

2014

## It's a Bird, It's a Plane! But Manufacturers Have No Duty to Train: When Finding No Duty in Minnesota Products Liability Led to Misstating Common Law Undertakings

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### Bluebook Citation

Allan M. Tritch, Note, *It's a Bird, It's a Plane! But Manufacturers Have No Duty to Train: When Finding No Duty in Minnesota Products Liability Led to Misstating Common Law Undertakings*, 11 U. St. Thomas L.J. 331 (2014)

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## NOTE

# IT'S A BIRD, IT'S A PLANE! BUT MANUFACTURERS HAVE NO DUTY TO TRAIN: WHEN FINDING NO DUTY IN MINNESOTA PRODUCTS LIABILITY LED TO MISSTATING COMMON LAW UNDERTAKINGS

ALLAN M. TRITCH\*

### ABSTRACT

*In July 2012, the Minnesota Supreme Court was the first state supreme court to hold that manufacturers have no “duty to train”; manufacturers need only provide adequate written warnings and instructions. The court did not provide precedent for its holding. Rather, the court implicitly relied on, but did not expressly discuss, strong public policy concerns. The court also provided a second holding, stating in three paragraphs that—contrary to common law and Minnesota law—a duty in tort may not arise solely from a contract. This note shows that the history of strict products liability supports the court’s first holding. However, in reaching this decision, the court’s second holding overturned well-developed law: undertaking a duty in negligence by contract. The same reasons underlying that manufacturers have no “duty to train” parallel and support common law undertakings. Thus, this decision created dissonance between the purpose and promulgation of products liability law.*

### INTRODUCTION

In *Glorvigen v. Cirrus Design Corp.*, the Minnesota Supreme Court was the first state supreme court to hold that manufacturers<sup>1</sup> have no “duty

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1. Use of the term “manufacturers” will be used throughout this note to generally include manufacturers, distributors, and sellers of goods. For a discussion on liability of non-manufactur-

to train.”<sup>2</sup> The Minnesota Supreme Court’s second holding then denied recovery for tort damages because the parties’ obligations arose from a contract. Although holding that manufacturers have no “duty to train” is consistent with products liability,<sup>3</sup> this note intends to clarify that *Glorvigen’s* second holding—that a duty in tort cannot arise from a contract—creates dissonance between the purpose and promulgation of products liability.

To arrive at this conflicting resolution, *Glorvigen* first framed the products liability issue as a duty question (viz., a question for the court, not for a jury).<sup>4</sup> By doing so, the court avoided interminable claims against manufacturers by holding that they have no “duty to train” a user or consumer about safe use of a product; consumers need only receive written warnings and instructions. However, *Glorvigen* went awry in its analysis. The court’s second holding removed tangential duties of manufacturers with respect to liability for their products by also holding that a duty in tort cannot arise from a contractual relationship between the consumer and the manufacturer.<sup>5</sup>

Plaintiffs in *Glorvigen* might never have brought a claim against Cirrus if not for a contract that explicitly provided for transition training.<sup>6</sup> The Minnesota Supreme Court devoted only three paragraphs to the crux of the case, holding that a duty in tort cannot arise from a contract. Yet the significance of that holding is overshadowed by the first, likely because Minnesota is the first state supreme court to hold that manufacturers do not have a “duty to train”<sup>7</sup> consumers.<sup>8</sup> Thus, *Glorvigen* not only fails to fairly limit

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ing product resellers, see Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213 (1988).

2. *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 584 (Minn. 2012).

3. Products liability is defined by Black’s Law Dictionary as “[a] manufacturer’s or seller’s tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product.” BLACK’S LAW DICTIONARY 569 (3d pocket ed. 1996); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect”); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”) (emphasis added).

4. *Glorvigen*, 816 N.W.2d at 582 (“Duty is a threshold question. . .”).

5. *Id.* at 582–84.

6. *Id.* at 576.

7. The majority holds that manufacturers do not owe a “duty to train” consumers because “imposition of a duty to train would require an unprecedented expansion of the law.” *Id.* at 583.

8. See generally PRODUCT LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM (Morton F. Daller ed. 2013). However, at least one New York court held sellers of a product do not have a duty to train. See *Adenyinka v. Yankee Fiber Control, Inc.*, 564 F.Supp. 2d. 265, 285–86

manufacturers' liability with its improper second holding, but also discourages manufacturers from *ever* providing more than written instructions to consumers by holding that they have no "duty to train."

This note explores the development of the products liability doctrine and policy reasons<sup>9</sup> in support of holding that manufacturers have no "duty to train" a consumer. Additionally, this note will show that a duty in tort can arise solely from a contract and broadly holding otherwise contradicts these developments and policies. Therefore, the second holding of *Glorvigen* should be overturned.

Section I of this note provides a summary of *Glorvigen* to show the facts underlying plaintiffs' claims and the previous rulings that led to its ultimate disposition. Section II provides background on the development of products liability and how Minnesota characterizes such claims. Section III explains a legal duty in Minnesota tort law and how *Glorvigen* supplanted a jury's resolution of a products liability claim by holding that manufacturers need only provide written instruction; they have no "duty to train." Section IV considers policy reasons that likely underlay and support the holding of no "duty to train." Section V addresses *Glorvigen's* second holding: that a duty in tort cannot arise solely from a contract—a decision contrary to Minnesota and "black letter" law.

## I. A SYNOPSIS OF THE *GLORVIGEN V. CIRRUS DESIGN* CORPORATION DECISION

*Glorvigen* involved two fathers who died in a plane crash because one was a pilot who had not received the necessary training to recover in a specific emergency situation. In January 2003, Gary Prokop brought his passenger, James Kosak, along for an attempted flight from Grand Rapids to St. Cloud, Minnesota to watch their sons play in a hockey game.<sup>10</sup> However, they encountered turbulence soon after takeoff, which ultimately led to a crash and the death of both Prokop and Kosak.<sup>11</sup>

Prokop was a licensed pilot who, after two years of experience flying his Cessna 172 Sky Hawk, purchased a Cirrus SR22 airplane in December 2002.<sup>12</sup> The SR22 was a more sophisticated aircraft than the Cessna, having "several features that [were] uncommon or entirely new to certified general aviation aircraft," such as an autopilot function<sup>13</sup> and a top speed of 180

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(S.D.N.Y. 2008) ("[P]laintiff has failed to cite any case wherein a seller . . . has been found to owe a duty to train the users . . . and there appears to be an absence of persuasive authority from courts applying New York law to support existence of such a duty.").

9. For a greater discussion of policy both for and against strict products liability, see David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

10. *Glorvigen*, 816 N.W.2d at 578 (both Grand Rapids and St. Cloud are cities in the State of Minnesota).

11. *Id.* at 577–78.

12. *Id.* at 575.

13. *Id.*

knots.<sup>14</sup> Pilots needed special qualifications to fly the SR22, yet “Cirrus marketed the airplane to ‘pilots with a wide range of experience.’”<sup>15</sup>

To bridge this gap, Cirrus provided written materials and a training program for new owners “designed to help already-licensed pilots transition into flying the SR22.”<sup>16</sup> The training entailed a “two-day, new-owner training program,” referred to as the “Pilot Training Agreement” (“PTA”).<sup>17</sup> The PTA was tailored for already-licensed pilots learning how to fly the SR22<sup>18</sup> and intended to transition a pilot from his current airplane to the SR22 by teaching the pilot about unique features of the SR22.<sup>19</sup> According to Cirrus, the training program was supposed to “build on the pilot’s existing knowledge and experience, by reviewing the systems and procedures of the SR22, and by *paying close attention to those areas that may be new to many pilots and owners.*”<sup>20</sup>

One of the lessons included in the agreement, Flight Lesson 4a, introduced trained pilots to methods for recovering from a specific emergency situation—that of inadvertently entering instrument meteorological conditions (“IMC”) from visual flight rules (“VFR”), or “VFR into IMC.”<sup>21</sup> VFR are rules governing flight when conditions allow pilots to fly using only visual reference rather than reliance on navigation equipment, essentially “see and be seen.”<sup>22</sup> IMC “relates to the flying and navigating of an airplane using only instruments.”<sup>23</sup> Hence, “VFR into IMC is an emergency situation in which the pilot loses the ability to see the horizon and must navigate the airplane through use of instruments alone.”<sup>24</sup>

“Spatial disorientation caused by VFR into IMC is a leading cause of small plane crashes. In the SR22, the correct procedure to follow upon entering inadvertent IMC is to activate the autopilot.”<sup>25</sup> The PTA stated that the program would “consist of . . . [a]ircraft systems training with emphasis on the innovative aspects of the SR22, [including the] . . . autopilot/trim system.”<sup>26</sup> However, Cirrus never provided this “VFR into IMC” lesson to Prokop.<sup>27</sup>

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14. *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 544 (Minn. Ct. App. 2011), *aff’d*, 816 N.W.2d 572 (Minn. 2012).

15. *Glorvigen*, 816 N.W.2d at 576.

16. *Id.* at 575.

17. *Id.* at 576.

18. *Glorvigen*, 796 N.W.2d at 544, *aff’d*, 816 N.W.2d 572.

19. *Id.*

20. *Glorvigen*, 816 N.W.2d at 576 (emphasis added).

21. *Id.* at 577–78.

22. *Visual Flight Rule (Aviation) Definition*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/630843/visual-flight-rule> (last visited Apr. 5, 2013).

23. *Glorvigen*, 816 N.W.2d at 578, n.5.

24. *Id.* at 585, n.8 (Anderson, P., J., dissenting).

25. *Id.* at 577.

26. *Glorvigen*, 796 N.W.2d at 545, *aff’d*, 816 N.W.2d 572.

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

Prokop was “attempting to recover from [VFR into IMC] when he crashed.”<sup>28</sup> Although Prokop was legally licensed to fly in the conditions at take-off, he inadvertently entered IMC-like conditions.<sup>29</sup> This triggered the crash because Prokop had not been trained to recover when entering conditions that force a pilot flying an SR22 to rely on navigation equipment.<sup>30</sup> In fact, Prokop did not activate the autopilot at all during his flight.<sup>31</sup>

Cirrus had contracted with the University of North Dakota Aerospace Foundation (“UNDAF”) Flight School to provide transition training to SR22 purchasers.<sup>32</sup> Yu Weng Shipek was Prokop’s UNDAF flight instructor who testified that he gave Flight Lesson 4a to Prokop, but failed to document it.<sup>33</sup> “According to the [transition training] syllabus, that omission indicates that the maneuvers were either skipped or left incomplete at Shipek’s discretion.”<sup>34</sup> Regardless, Shipek provided Prokop with a high-performance endorsement (valid only in the Cirrus SR22), even though Flight Lesson 4a—which was to be completed as part of the purchase agreement—was never administered, meaning Prokop never practiced the maneuver while flying.<sup>35</sup>

The director of transition training at the Cirrus facility, John Wahlberg, testified about VFR into IMC: the autopilot-assisted recovery is “‘the safest maneuver’ [during VFR into IMC, but that] ‘in order for this training to take, in order for training to be effective, you can’t just do it on the ground . . . . It has to be done up in the sky with the pilot.’”<sup>36</sup> Wahlberg also testified that the speed of the SR22 complicates recovery during VFR into IMC because it requires a “fast response from the pilot,” and if a pilot is not trained to execute the recovery procedure quickly, he may die.<sup>37</sup> Further, an expert airplane accident investigator, Captain James M. Walters, stated that “skipping an in-flight lesson on recovery from VFR into IMC did not meet industry standards.”<sup>38</sup> Walters testified that if “Prokop had been able to recover during those IMC-like conditions, certainly the accident would not have happened.”<sup>39</sup> In addition, Walters testified to “‘three root[ ] causes’ of the crash: (1) ‘Prokop made a poor decision [to go flying],’ (2) ‘Prokop was not given the tools that he needed to make an appro-

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28. *Id.* at 575.

29. *Id.* at 578–79.

30. *Id.*

31. *Id.* at 579.

32. *Id.* at 576.

33. *Glorvigen*, 816 N.W.2d at 578.

34. *Id.*

35. *Glorvigen*, 796 N.W.2d at 546–47, *aff’d*, 816 N.W.2d 572.

36. *Glorvigen*, 816 N.W.2d at 578.

37. *Id.*

38. *Id.*

39. *Id.* at 579.

ropriate decision,' and (3) Prokop was not 'given the proper tools to be able to recover from that event.'"<sup>40</sup>

Prokop was legally licensed to fly at takeoff. However, he did not know that he needed VFR into IMC in-flight training and was not provided such training—a severe limitation on his flying abilities in the SR22. It is likely that without training to recover from VFR into IMC, Prokop did not know how to respond when he encountered IMC-like conditions. A jury awarded a total of \$19,400,000.00 to the trustees of Prokop and Kosak after finding that Cirrus, UNDAF, and Prokop were all negligent, and that the negligence was a direct cause of the crash, apportioning fault among all negligent parties.<sup>41</sup>

A divided Minnesota Court of Appeals reversed the jury's award, concluding that Cirrus and UNDAF were not liable as a matter of law.<sup>42</sup> The majority's reasoning was that Cirrus's duty to instruct did not include a duty to provide training and that the negligence claim was barred by the educational malpractice doctrine.<sup>43</sup> In other words, the court of appeals looked at the issue as though providing Flight Lesson 4a was a duty separate from the duty to warn or instruct.

The Minnesota Supreme Court affirmed this decision, stating that "[t]he duty to warn [or instruct] has never before required a supplier or manufacturer to provide training, only accurate and thorough instructions on the safe use of the product, as Cirrus has done here."<sup>44</sup> Further holding that a duty which "could only have arisen from the contract, [is] . . . not recover[able] in tort."<sup>45</sup>

## II. SOME BACKGROUND ON PRODUCTS LIABILITY— THE FOREGROUND OF *GLORVIGEN*

Many dangerous products are available to the modern consumer. As technology advances, consumers may need greater instructions on proper use of a product or alternatives to services provided.<sup>46</sup> Common law has generally protected consumers (the weaker parties);<sup>47</sup> however, the costs of this protection should have limits. Products liability spreads the increased

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40. *Id.*

41. *Id.* at 580.

42. *Glorvigen*, 816 N.W.2d at 580.

43. *Id.* This Note does not discuss the educational malpractice doctrine because the Minnesota Supreme Court did not reach this issue. *Id.* at 584.

44. *Id.* at 582.

45. *Id.* at 584.

46. See generally Joffre Swait & Wiktor Adamowicz, *The Influence of Task Complexity on Consumer Choice: A Latent Class Model of Decision Strategy Switching*, 28 J. CONSUMER RES., 135 (2001); Pratibha A. Dabholkar, *Consumer Evaluations of New Technology-Based Self-Service Options: An Investigation of Alternative Models of Service Quality*, 13 INT'L J. RES. MKTG. 29 (1996).

47. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

transaction costs among manufacturers and consumers in order to hold manufacturers liable for defects in the manufacturing of a product, its design, or an inadequate warning or instruction of how the consumer should use the product safely.<sup>48</sup> But to what extent are courts willing to hold manufacturers accountable if a consumer is harmed?<sup>49</sup>

Common law historically required privity between parties to determine whether the manufacturer owed a duty to an injured consumer regarding use of a product.<sup>50</sup> However, common law negligence eventually did away with this privity requirement.<sup>51</sup> While the need for privity was deemed unnecessary for product liability claims, common law still recognizes that a duty in tort may arise from a contract.<sup>52</sup> Products liability imposed a duty, regardless of privity, onto manufacturers to provide consumers with safe products. The doctrine of products liability did not abolish duties that arise from privity of contract; instead, it looked through them.<sup>53</sup>

Written warnings ensure that a consumer has been put on notice of improper use of a product whereas written instructions elucidate the proper manner in which to use a product. Requiring hands-on instructions could stifle commerce rather than promote it because manufacturers would have to spread the increased costs of products training among distributors, sellers, and consumers. Prices of products would increase as the amount of training for a product increased. This economic theory, in combination with undefined parameters of such a “duty to train,” could lead to a flood of litigation to determine which products require hands-on instructions, what

48. Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402a, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857, 861 (1993).

49. “Consideration of the reported cases [regarding liability of manufacturers for defective products] strongly suggests that the factors defining compliance with minimum standards of consumer use . . . are closely identified with the normal, reasonable expectation patterns of buyers and sellers . . . . Consideration of the cases also suggests that legally defective products can frustrate [consumers’] reasonable expectations in several ways.” Reed Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 305 (1972).

50. The first major case in the evolution of products liability in Minnesota was *Schubert v. J.R. Clark Co.*, 49 Minn. 331, 51 N.W. 1103 (1892); however, courts were cautious to avoid expanding a manufacturer’s liability, so a manufacturer’s liability was limited to those whom the product was made for or sold to until 1910 when the court noted that contract was not a limiting factor: “A duty with respect to instrumentalities delivered under contract may exist towards others than the contracting parties. That duty extends to all persons likely to be injured by defendant’s want of care, providing it is reasonable for such person to rely on care having been taken.” *O’Brien v. American Bridge Co.*, 110 Minn. 364, 125 N.W. 1012, 1013 (1910).

51. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (N.Y. 1916) (holding that liability of the manufacturer extended to, but did not go beyond, the ultimate purchaser when the manufacturer created a defective wheel, sold it to a dealer who then sold it to a consumer, and the consumer was injured).

52. See generally Joseph H. Beale, Jr., *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891).

53. E.g., *Wright v. Holland Furnace Co.*, 186 Minn. 265, 243 N.W. 387, 388 (1932) (stating that “[c]ontract obligation may sometimes be incidental to, but is not the basis of, liability in tort . . . . The presence of a contract between tortfeasor and third party is incidental only.”).



the extent of those instructions would be, and what related claims might be brought by consumers. *Glorvigen* most likely sought to prevent expanding products liability beyond the scope of its original intent<sup>54</sup> by holding that manufacturers do not have a “duty to train,” but only a duty to provide adequate and thorough instructions regarding safe use of a product.<sup>55</sup> However, holding no “duty to train” does not depend upon, or benefit from, also holding that a duty in tort cannot arise solely from a contract.

With the likely goal of ensuring that manufacturers do not have a “duty to train,” *Glorvigen* misconstrued historical developments in tort law by holding that a duty in tort cannot arise from a contract. To the contrary, the earliest form of products liability within the tort law of negligence required privity of contract between an injured party and the manufacturer of a good.<sup>56</sup> It was believed that the manufacturer did not owe a duty to anyone other than the purchaser of its product and would not be held liable for use or misuse of the product resulting in injury to others.<sup>57</sup> *MacPherson* discarded the requirement of privity between consumer and manufacturer in negligence<sup>58</sup> and contract warranty law discarded privity by imposing strict liability<sup>59</sup>—which *Greenman* adopted as a doctrine of products liability.<sup>60</sup> The Minnesota Supreme Court “declare[d its] agreement with the principles underlying the rule of strict tort liability and . . . record[ed its] intention of applying that rule”<sup>61</sup> in products liability cases. Those principles are em-

54. See *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 188 N.W.2d 426, 431 (1971) (observing that the purposes of imposing strict liability on defective-product manufacturers and sellers include promoting “[t]he public interest in safety . . . by discouraging the marketing of defective products”). The Minnesota Supreme Court has extended a manufacturer’s strict liability to “retailers and distributors” because “[t]he same policy considerations apply, since both retailers and manufacturers are engaged in the business of distributing goods to the public.” *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64, 72 n.1 (1970). See also *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 901 (1963) (“The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”).

55. *Glorvigen*, 816 N.W.2d at 583. The court noted that “[p]roducts liability is a manufacturer’s or seller’s tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product.” *Id.* at 581.

56. *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 867–68 (8th Cir. 1903) (“[T]he natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold . . . . The limits of the liability for negligence and for breaches of contract in [products liability cases] are held to be identical.”).

57. See, e.g., *Winterbottom v. Wright*, 10 M&W 109, 152 Eng. Rep. 402 (Ex. 1842); *Loop v. Litchfield*, 42 N.Y. 351 (1870).

58. *MacPherson*, 111 N.E. at 1050.

59. “Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.” BLACK’S LAW DICTIONARY 427 (3d pocket ed. 1996).

60. *Greenman*, 59 Cal. 2d at 57.

61. *McCormack v. Hanksraft Company*, 278 Minn. 322, 154 N.W.2d 488, 501 (Minn. 1967).

bodied in the Restatement (Second) of Torts § 402A (1965), which provides that a person is liable for “sell[ing] any product in a defective condition unreasonably dangerous to the user or consumer . . . for physical harm thereby caused to the ultimate user or consumer.”<sup>62</sup>

There is a notable difference between negligence and strict products liability. Negligence is an obvious form of liability based on fault whereas strict liability is imposed without fault, or at least without requiring any proof of fault.<sup>63</sup> In other words, as the magnitude of risk occasioned by the defendant’s activity increases, so does the burden of precautions she must adopt in order to avoid being found negligent. Strict products liability in tort, however, merges the contractual concept of implied warranty<sup>64</sup> with the tort concept of negligence.<sup>65</sup> Such strict products liability ignores the precautions a defendant has (or might have) taken and imposes liability solely for the defendant’s choice of engaging in the activity (viz., designing, manufacturing, and/or selling the product).

Three products liability claims are available to consumers: (1) manufacturing defects, (2) design defects, and (3) failures to warn or instruct.<sup>66</sup> Manufacturing defect claims tend to be strict products liability claims while design defect and failure to warn or instruct claims tend to reside in negligence. This is because the latter involve consumers receiving a product exactly as the manufacturer intended while the former does not.

Manufacturing defects involve products that do not enter the market as the manufacturer intended (e.g., a faulty gas tank seal that results in a car explosion because of an error in the manufacturing of the product). When a manufacturing defect exists, the consumer can compare the defective product to that of every other product that was created as the manufacturer intended (e.g., other products created in the same factory). However, design defects and failure to warn or instruct claims do not allow for such a comparison; instead, the product must be compared to some standard of safety that requires a negligence analysis. Many courts insist on speaking of liability due to design defects and inadequate warnings or instructions as being “strict,” even though both claims rely on a reasonableness test “traditionally used in determining whether an actor has been negligent.”<sup>67</sup> But inadequate

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62. *Id.* at 499 n.15.

63. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 24 (1998).

64. Implied warranty is defined by Black’s Law Dictionary as “[a]n obligation imposed by the law when there has been no representation or promise; esp., a warranty arising by operation of law because of the circumstances of a sale, rather than by the seller’s express promise.” BLACK’S LAW DICTIONARY 772 (3d pocket ed. 1996).

65. “A person acts negligently if the person does not exercise reasonable care under all the circumstances.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (1998).

66. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998).

warnings or instructions involve foreseeable risks of harm that may be avoided by the provision of more accurate and thorough warnings and instructions.<sup>68</sup> Here is my rule of thumb: when a manufacturer cannot design the danger out of its product, then the manufacturer should warn consumers of that danger and/or instruct consumers as to proper and safe use of the product.

Products liability is intended to push costs of defective products onto the manufacturers rather than the injured consumers.<sup>69</sup> There are many policy arguments for imputing a duty onto manufacturers in products liability actions, which mainly deal with protection of the consumer and a balance of that protection against the needs of the product manufacturer.<sup>70</sup>

Primarily, strict liability is imposed on manufacturers to spread the losses due to defective products.<sup>71</sup> This drives prices up for consumers so that manufacturers can pay for losses or insure against them.<sup>72</sup> While tort liability increases costs of products, business competition drives them down. Therefore, products liability induces manufacturers to take greater safety precautions and market safer products.<sup>73</sup> Nevertheless, modern products inevitably result in injuries, which can have a devastating effect on the individual consumer.<sup>74</sup> And consumers are at a disadvantage if they must prove negligence on the part of the manufacturer because of their limited resources. Hence, the consumers should be protected from “unknown, latent dangers in products.”<sup>75</sup>

Today most states have adopted either the Restatement (Second) of Torts or another version of strict products liability.<sup>76</sup> The Restatement (Second) of Torts § 402A does not expressly refer to failure to warn in products liability; however, comment j to § 402A suggests that “the seller may be required to give directions or warning” except when “the danger, or potentiality of danger, is generally known and recognized.”<sup>77</sup>

68. *Glorvigen*, 816 N.W.2d at 582; See also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

69. Companies generally seek to achieve “economies of scale”—i.e., as production increases, the costs of producing decrease for manufacturers; however, the Henry Ford assembly line model inevitably results in defects, and it makes sense to hold the manufacturer liable for such defects. For a discussion on economies of scale see *Economies of Scale and Scope*, THE ECONOMIST, Oct. 20, 2008, <http://www.economist.com/node/12446567>.

70. Swisher, *supra* note 48, at 861.

71. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63 (1963).

72. Swisher, *supra* note .48, at 861.

73. *Id.*

74. *Id.*

75. *Id.* at 862.

76. See Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 WASH & LEE L. REV. 1509, 1514 n.32 (1992) (noting that “[t]hirty-seven states and the District of Columbia recognize the Restatement’s version of strict products liability[]; s]even states and Puerto Rico recognize other variations[] Delaware, Massachusetts, Michigan, North Carolina and Virginia have not yet recognized strict products liability”).

77. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

It has been noted that[,] notwithstanding the fact that there is no cross-reference from § 402A of the Restatement of Torts 2d (which sets out the strict tort liability doctrine) to § 388 of the Restatement of Torts 2d (which spells out the duty to warn in negligence actions), the principles applicable in the latter should be applicable to the former.<sup>78</sup>

Even though § 402A does not expressly address failure to warn in products liability, the Restatement (Third) does do so with inclusion of negligence language.<sup>79</sup>

So how did failure to warn or instruct claims evolve into a combination of negligence and strict liability? Failure to warn or instruct claims derive mainly from negligence in the Restatement (Second) of Torts § 388.<sup>80</sup> Section 388 provides:

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

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.<sup>81</sup>

The determination of whether a failure to warn or instruct claim sounds in negligence or strict liability can be extremely difficult.<sup>82</sup>

In an attempt to avoid this difficulty, Minnesota courts analyze strict products liability failure to warn claims in the same manner as negligence failure to warn claims: “As a practical matter, where the strict liability claim is based on . . . failure to warn . . . there is essentially no difference between

78. Allan E. Korpela, Annotation, *Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort*, 53 A.L.R.3d 239 § 2[b] (originally published in 1973).

79. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (“A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product . . . (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.”).

80. M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 231 (1987).

81. RESTATEMENT (SECOND) OF TORTS § 388 (1976).

82. Douglas R. Richmond, *Products Liability: Corporate Successors and the Duty to Warn*, 45 BAYLOR L. REV. 535, 540 (1993).

strict liability and negligence,”<sup>83</sup> because failure to warn or instruct claims are based on a concept of negligence.<sup>84</sup> “The distinction between strict liability and negligence in design-defect and failure-to-warn cases [in Minnesota] is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.”<sup>85</sup>

Regardless of whether a failure to warn claim sounds in negligence or strict liability, “duty to warn is the most widely-employed claim or theory in products liability litigation today.”<sup>86</sup> There are several important reasons for this:

First, failure to warn theories are less technical and expensive to prosecute than traditional design defect cases. Second, but related to the first, is a widespread recognition that almost all products capable of causing injuries could be made less hazardous by conveying effective warnings or instructions to users. Finally, a manufacturer’s breach of its alleged duty to warn can be pursued under three theories: negligence, strict liability, and breach of implied warranty.<sup>87</sup>

In Minnesota, a failure to warn or instruct claim can be stated as one for strict liability or for negligence, but the plaintiff must submit their case to the jury on only one theory.<sup>88</sup> For example, the plaintiffs in *Glorvigen*

83. *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 215 (Minn. 1982). A handful of other jurisdictions have held similarly:

*See, e.g.*, *Russell v. G.A.F.*, 422 A.2d 989, 991 (D.C. 1980) (concluding that both strict liability and negligent failure to warn impose a duty of ordinary care); *Bernier v. Raymark Ind., Inc.*, 516 A.2d 534, 540 (Me. 1986) (explaining that strict liability failure to warn resembles negligence because the reasonableness of a manufacturer’s conduct is a critical issue under each); *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979) (holding that when liability turns on adequacy of warning, the issue is one of reasonable care regardless of the theory pleaded); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 818 n.5 (Ohio 1982) (noting that a rule imposing an obligation on a seller to give adequate warning is a rule fixing the standard of care, regardless of whether the tort is labeled strict liability) (quoting *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 273 (Ohio 1977)), *cert. denied*, 459 U.S. 857 (1982).

*Pittenger*, *supra* note 76, at 1518 n.49. *Cf.* Florida adopted the California Supreme Court’s language in separating failure to warn in strict liability from failure to warn in negligence:

Failure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure to warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with a standard of due care or the reasonableness of a manufacturer’s conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.

*Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1172 (Fla. App. 4 Dist. 1998) (citing *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 558–59 (Cal. 1991)).

84. *Westerberg v. School District No. 792*, 148 N.W.2d 312, 316–18 (Minn. 1967).

85. *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 622 (Minn. 1984).

86. *Richmond*, *supra* note 82, at 535.

87. *Id.* at 537.

88. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984).

brought a failure to instruct products liability claim under a theory of negligence and the jury apportioned 25 percent liability to the pilot and 75 percent liability to Cirrus and UNDAF.<sup>89</sup>

Strict products liability imputes a duty on the manufacturer without reference to any contract, thereby doing away with any privity requirement. Without a privity requirement, common law negligence acknowledges that a duty in tort may arise from either a manufacturer's failure to instruct or by a party undertaking a duty via contract.<sup>90</sup> But for a consumer to win a negligence action, the manufacturer must—first and foremost—have owed her a legal duty.<sup>91</sup>

### III. LEGAL DUTIES ARE DETERMINED BY THE COURTS

When liability is based on a theory of negligence, “a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury.”<sup>92</sup> Duty is a threshold question in Minnesota,<sup>93</sup> and Minnesota courts consider negligence law on a supplier's duty to warn to be “well developed[:] . . . . In general, 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.”<sup>94</sup> “If no duty exists, a court need not reach the remaining elements of a negligence claim.”<sup>95</sup>

In *Glorvigen*, no party disputed that Cirrus had a duty to warn, including a “‘duty to give adequate instructions’ on the safe use of Cirrus airplanes to foreseeable users.”<sup>96</sup> A manufacturer has a duty not only to warn of danger but also to provide adequate instructions for safe use of its product.<sup>97</sup> “In the case of extremely dangerous products, the supplier may be required to go to considerable lengths to inform the required persons of danger.”<sup>98</sup> Minnesota's jury instructions provide the framework for determining the adequacy of a product usage instruction:

A manufacturer must keep up with scientific knowledge and advances in the field.

A manufacturer's duty to provide reasonably adequate (*warnings*) (*instructions*) must be judged according to the scientific knowl-

89. *Glorvigen*, 816 N.W.2d at 580.

90. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (1998).

91. See *infra* § III.

92. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

93. *Id.*

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

95. *Kellogg v. Finnegan*, 823 N.W.2d 454, 458 (Minn. Ct. App. 2012).

96. *Glorvigen*, 816 N.W.2d at 572.

97. *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146, 151 (Minn. Ct. App. 1992), *review denied* (Minn. Feb. 12, 1993).

98. *Korpela*, *supra* note 78 § 2[a].

edge and advances that existed at the time the product was designed.

In deciding whether the manufacturer's (*warnings*) (*instructions*) were reasonably adequate, consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product,
2. The seriousness of the harm that would result,
3. The cost and ease of providing (*warnings*) (*instructions*) that would avoid the harm,
4. Whether the (*warnings*) (*instructions*) are in a form the ordinary user could reasonably be expected to notice and understand,
5. Whether the manufacturer considered the scientific knowledge and advances in the field,
6. [Other factors].

A product that is not accompanied by reasonably adequate (*warnings*) (*instructions*) is unreasonably dangerous to whoever uses or is affected by the product. The product must be reasonably safe for use if the (*warnings*) (*instructions*) are followed.<sup>99</sup>

According to the *Glorvigen* jury, Cirrus and UNDAF breached their duty to provide adequate instructions. Despite this conclusion, the Minnesota Court of Appeals reframed the issue by removing the determination of whether Cirrus's instruction was adequate from the jury and, instead, analyzed the instruction itself as a matter of law. Put simply, the court of appeals looked at the issue as though providing Flight Lesson 4a was a duty separate from the duty to warn or instruct (under both products liability and common law negligence).

Ultimately, the Minnesota Supreme Court concluded "that Cirrus's duty to warn did not require Cirrus to provide Flight Lesson 4a<sup>100</sup> . . . . Indeed, imposing a duty to train would be wholly unprecedented."<sup>101</sup> The Minnesota Supreme Court arrived at its conclusion by stating that the appellants were unable to cite any case law that included an obligation of a manufacturer to "provide training in order to discharge its duty to warn."<sup>102</sup>

Further, *Glorvigen* announced that Cirrus adequately discharged its duty to warn by providing written instructions as required under Minnesota law.<sup>103</sup> Since "imposition of a duty to train would require an unprecedented expansion of law," the court held that "Cirrus did not owe a duty to train Prokop."<sup>104</sup> This reasoning suggests that, under Minnesota law, a manufacturer discharges its duty to warn by handing over a booklet, regardless of any consideration for hands-on instructions. Precedent does not support im-

99. 4A Minn. Prac., Jury Instr. Guides—Civil CIVJIG 75.25 (5th ed.).

100. *Glorvigen*, 816 N.W.2d at 582–83.

101. *Id.* at 583.

102. *Id.*

103. *Id.*

104. *Id.*

position of a “duty to train,” and not imposing such is strongly supported by public policy concerns, even though the Minnesota Supreme Court did not explicitly enumerate them.

Even though Cirrus knew it was manufacturing a dangerous product and acknowledged this by providing transitional training to instruct pilots on the complexity of its product, *Glorvigen* chose to address the adequacy of the instruction (i.e., whether Cirrus breached its duty) rather than leave this determination to the jury because the existence of a duty is a matter of law. Although *Glorvigen*'s first holding was proper, reaching it in this manner conflicts with Minnesota precedent of allowing the jury, not the court, to determine how and in what form such product instructions should be conveyed to consumers.<sup>105</sup>

Although the existence of “a duty is a legal question for court resolution,” the “adequacy of the warning” should “remain for jury resolution.”<sup>106</sup> The jury in *Glorvigen* decided that the nature of the SR22 required hands-on instructions. Minnesota law mandates that a jury's verdict is not to be disturbed unless it cannot “be sustained on any reasonable theory of the evidence.”<sup>107</sup>

Considering all of the evidence (e.g., the expert who testified that adequate instructions to operate a Cirrus SR22, according to industry standard,<sup>108</sup> required training be conducted up in the sky with the pilot in order to be effective) it is difficult to say that the *Glorvigen* jury's verdict was not well-supported by the evidence. The SR22 is a very fast, highly dangerous aircraft. Cirrus recognized this and provided transition training with the purchase of an SR22.<sup>109</sup> Regardless of what written materials Prokop received, experts said that the training needed to be done in the air. Flight Lesson 4a included VFR into IMC training as part of the overall transition training, and it was not administered. The purpose of the jury instructions is to allow a case-by-case resolution as to whether the warning or instruction is adequate. As the *Glorvigen* dissent stated, “[f]ar from imposing a new duty to train on suppliers, the jury in this case simply determined that a supplier of a dangerous product must provide a warning commensurate with that danger to consumers, as required under our case law.”<sup>110</sup>

But courts have always been free “to declare that the facts are such that no reasonable jury could find otherwise. That's not a no-duty ruling; that is

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105. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987).

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

107. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

108. Industry standard alone may not be sufficient to determine whether a defendant was negligent, but Minnesota has recognized that juries are to consider “the customs and practices of the trade.” See *Broughton V. Curran v. Nielsen Co.*, 287 N.W.2d 640, 642 (Minn. 1979).

109. *Glorvigen*, 816 N.W.2d at 576.

110. *Id.* at 587 (Anderson, P., J., dissenting).



a ruling that, as a matter of law, there is no negligence because no reasonable jury could find otherwise.”<sup>111</sup>

“Sometimes policy considerations will counsel against the imposition of a duty, even if the injury is foreseeable.”<sup>112</sup> The logical question is whether adequacy of an instruction, which requires hands-on instructions amounts to imposing a new “duty to train.” *Germann* set forth the standard for determining whether a manufacturer has a duty to warn or instruct.<sup>113</sup> The standard is foreseeability: if the circumstance causing damage is direct and is the type of occurrence that was or should have been reasonably foreseeable when looking back to the alleged negligent act, a court should hold that, as a matter of law, a duty exists.<sup>114</sup> Rather than affirm a jury’s determination that a duty to instruct may entail hands-on instructions, *Glorvigen* looked back to the negligent act and determined that a “duty to train” does not exist, most likely because of the underlying policy considerations.

#### IV. PUBLIC POLICY CONSIDERATIONS UNDERLYING THE MINNESOTA SUPREME COURT’S HOLDING THAT MANUFACTURERS DO NOT HAVE A “DUTY TO TRAIN” CONSUMERS

The Minnesota Supreme Court did not provide any reasoning for holding that manufacturers have no “duty to train,” aside from noting the lack of case law supporting such a proposition.<sup>115</sup> As the first state supreme court to hold that manufacturers do not have a “duty to train” but only to provide written instructions, it was incumbent upon the Minnesota Supreme Court to explain its holding. Unfortunately, *Glorvigen* left many questions unanswered for consumers. For example, is the harm from holding that manufacturers have no “duty to train” much greater to the individual consumer than it may be to the manufacturers to whom juries extend this obligation? If a manufacturer is only required to provide written instructions, will call-center help-lines cease to exist?<sup>116</sup> Who can a consumer rely on to provide training, and what duty will that provider have? Even though the court chose not to address these questions, if the majority had held that manufacturers have a “duty to train,” a greater number of questions for manufacturers and the court would have arisen.<sup>117</sup>

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111. Michael D. Green, *Symposium, Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts*, 37 WM. MITCHELL L. REV. 1011, 1017 (2011).

112. Mike Steenson, *Recent Development in Minnesota Negligence Law: The Domagala Dilemma-Domagala v. Rolland*, 39 WM. MITCHELL L. REV. 633, 633 (2013).

113. *Germann*, 395 N.W.2d at 924 (Minn. 1986).

114. *Id.*

115. *See Glorvigen*, 816 N.W.2d at 583.

116. This outcome is not very likely considering that the market still determines many expectations that consumers have and manufacturers must meet. For a discussion on markets setting standards, see Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819 (1992).

117. Discussed *infra* pp. 20–24.

Although *Glorvigen* did not enumerate policy reasons, three in particular support its decision that manufacturers have no “duty to train”: (1) to promote trade rather than stifle it by increasing transaction costs<sup>118</sup> further than products liability already has; (2) to avoid a flood of litigation<sup>119</sup> regarding what products would require hands-on instructions, what the extent of those instructions would be, and possible related claims; and (3) to keep factors such as consumer idiosyncrasies, intelligence levels, and fallacies out of a products liability claim.<sup>120</sup>

The first policy involves economic considerations. Rather than increase transaction costs, *Glorvigen* (and our economy) seeks to promote free trade. Consumers can purchase any number of dangerous, life-threatening products. As long as the product contains no manufacturing or design defects, the manufacturer need only provide adequate warnings or instructions via materials the consumer can access at any time (i.e., written warnings or instructions). Failure to warn or instruct claims are the most common in products liability; requiring more than written instructions from manufacturers would exponentially increase transaction costs and liability for manufacturers, increasing prices across the entire market.<sup>121</sup>

The second policy consideration is the most obvious: myriad lawsuits could have been brought by plaintiffs relying on *Glorvigen* and claiming that manufacturers have a “duty to train.” Since the jury instructions provide factors for determining whether a warning or instruction was adequate, a jury could find hands-on instructions necessary for products not nearly as dangerous or complex as the SR22.<sup>122</sup> In *Glorvigen*, only Flight Lesson 4a

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118. Manufacturers are creating ever-increasing complex products and have been supplementing written warnings and instructions that accompany these products. See Brief of Amicus Curiae Products Liability Advisory Council, Inc. at \*16; *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 576 (Minn. 2012) (No. A10-1242, A10-1243, A10-1246, A10-1247) 2011 WL 9518489, at \*16–17.

If a duty to train is imposed upon product manufacturers and sellers, such companies will be forced to respond in a variety of ways, such as: (1) stop offering complicated products that a reasonable person may have trouble safely using with reference to the written warnings and instructions alone; (2) stop offering supplemental training regarding such products; or (3) raise the price of such complicated products to offset the increased training costs and inevitable liability risks. . . . [i]mposition of a duty to train will hamper economic activity in Minnesota as the increased prices will lower demand and thus sales of complicated products.

*Id.* at \*16–17.

119. *Id.* at \*17 (“The imposition of a duty to train under Minnesota product liability law will cause a flood of litigation and dramatically alter product manufacturers’ and sellers’ costs of doing business in Minnesota.”).

120. *Id.* at \*17–18 (“Of what significance is the existence of a comprehensive regulatory scheme already in existence establishing the amount of training and the competence of operators of the equipment?”).

121. Nash, *supra* note 48, at 861.

122. The dissent notes that the majority accepted an argument by Cirrus and *amici* that if the court were to hold “that Cirrus was obligated to provide Flight Lesson 4a in order to adequately discharge its duty to warn, then all suppliers—even suppliers of coffee pots, according to statements made during oral arguments—will be required to provide training to their users.” Yet,

was in dispute. However, the extent of training would also open a door to subsequent litigation. Each product would be different and the training may require anywhere from minutes to days of training, such as with the SR22.<sup>123</sup> This training may be considered “post-sale”<sup>124</sup> instructions, requiring a significant investment on the part of the manufacturer beyond providing a safe product. In fact, if the consumer needed to return to premises owned by the manufacturer, this might expose the manufacturer to even greater costs and additional liability. The training could also require use of property other than where the product is manufactured or sold, requiring additional expenses and insulations from liability. Regardless, the manufacturer would face a greater probability of potential claims on its premises, especially if the product is very dangerous. Additionally, the cost of finding reliable instructors would continually rise as more products are found to require hands-on instructions.<sup>125</sup> While worrying about the competency of their instructors, manufacturers would also have to consider the competency of each individual consumer.

The third policy consideration seeks to avoid such levels of adequate hands-on instructions for each individual consumer.<sup>126</sup> While each product may require a different amount of instruction, each consumer would also require a different amount to ensure the instructions were adequate and thorough. A portion of this would be attributable to the consumer’s negligence if an accident were to occur. However, Minnesota is a comparative fault state,<sup>127</sup> meaning the manufacturer could still be held liable. Any in-

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“[t]his argument overreacts to the scope and impact of such a holding.” *Glorvigen*, 816 N.W.2d at 586 (Anderson, P. J., dissenting).

123. See Brief and Addendum of Respondent-Appellee at \*35, *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 576 (Minn. 2012) (No. A10-1242, A10-1243, A10-1246, A10-1247) 2011 WL 9518487 at \*35 (“The duty to train . . . would be almost boundless.”).

124. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (1998). For a greater discussion on manufacturers’ post-sale warnings, see M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations* (Pace Law Faculty Publications, Paper 142, 2000), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1141&context=lawfaculty>; See also Douglas R. Richmond, *Expanding Products Liability: Manufacturers’ Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7 (1999).

125. See Brief and Addendum of Amicus Curiae Aircraft Owners and Pilots Association at 12 *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 544 (Minn. Ct. App. 2011) *aff’d*, 816 N.W.2d 572 (Minn. 2012) (Nos. A10-1242, A10-1243, A10-1246, A10-1247), 2010 WL 8903390 at \*12 (“Loss of available flight training providers will ensue [and] . . . with the uncertainty [of what a “duty to train” includes], costs are also likely to increase, thus reducing the availability of training.”).

126. The court could impose a limit on the duty to train. A California court reasoned that “[a] flight school, like a driving school, cannot anticipate and train for every possible hazardous situation. Having adequately trained [a pilot] to the point where he obtained his pilot’s license, [a manufacturer’s] duty to train should terminate at that point.” *Hubbard v. Pac. Flight Servs., Inc.*, (Nos. C046617, C047093) 2005 WL 2739818, at \*10 (Cal. App. 3d Oct. 25, 2005).

127. Minn. Stat. § 604.01 (2012). For a discussion on the issues wrapped up in comparative fault apportionment between manufacturers and consumers in strict products liability cases, see Jon D. Jenvold, *Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974).

struction requires a level of understanding and some consumers may take more time to reach an adequate level.<sup>128</sup>

The failure to warn or instruct claim in *Glorvigen* provided a difficult decision for the court: allow jury discretion as to the adequacy of an instruction or bypass the jury by holding that, as a matter of law, manufacturers do not have a “duty to train.” Choosing the latter route, *Glorvigen* was the first state supreme court case to establish a true ceiling on the duty to provide adequate warnings or instructions. Essentially, the court established that manufacturers are only required to provide accurate and thorough written instructions; if hands-on instructions are required for the product, such responsibility is in the hands of the consumer.<sup>129</sup>

Plaintiffs’ claim in *Glorvigen* might never have been brought if not for a contract between Prokop and Cirrus that provided for transition training. With such an obvious agreement to provide hands-on training, it seemed logical that Cirrus breached its duty to provide adequate instructions when it failed to fulfill its promise to Prokop. And, while the facts of this case lend credence to allowing recovery for plaintiffs on a failure to instruct claim, the underlying public policy reasons weigh heavily against recovery on those grounds.

The contract brought to surface the products liability failure to warn or instruct claim, but it also provided another common law route to recovery: plaintiffs could alternatively claim the duty was found in the contract itself and Cirrus negligently performed its undertaking to render services.

By focusing on establishing a ceiling in failure to warn or instruct claims, *Glorvigen*’s tunnel vision overruled nearly a decade of law establishing that a duty in tort may arise from contract. However, this improper second holding was overshadowed by the proper first holding of no “duty to train.” If a manufacturer does not have a “duty to train” and consumers are not able to hold the manufacturer or anyone else liable through contract, the possibility of recovery for any resulting personal injury is nonexistent. This holding not only conflicts with nearly fifty years of black letter law,<sup>130</sup> it ignores the fact that allowing a duty in tort to arise from a party’s contract gives the parties discretion as to the extent of this liability—a result that favors and aligns with the policy reasons behind holding that manufacturers have no “duty to train.”

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128. See Brief and Addendum of Amicus Curiae Aircraft Owners and Pilots Association at 13 *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 544 (Minn. Ct. App. 2011) *aff’d*, 816 N.W.2d 572 (Minn. 2012) (Nos. A10-1242, A10-1243, A10-1246, A10-1247), 2010 WL 8903390 at \*13 (“A pilot who meets proficiency standards one day, may not be able to fly to those same standards the next. There is no way to deny this very human element when trying to assign liability or fault when things go wrong after training ends.”).

129. *Glorvigen*, 816 N.W.2d at 572–81.

130. See, e.g., RESTATEMENT (SECOND) OF TORTS § 323 (1965).

## V. COMMON LAW UNDERTAKINGS: WHERE *GLORVIGEN* WAS WRONG

The *Glorvigen* majority only devoted three paragraphs to its second holding: that a duty in tort cannot arise solely from a contract.<sup>131</sup> This runs contrary to both black letter common law and Minnesota law. To understand why this holding is flawed, a few things must be put into context: (1) Minnesota has adopted the Restatement (Second) of Torts § 323, Negligent Performance of Undertaking to Render Services;<sup>132</sup> (2) Minnesota case law allows recovery in tort when parties have a contractual relationship and a personal injury occurs;<sup>133</sup> and (3) most important is the economic loss doctrine.<sup>134</sup> Minnesota's legislature amended Minnesota Statutes section 604.101 in the year 2000 to allow recovery in tort only when personal injury results from a contractual relationship.<sup>135</sup>

The Restatement (Second) of Torts § 323 Negligent Performance of Undertaking to Render Services provides that:

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

131. *Glorvigen*, 816 N.W.2d at 583–84.

132. See *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). See also *Reedon of Faribault, Inc. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 494 (Minn. 1988) (acknowledging that a duty may arise under a contract to render services but holding that Fidelity did not contract into such services, explicitly stating, “[Fidelity] only owes a duty if it undertook ‘to render services’ to respondent.”).

133. See *supra* notes 147–48 and accompanying text. “Minnesota has long recognized 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.’” *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 198 (Minn. Ct. App. 2011) (citing *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 821–22 (1975); *Williams v. Harris*, 518 N.W.2d 864, 868 (Minn. Ct. App. 1994) (“Minnesota recognizes that, even though there is no duty in the first instance, if a person voluntarily assumes a duty, the duty must be performed with reasonable care or the person will be liable for damages.”), *review denied* (Minn. Sept. 28, 1994).

134. See *Hapka v. Paquin Farms*, 458 N.W.2d 683, 691 (Minn. 1990) (finding “no tort liability for the damage to the potato crop grown with the defective seed” where the recovery is one solely for “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, at \*4 (Minn. Ct. App. Feb. 19, 2002). See also Minn. Stat. § 604.10(a):

Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort[;]

MINN. STAT. § 604.101, subd. 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.”).

135. Minn. Stat. § 604.101 (2012) (“This section does not apply to claims for injury to the person.”) For a greater discussion on the economic loss doctrine in Minnesota, see Daniel S. Kleinberger, Linda J. Rusch, et. al., *Building a New Foundation: Torts, Contracts, and the Economic Loss Doctrine*, MINNESOTA BENCH AND BAR, Sept. 2000, available at <http://www.mnbar.org/benchandbar/2000/sep00/econ-loss.htm>.

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.<sup>136</sup>

The application of § 323 is broad and Minnesota had not applied it in narrow circumstances such as *Glorvigen*. The scarcity of such "sufficient decisions" led Minnesota to move in a direction opposite to that of the Restatements.<sup>137</sup> Comment d to § 323 states that "there is no essential reason why the breach of a promise which has induced reliance and so caused harm should not be actionable in tort [especially] . . . where the harm is physical."<sup>138</sup> The comment also notes "[t]he technicalities to which the courts have resorted in finding some commencement of performance indicate a development of law toward such liability. In the absence of sufficient decisions, however, the question is left open."<sup>139</sup>

The Restatement (Third) of Torts § 42, Duty Based on Undertaking, reiterates the rule in § 323 and provides strong suggestions that states should acknowledge a duty in tort arising out of a contract:

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

- (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
- (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.<sup>140</sup>

Comment d to § 42 defines an undertaking as one that "entails an actor voluntarily rendering services, gratuitously or pursuant to a contract, on behalf of another."<sup>141</sup> The Restatement (Third) of Torts § 42 cleared up what

136. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

137. RESTATEMENT (SECOND) OF TORTS § 323 cmt. d (1965) notes that:

Decisions in a number of jurisdictions, holding that the breach of a promise can give rise only to a contract action, and does not result in liability in tort, have not been overruled. The modern law has, however, witnessed a considerable weakening and blurring of the distinction, in situations where the plaintiff's reliance upon the defendant's promise has resulted in harm to him. Through the development of the doctrine of 'promissory estoppel' the contract rule itself has been considerably modified to permit, in many situations, the enforcement of a promise made without consideration.

138. RESTATEMENT (SECOND) OF TORTS § 323 cmt. d (1965).

139. *Id.*

140. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (1998).

141. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 cmt. d (1998). Comment d further states that "[t]he actor need not act for the purpose of protecting the other; this Section is equally applicable to those who act altruistically and to those who act nonaltruistically, as is often the case when an undertaking is a result of a contractual agreement."

Restatement (Second) of Torts § 323 left unclear for courts: whether a duty could arise in tort solely from a contract.

If contract law provides a remedy for mere promises, tort law should also do so when breach of the promise causes personal injury or property damage. The crux of a duty based on a promise is that the actor engage in behavior that leads another person to forgo available alternatives for protection. Whether that behavior consists of action or a promise should not matter.<sup>142</sup>

Hence, the common law recognizes a duty in tort arising solely from a contract. This makes perfect sense, given that the common law of torts originally required parties to be in privity of contract and removed this requirement to expand liability, not to reduce it.<sup>143</sup>

What is considered a “sufficient decision” for this analysis, though? In 1979, the Minnesota Supreme Court held in *Walsh v. Pagra Air Taxi, Inc.*<sup>144</sup> that a fixed base operator (“FBO”) at a city airport was liable for breach of a tort duty that the FBO assumed through its operating agreement with the city (a contract). In 2005, the Minnesota Court of Appeals sent the question of whether a caretaker at a day care service was liable for the death of an infant to a jury because the caretaker could have “created a special relationship with the [infant] *even without having previously accepted her entrustment*”<sup>145</sup> through contract.

Yet, the majority in *Glorvigen* relies on the “fundamental difference[s] between tort and contract.”<sup>146</sup> These fundamental differences link back to a 1917 case called *Keiper v. Anderson* which held that a wrongful death action could not be brought by the estate of a deceased tenant when the landlord’s failure to heat the premises led to death of the tenant.<sup>147</sup> The *Keiper* court said that, “[h]ad Keiper survived, his cause of action would have been for breach of contract to heat the premises, as proof of the contract would have been necessary to create any cause of action.”<sup>148</sup> However, *Keiper* also recognized that sub-lessees of the tenant, members of tenant’s family,

142. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 cmt. e (1998) (emphasis added).

143. See *Thomas v. Winchester*, 6 N.Y. 397 (1852) (articulating that contractual obligations can give rise to duties in tort). See also *Winterbottom v. Wright*, 10 M&W 109, 152 Eng. Rep. 402 (Ex. 1842) (limiting liability of suppliers of goods and services to parties with whom they had contractual relationships). The requirement of privity was then abolished. See *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (recognizing that not every duty arising out of contract must be limited to parties in privity).

144. *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570–71 (Minn. 1979). See also *Paul v. Faricy*, 37 N.W.2d 427, 436 (Minn. 1949) (suggesting that a city that enters a maintenance contract with the state may be liable for injuries resulting from negligence in maintenance).

145. *Laska v. Anoka Cnty.*, 696 N.W.2d 133, 140 (Minn. Ct. App. 2005) (emphasis added).

146. *Glorvigen*, 816 N.W.2d at 584 (quoting W. Prosser, *Handbook of the Law of Torts* § 92, at 613 (4th ed. 1971)).

147. *Keiper v. Anderson*, 138 Minn. 392, 165 N.W. 237, 238 (Minn. 1917).

148. *Id.* (emphasis added).

and employees of the tenant could recover from a landlord because “[t]he liability of the landlord was in each case based on his negligence.”<sup>149</sup> Put simply, do not form a contract if you might incur injury to your person or property if you want to recover any damages. William Prosser and Werdner Keeton once suggested that “it’s cheaper to kill a man than to maim him,”<sup>150</sup> and apparently the Minnesota Supreme Court has not corrected this old adage. Contracts absolve a party from liability for a negligent act, limiting damages to breach of contract even when death results from such an act.<sup>151</sup>

Is the Minnesota Supreme Court suggesting that it may be more favorable for the plaintiff to not have a contract in the happenstance an injury results? If so, perhaps couch surfing<sup>152</sup> has become more than a traveler’s inexpensive way to explore the world.

*Keiper* is no longer applicable law. Yet *Glorvigen* relied on this century-old case, irrespective of Minnesota’s subsequent adoption of the Restatement (Second) of Torts § 323, the economic loss doctrine, and case law allowing recovery when bodily or property damage results from negligent performance of a duty undertaken by a contract.<sup>153</sup> The products liability action in this case should have turned the majority’s attention to well-settled principles in tort law that products liability brought to light.<sup>154</sup>

Even before *Keiper*, the common law acknowledged that to create a duty, “no consideration need be shown, since no contract is necessary. As a matter of fact, entrance into such a relationship is often the occasion of a contract. . . . [E]ven in [those] cases the terms of the contract seldom embrace the whole transaction.”<sup>155</sup> As the *Glorvigen* dissent noted, “[i]t should be self-evident that a party who breaches a contract ought to be liable for the breach of that contract. But 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.”<sup>156</sup>

The majority’s reliance on the “fundamental differences between tort and contract” misstates the issue. Prokop and Kosak died as a result of

149. *Id.*

150. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 945 (5th ed. 1984).

151. Minnesota has recognized some forms of recovery for tenants when damage to person or property results from a landlord’s negligence. For a greater discussion on the development of landlord-tenant laws in Minnesota, see Lawrence R. McDonough, *Still Crazy After All These Years: Landlords and Tenants and the Law of Torts*, 33 WM. MITCHELL L. REV. 427 (2006).

152. See Cody Kittle, *Adventures in Couch Surfing: One Sojourner’s Truth*, TIME, Feb. 15, 2011, available at <http://www.time.com/time/travel/article/0,31542,2045092,00.html>.

153. See *supra* notes 138–39 and accompanying text.

154. *Wright v. Holland Furnace Co.*, 243 N.W. 387, 388 (Minn. 1932) (“The presence of a contract between tortfeasor and third party is incidental only.”).

155. Beale, *supra* note 52, at 222.

156. *Glorvigen*, 816 N.W.2d at 589 (Anderson, P., J., dissenting) (citing *Eads v. Marks*, 39 Cal.2d 807, 249 P.2d 257, 260 (1952)).



Cirrus's and UNDAF's negligence. The fact that personal injuries (death) resulted from that negligence is why the claim was brought—to recover for noneconomic losses. The term “economic loss” is meant to describe losses resulting from product defects that are not recoverable in a typical tort action; however, the economic loss doctrine does not bar tort claims for all economic losses.<sup>157</sup> The very purpose of the doctrine is to “preserve[ ] the boundary between tort and contract law.”<sup>158</sup>

The *Glorvigen* majority cites a case involving the economic loss doctrine to support its holding:

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.<sup>159</sup>

This not only fails to address the purpose behind the economic loss doctrine, it fails to accurately portray *80 South Eighth Street Ltd. Partnership*: “[E]conomic losses that arise out of commercial transactions, *except those involving personal injury or damage to other property*, are not recoverable under the tort theories of negligence or strict products liability.”<sup>160</sup> This well-developed rule in Minnesota<sup>161</sup> stands for the position that when personal injury or damage to other property is involved, a tort duty will emanate from a contract and tort damages will be allowed.

The *Glorvigen* majority ignored this distinction by focusing on its first holding that limited a manufacturer's liability for consumers' potential failure to warn or instruct claims. By first holding that there is no “duty to train,” the gravamen<sup>162</sup> of the plaintiffs' claim—negligence—was whitewashed.<sup>163</sup> Even though plaintiffs only asserted tort claims, the major-

157. See, e.g., *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 399 (Minn. 1977) (loss of consortium); *Horvath v. Liquid Controls Corp.*, 455 N.W.2d 60, 64 (Minn. Ct. App. 1990) (wrongful death).

158. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 572 N.W.2d 321, 324 (Minn. Ct. App. 1997).

159. *Glorvigen*, 816 N.W.2d at 584 (quoting *80 S. Eighth St. Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W. 2d 393, 395–96) (emphasis added).

160. *Id.* at 396 (emphasis added).

161. See generally Cortney G. Sylvester, *Economic Loss: Commercial Contract Law Lives*, 27 WM. MITCHELL L. REV. 417 (2000); Jacquelyn K. Brunmeier, *Death by Footnote: The Life and Times of Minnesota's Economic Loss Doctrine*, 19 WM. MITCHELL L. REV. 871 (1993).

162. Gravamen is defined by Black's Law Dictionary as the “substantial point or essence of a claim, grievance, or complaint.” BLACK'S LAW DICTIONARY 318 (3d pocket ed. 1996).

163. The Minnesota Court of Appeals explicitly stated that “[t]he gravamen of respondents' claims is that appellants breached their duty to provide adequate flight training by omitting Flight

ity stated that, “[w]hen 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.”<sup>164</sup> However, *Lesmeister* involved purely economic losses without any personal injury:<sup>165</sup> the “gravamen of [the] case . . . is contractual [and] [a]ny duties between the parties arose out of the contracts;”<sup>166</sup> therefore, *Lesmeister* concluded, the only claims available were contractual because the only damages sought were for economic losses.<sup>167</sup>

The *Glorvigen* majority misapplied Minnesota law. The majority focused on cases involving purely economic losses rather than damage to the person. This misapplication effectively created new law and foreclosed recourse to injured parties for damages outside breach of contract, even when noneconomic losses are involved. The dissent said it best:

If the mere presence of a contract foreclosed all tort liability, medical malpractice claims would cease to exist. 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.<sup>168</sup>

*Glorvigen*'s second holding leaves many questions unanswered. If Minnesota does not recognize a duty in tort arising solely under contract, how will this unfold in future claims? For example, Clark hires Kent to salt his sidewalk every morning from September through April.<sup>169</sup> Kent was out working late in mid-January and fails to salt Clark's sidewalk one morning because he slept through an alarm. Clark slips on his sidewalk due to Kent's negligence (and breach of contract), breaking his leg. The duty that Kent owed Clark arose from a contract and the parties would not have had a relationship but for that contract. However, by the parties' actions, a duty arose in tort whereby Clark is relying on Kent to salt his sidewalk every morning because Kent undertook the duty to do so. Is a court going to look through the contract and allow recovery in tort, or ignore the negligence and hold that Kent owes Clark only the wages it would cost for someone else to do Kent's work for the day Kent failed to salt Clark's sidewalk? If Clark

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4a.” *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 553 (Minn. Ct. App. 2011) *aff'd*, 816 N.W.2d 572 (Minn. 2012).

164. *Glorvigen*, 816 N.W.2d at 584 (citing *United States v. Johnson*, 853 F.2d 619, 622 (8th Cir. 1988) (citing *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983)).

165. *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983). It is important to note that plaintiffs in *Glorvigen* did not assert a “negligent breach of contract” as discussed in *Lesmeister*. Such a claim would be for economic losses rather than for damage to property, and the economic loss doctrine would bar such claims.

166. *Id.*

167. *Id.*

168. *Glorvigen*, 816 N.W.2d at 589 (Anderson, P., J., dissenting).

169. It is important to note that this example involves a service contract, and therefore, the economic loss doctrine would not apply.

were only able to recover contract damages, he would not be able to recover for his hospital bills, medication, subsequent treatment or therapy, or lost wages for days of work missed due to the injury.<sup>170</sup>

*Laska* suggests that the courts should look through the contract and find the duty such a defendant undertook.<sup>171</sup> By looking through the contract, a court may establish a separate special relationship, thereby establishing a duty under a common law undertaking rather than the contract, allowing Clark to recover from Kent's negligence. However, until *Glorvigen* is overruled, the distinction between claims for noneconomic losses and claims for purely economic losses will be muddled by courts citing *Glorvigen* as authority when only the latter is involved.<sup>172</sup>

Part of the problem with the Minnesota Supreme Court choosing to ignore black letter law is the challenge of how this decision will unfold in future litigation.<sup>173</sup> Parties may freely enter contracts involving limitations of liability,<sup>174</sup> so why is the Minnesota Supreme Court unwilling to allow recovery in tort when the breach of a contractual duty results in a personal injury? Whether operating solely within the contract or beyond it, there is a possibility that a duty may arise. However, that duty must not arise solely from the contract for a party to recover in tort. Simply put, the parties would have to contract into a special relationship—any other form of accepting a tort duty under contract will not suffice. However, after *Glorvigen*, consumers may not even have this option.

#### CONCLUSION

Holding that manufacturers have no “duty to train” weighs heavily in favor of public policy. However, it seems the *Glorvigen* majority had tunnel

170. See Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390, 398–401 (1997).

171. *Laska*, 696 N.W.2d at 140.

172. A Minnesota District Court cited *Glorvigen* in February 2013 as authority when only economic losses were involved. See *Cargill, Inc. v. Ron Burge Trucking, Inc.*, CIV. 11-2394 PAM/JJK, 2013 WL 608520, at \*1 (D. Minn. Feb. 19, 2013). In *Cargill*, the Plaintiff claimed that a bailment relationship imposed duties of care that sound in negligence, arising from the parties' contract. Rather than holding that the economic loss doctrine barred recovery for such a claim, the court stated that “*Glorvigen* held that when a contract imposes the only duties between the parties, a negligence action will not lie.” *Id.* at \*3.

173. At least eight courts have cited *Glorvigen* as authority for the proposition that tort liability does not arise when the duty breached is imposed by contract. See *CenturyLink*, A12-0884, 2013 WL 400354, at \*1 (Minn. Ct. App. Feb. 4, 2013), review denied (Minn., Apr. 16, 2013); *Target Corp. v. LCH Pavement Consultants, LLC*, CIV. 12-1912 JNE/JJK, 2013 WL 2470148, at \*1 (D. Minn. June 7, 2013); *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 732 F.3d 755 (7th Cir. 2013) certified question answered, 848 N.W.2d 539 (Minn. 2014); *Carlson, Inc. v. Int'l Bus. Machines Corp.*, 10-CV-3410 JNE/TNL, 2013 WL 6007508, at \*1 (D. Minn. Nov. 13, 2013); *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 544 (Minn. 2014); *Commonwealth Land Title Ins. Co. v. Historic Ivy Tower, LLC*, A13-1621, 2014 WL 3799607, at \*1 (Minn. Ct. App. Aug. 4, 2014); *Weiss v. Private Capital, LLC*, A13-2029, 2014 WL 4175867, at \*1 (Minn. Ct. App. Aug. 25, 2014).

174. See, e.g., U.C.C. §§ 2-316, 2-719 (1991); Minn. Stat. § 336.2-719(3) (1988).

vision in promoting these policy considerations by also broadly holding that a duty in tort may not arise from a contract. If the court had held that manufacturers had a “duty to train,” it would have been imputing a new duty on manufacturers outside the scope and purpose of products liability. Yet, to achieve this goal *while still protecting consumers*, the Minnesota Supreme Court should not have broadly held that a duty in tort may not arise from a contract. Although public policy favors against imputing a “duty to train” on manufacturers, it is dissonant to also hold that parties may not bargain their own terms for such liability. If courts want to avoid imputing duties onto manufacturers, then contracting in and out of duties provides a great solution, retaining the underlying policy reasons behind products liability while sticking with our tradition of freedom to contract. Most importantly, it avoids a grossly unfair result for consumers.

Always read the exclusionary clause.<sup>175</sup>

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175. Under Minnesota law, a buyer may not bring a product defect tort claim for compensatory damages unless the defect “caused harm to the buyer’s tangible personal property other than the goods or to the buyer’s real property.” Minn. Stat. § 604.101, subd. 3 (2010). However, no bar exists for claims involving injury to the person. *Id.* at subd. 2.

