinely found that they are incapable of assessing claims involving the sufficiency of curriculum or pedagogical techniques for a variety of practical and policy reasons. Creative plaintiffs'

²⁷⁹ See, e.g., *Sheesley v. Cessna Aircraft Co.*, No. CIV. 02-4185-KES, 2006 WL 1084103 (D.S.D. Apr. 20, 2006); *Waugh v. Morgan Stanley & Co.*, 966 N.E.2d 540 (Ill. App. Ct. 2012); *Glorvigen*, 816 N.W.2d at 572; *Dall. Airmotive, Inc. v. Flight-Safety Int'l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008).

²⁸⁰ *Glorvigen*, 816 N.W.2d at 575.

²⁸¹ See *id.*

lawyers have avoided making generalized critiques of the quality of the training by pointing to specific identifiable negligent acts on the part of the flight instructor, but these claims have not seen much success. Tort recovery against flight training providers based on products liability theories, liability for a voluntary undertaking, and contractual law have not fared much better.

However, *In re Air Crash Near Clarence Center, Murphy*, and *Newman* stand for the proposition that claims against flight training providers should be treated differently. The sorts of policy reasons typically raised by courts when declining to adjudicate educational malpractice claims ring hollow when considering claims against flight training providers or other “for-profit commercial entit[ies], teaching a narrowly structured course on the operation of a specific [piece of equipment]” or a specific set of well defined safety-critical skills.²⁸² The courts should be able to competently adjudicate cases involving objective failures to provide discrete pieces of safety-critical instruction that pose a foreseeable risk of harm.

Although it may be difficult for a plaintiff to prove such a case, they should at least be allowed the opportunity to do so. Factual scenarios giving rise to liability against a flight training providers are not inconceivable, and if the plaintiff is able to make out such a claim, it should be allowed to proceed before a jury for adjudication. As seen in *Glorvigen*, jurors have proven receptive to such theories.²⁸³ The courts should not substitute their own judgment for the jury’s by determining that flight training claims are barred as a matter of law. Such a categorical rejection robs deserving plaintiffs of their right of recover against truly negligent actors.

²⁸² *Newman*, 924 F. Supp. 2d at 1329.

²⁸³ See *Glorvigen*, 816 N.W.2d at 572.

