

NOS. A10-1242, A10-1243, A10-1246, AND A10-1247

State of Minnesota
In Supreme Court

Rick Glorvigen, as Trustee for the Next-of-Kin of Decedent James Kosak,
Appellant/Cross-Respondent (A10-1242, A10-1246),

and

Thomas M. Gartland, as Trustee for the
Next-of-Kin of Decedent Gary R. Prokop,
Appellant/Cross-Respondent (A10-1243, A10-1247),

vs.

Cirrus Design Corporation,
Respondent/Cross-Appellant (A10-1246, A10-1247),

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

and

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

**REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-
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NEXT-OF-KIN OF DECEDENT JAMES KOSAK**

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ARGUMENT

I. Cirrus and UNDAF Breached Their Duty To Prokop and Kosak When They Failed To Give Flight Lesson 4a.

A. Cirrus Admits That It Owed A Duty To Prokop And Kosak To Instruct In The Safe Use Of The SR22.

Cirrus admits that “[t]here is no question that as an aircraft manufacturer, Cirrus has a duty to warn aircraft purchasers of non-obvious dangers and to provide purchasers with any instructions that may be necessary for the safe use of the product.” Cirrus Br. at 24, citing *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977); *see also Tayam v. Executive Aero, Inc.*, 166 N.W.2d 584, 586 (Minn. 1969) (aircraft manufacturer had a duty to instruct purchaser regarding safe operation of aircraft). Further, “Cirrus agrees that a manufacturer remains ultimately responsible for the safety of its product. . . .” Cirrus Br. at 29. Glorvigen and Gartland (“Plaintiffs”) agree that this is the duty the law imposes upon Cirrus as an aircraft manufacturer. This is the duty that the jury found Cirrus and UNDAF (“Defendants”) breached in this case.

B. The Jury Found That Cirrus And UNDAF Breached Their Duty To Instruct In The Safe Use Of The SR22 By Failing To Give Flight Lesson 4a.

The constant theme running through Defendants’ briefs is that the facts do not support the jury’s verdict. Although both couch their arguments in terms of a duty not being owed, which is a question of law, their actual premise is that the owed duty was discharged, which is a question of fact. *See e.g.* Cirrus Br. at 23 (“the materials Cirrus provided to Prokop with the SR22 were undisputedly complete, accurate, and adequate to inform Prokop how to safely operate the aircraft, including the autopilot.”); Cirrus Br. at

28 (“There was no information necessary for the safe operation of the aircraft that Prokop did not have and that Cirrus did not provide.”). The jury found, however, that Defendants’ duty to instruct Prokop in the safe use of the SR22 was not discharged by the supply of the materials that Cirrus provided. It is that *jury determination* that Defendants ask this court to discard, asking this Court to improperly substitute its own factual findings for those of the jury.

Cirrus tries to justify this request by stating, without citation, that “the record establishes as a matter of law that Cirrus satisfied its duty” Cirrus Br. at 28. Judgment as a matter of law, however, is only appropriate if “there is *no legally sufficient evidentiary basis* for a reasonable jury to find for [a] party on [an] issue.” Minn. R. Civ. P. 50.01 (a) (emphasis added.) The standard is:

Whether there is *any* competent evidence reasonably tending to sustain the verdict. Such a motion “admits every inference reasonably to be drawn from the evidence as well as the credibility of the testimony for the adverse party,” and should not be granted unless reasonable minds can reach but one conclusion against the verdict.

Hanson v. Roe, 373 N.W.2d 366, 372 (Minn. App. 1985) (emphasis added) (citation omitted). Thus, “[t]he power to set aside a verdict should be used sparingly.” *Cofran v. Swanman*, 225 Minn. 40, 43, 29 N.W.2d 448, 450 (1947). Moreover, the parties prevailing at trial—Glorvigen and Gartland (“Plaintiffs”)—are entitled to have the evidence viewed in the most favorable light and to have the benefit of all reasonable inferences to be drawn from the evidence. *Olson v. Penkert*, 252 Minn. 334, 340, 90 N.W.2d 193, 199 (1958).

As described in Plaintiffs' primary briefs, there is more than enough evidence to meet this standard and support the jury's finding that it was not reasonable for Defendants to fail to give Flight Lesson 4a. The evidence, from the mouth of Defendants' own director of transition training, was that the manual and ground lesson materials on the autopilot and the VFR into IMC maneuver—the very materials that Defendants claim allow this court to find as a matter of law that they discharged their duty—could not be effective in the absence of Flight Lesson 4a: “in order for this 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.*” (Testimony of John Glenn Wahlberg, UNDAF's director of transition training at Cirrus's facility, T.696) (emphasis added). Thus, Defendants' director agreed that Flight Lesson 4a was “required” because encountering IMC-like conditions is “*a dangerous situation,*” *a leading cause* of crashes for VFR pilots such as Prokop, and *a pilot who cannot execute the auto-pilot assisted recovery maneuver “may die.”* (*Id.*, T.511, 697-698) (emphasis added).

Faced with these facts, Defendants ask this Court to ignore basic Minnesota law. UNDAF goes so far as to contend that dissenting Judge Klaphake's statement that “the verdict can be reversed only if ‘manifestly against the entire evidence’ *is incorrect.*” UNDAF Br. at 20 (emphasis added). Judge Klaphake, who was misquoted by UNDAF, was correct in his recitation of the standard of review that the verdict can only be reversed if “‘manifestly against the entire evidence’ or contrary to law.” *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 558 (Minn. App. 2011) (Klaphake, J., dissenting) (Add.33), citing *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007).

Cirrus implicitly makes the same request, insisting that this Court find as a matter of law that Defendants properly warned of all “unforeseen risks” and provided sufficient instructions on how to avoid or escape them.¹ Defendants tried mightily to show the jury that they had provided Prokop with these written instructions. They argued that those instructions were adequate—that they had put Prokop on notice of all non-apparent dangers and instructed him on how to avoid or escape those dangers. The jury heard this evidence and these arguments, and decided that Defendants were negligent.

Cirrus nonetheless contends that it is “undisputed” that its “information on autopilot operation in the pilot manual, the autopilot manual, and the training materials was *complete* and accurate” (Cirrus Br. at 11-12) (emphasis added), that “it is undisputed that Cirrus met Minnesota’s standard for adequate warnings and instructions,” and that Plaintiffs have never claimed that the instructions provided Prokop were incomplete, inaccurate, or inadequate. *Id.* at 26. As support, Cirrus points to a statement in Glorvigen’s primary brief that “[h]ere, Plaintiffs do not complain that the training materials – the Initial Training Syllabus . . . , the Cirrus SR22 Training Manual . . . , and the PowerPoint slides used during the training . . . were deficient.” Cirrus Br. at 12, quoting Glorvigen Primary Br. at 41-42. However, in context, the sentences that followed this sentence in Glorvigen’s primary brief show that the import was the exact

¹ The standard employed by Cirrus is wrong. There is no Minnesota case holding that a manufacturer has a duty to only warn of “unforeseen” risks. Cirrus Br. at 27. On the contrary, a manufacturer has a duty to “protect users . . . from foreseeable dangers.” *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998) citing *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956). *See infra*, Section I. D.

opposite of what Cirrus claims: “On the contrary, Plaintiffs allege that specific instruction that Cirrus’s own materials indicate should have been given was not given. . . . It was the failure to give the critical flight instruction—Flight Lesson 4a—that constituted the negligence.” *Glorvigen Primary Br.* at 42. The core basis of Plaintiffs’ case has always been that Defendants did not meet the standard for adequate instructions and that the instructions Prokop received were inadequate because Defendants failed to provide the necessary in-flight instruction on how to execute the autopilot assisted maneuver that Cirrus mandated as the safest way to escape IFR conditions in an SR22. (*See, e.g.*, T.258-261, 274, 511, 694-698).

C. The Federal District Court Did Not Dismiss Plaintiffs’ Negligent Failure To Warn Claims And This Case Proceeded—And Was tried—As A Products Liability Negligence Case.

The ruling of the Minnesota Federal District Court on Cirrus’s summary judgment motion did not dismiss Plaintiffs’ negligent failure to warn and instruct claims. That Court’s decision specifically recognized that Cirrus, as the manufacturer and seller of a product, owed a duty to provide instructions for safe use, stating that “[t]he duty to warn can arise in the negligence context and ‘includes the duty to give adequate instructions for the safe use of the product.’” *Glorvigen v. Cirrus Design Corp.*, 2008 U.S. Dist. LEXIS 10899, *10 (D. Minn. Feb. 11, 2008). (Add.139) (citing *Gray v. Badger Mining Co.*, 676 N.W.2d 268, 274 (Minn. 2004). Judge Magnuson based his preservation of Plaintiffs’ negligence claims on *Gray*, *Frey* and *Germann*—all *products liability* cases, and articulated the pertinent standard for “cases decided on negligence theories” as “the duty of care owing by a *manufacturer* of aircraft or aircraft equipment. . . .” *Glorvigen*,

2008 U.S. Dist. LEXIS 10899, *10-14. (Add.139-141) (emphasis added). Thus, while the federal court dismissed Gartland's *strict liability* claims, it did not dismiss all of Plaintiffs' so-called "products liability" claims—keeping alive the negligence based products liability claims. Judge Magnuson made it clear that the negligence claim, based in large part on the omission of Flight Lesson 4a, should be for the jury to resolve:

Here, by manufacturing an aircraft with an autopilot mechanism and including "transition training" as part of the aircraft's purchase price, Cirrus could have foreseen the injury as alleged in this case. The connection between Cirrus' alleged negligent training and the Plaintiffs' claimed damage is not so remote that the Court can conclude that public policy requires awarding summary judgment in favor of Cirrus at this stage.

Glorvigen, 2008 U.S. Dist. LEXIS 10899, *12-13. (Add.140).

Cirrus argues that *Hauenstein v. The Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984) compels the conclusion that *all* of Plaintiffs' products based claims—including Plaintiffs' *negligent* failure to warn and instruct claim—were dismissed simply because the strict liability claims were dismissed. Cirrus Br. at 20-21. Obviously, Judge Magnuson did not believe so, as evidenced by his specific retention of the negligent failure to warn and instruct claims while dismissing Gartland's strict liability "defective product" claims.

Hauenstein is not as sweeping as Cirrus pretends, and Judge Magnuson was correct that the product-based negligence claims can—and did—survive even though the strict liability claims were dismissed. First, this Court in *Hauenstein* did not base its decision on jury determinations that were "irreconcilably inconsistent," as Cirrus indicates. Cirrus Br. at 21. Instead, the basis of the ultimate ruling was the jury's failure to find causation. *Hauenstein*, 347 N.W.2d at 275-276. *Hauenstein's* discussion of how

strict liability and negligence theories interact could, therefore, be considered *dicta*. More importantly, *Hauenstein* only promulgated a guideline that a Plaintiff must choose whether to submit his claims to the jury on a strict liability or negligence theory. *Id.* at 275. This “guideline” has never been used as a substantive claims bar that would require that either or both theories be dismissed, leaving the plaintiff with no claim to submit to the jury. This extreme extension of *Hauenstein* must be rejected.

Furthermore—despite Defendants’ insistence that Judge Magnuson dismissed the negligent failure to warn and instruct claims—at trial the jury was clearly asked to evaluate the care required of Cirrus as a product manufacturer and seller. Cirrus’s own counsel told the jury: “[Y]ou’re going to be asked to determine whether Cirrus was negligent. And you’re going to have to *evaluate what would a prudent manufacturer do in that situation. . . .*” (T.1891) (emphasis added). Cirrus’s counsel also told the jury, “You will be asked whether Cirrus Design Corporation was negligent in the training of Gary Prokop. And in doing that, *you’ll be instructed that a manufacturer of aircraft is going to be evaluated on whether they accept it [sic] -- whether they acted with reasonable care with respect to this training.*” (T.1914) (emphasis added). Ultimately, the case went to the jury on a negligence theory and the basic negligence instruction was given, *without objection by Defendants.* (T.1783-84). It cannot be disputed that the jury was asked to assess the negligence of Cirrus (and its joint enterpriser, UNDAF) as a product manufacturer for failure to warn and instruct.

D. In Minnesota The Existence Of A Duty Hinges On A Foreseeability Analysis.

UNDAF—while insisting that it is not seeking any change in Minnesota law—cavalierly dismisses another of Minnesota’s most basic legal principles. It argues that in determining duty “the existence of a duty depends on public policy and the relationship between the parties, not on whether an injury is foreseeable” and that “foreseeability of the crash is not controlling.” UNDAF Br. at 19-20. UNDAF’s proposed analysis is in direct contradiction of this Court’s pronouncement in *Germann v. F. L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986), that, “[F]oreseeability of injury is the linchpin for determination of whether a duty to warn exists.” (Emphasis added). The test for foreseeability was explained in *Germann*:

In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of *public policy*, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.

Id. (emphasis added).

The Court of Appeals majority improperly discarded the *Germann* foreseeability test, determining that Defendants owed Plaintiffs no duty to provide Flight Lesson 4a without doing any analysis of foreseeability whatsoever. *Glorvigen*, 796 N.W.2d at 549-552. (Add.14-20). UNDAF asks this Court to do the same, contending that some other, undefined “public policy” analysis should replace the *Germann* foreseeability analysis. This makes little sense, and would be improper, since the *Germann* foreseeability

analysis is the mechanism through which public policy is expressed. *Germann*, 395 N.W.2d at 924 (“If the connection is too remote to impose liability as a matter of *public policy*, the courts then hold there is no duty, and consequently no liability.”) (emphasis added); *see also Whiteford*, 582 N.W.2d at 918 (“In determining whether a danger is foreseeable, courts look at whether the specific danger was objectively reasonable to expect . . . that which is not objectively reasonable to expect is too remote to create liability on the part of the manufacturer.”). Here, as shown in Plaintiffs’ primary briefs, the connection was foreseeable. *See, e.g., Glorvigen Primary Br.* at 20-21; *see also Glorvigen*, 796 N.W.2d at 559 (Klaphake, J., dissenting). (Add.35) (“[o]n these facts, the crash here is a direct and foreseeable consequence of appellants’ failure . . .”). In fact, Defendants’ director of transition training agreed that Flight Lesson 4a was “required” because encountering IMC-like conditions is *a leading cause of crashes for VFR pilots such as Prokop*. (T.511, 697-698).²

E. Plaintiffs Do Not Propose A New Common Law “Duty To Train.”

Cirrus—either mistakenly or purposefully—misconstrues what Plaintiffs are asking this Court to affirm. Plaintiffs do not seek a pronouncement that Cirrus had a

² UNDAF also attempts to justify discarding the *Germann* foreseeability test by arguing that this is not a products liability case. UNDAF Br. at 19. First, as shown above, this case was tried to the jury as a case involving the duties of a manufacturer. Second, foreseeability is a basic tenant of negligence law and is not limited to product manufacturer cases. *See, e.g., Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984) (“Foreseeability has been called the fundamental basis of the law of negligence. Justice Cardozo succinctly expressed the central relationship between the foreseeability of harm and the existence of a legal duty in *Palsgraf*, stating that ‘the risk reasonably to be perceived defines the duty to be obeyed. . . .’”), quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100, 59 A.L.R. 1253, 1256 (1928); and also citing W. Prosser, *Handbook of the Law of Torts* §§ 31 & 43 (4th ed. 1971).

“duty to train” or a duty to “train to proficiency” or a duty to “ensure that the purchasers were adequately trained.” Cirrus Br. at 30. On the contrary, the jury’s verdict can be affirmed without extended the long-standing duty of a product manufacturer in any way. The longstanding duty to instruct in safe use was to be discharged—in this case—by giving transition training that Cirrus designed, charged each customer for, and “highly recommended . . . prior to leaving with the aircraft”—in this instance for this aircraft. See App.394. Affirmation of this jury’s verdict, therefore, will not have “broad and costly effects on product sellers” and would not result in a new duty that “would be almost boundless.” Cirrus Br. at 35.

As discussed in more detail in Glorvigen’s primary brief, the Cirrus SR22 was a high performance aircraft with speed and “innovative aspects” that made it critical that Cirrus provide proper and effective instructions on its use. There was significant evidence of the importance of transition training at trial. In fact, the director of transition training at Cirrus’s facility admitted its importance.³ (T.511, 694-698). Even the Court of Appeals majority agreed that “Prokop may have needed transition training to safely

³ Cirrus argues that “FAA regulations, not Cirrus,” were the source of the prohibition on Prokop flying the SR22 alone without the high performance endorsement that would come with completion of Cirrus’s training. They further state that Prokop had other delivery options that would not have required him to take Cirrus’s training at the factory. Cirrus Br. at 8. The jury, however, heard evidence that Cirrus would not allow Prokop to take delivery of the plane until he completed the training. (T.1528). Though the FAA was plainly the initial source of the prohibition (as Glorvigen noted in its primary brief at p. 6), Cirrus chose to involve itself in enforcement of the rule, and included transition training in the purchase price of the SR22. Cirrus employee Bently testified that it would be “illegal” under FAA regulations for a pilot without a high performance endorsement to take the plane home, and Cirrus wanted to make sure that Cirrus could deliver the plane and that the customer could take it home. (T.1528).

pilot the SR22.” *Glorvigen*, 796 N.W.2d at 552 (Add.20). Cirrus chose to use in-person training as the means to discharge its duty to provide instructions for safe use of the SR22 that it sold to Prokop for over \$300,000. Now, Cirrus asks this Court to discard a jury verdict finding that it was negligent in the way it delivered—or, to be precise, failed to deliver—that in-person training because, it says, it would create a new and “unprecedented” duty to train. An affirmation of the jury’s verdict here simply affirms that the evidence—in this case, for this product—supports a finding that transition training—and Flight Lesson 4a in particular—was mandated and needed to discharge the long standing duty to provide instruction in safe use.

Cirrus’s insistence that the jury verdict must be reversed because Plaintiffs have somehow “consistently maintained” that the duty at issue is one to “train Prokop to proficiency,” is incongruous. Cirrus Br. at 37. Cirrus harkens back to Plaintiffs’ Complaints, but those pleadings discuss *adequacy* and never mention proficiency.⁴ Further, the concept of proficiency was discussed in various contexts at trial because that is the language that Cirrus chose to put in its Pilot Training Agreement with Prokop. (A.161). That is the standard for satisfaction of the duty that Defendants themselves established. *See* T.505, 701 (UNDAF employee Mr. Wahlberg agreed that the transition training “needed to be flight training to proficiency,” and “might” agree that if Mr. Prokop wasn’t trained to proficiency in the autopilot at the time of the transition training, then the training wasn’t adequate under UNDAF’s own standards.) It should also not be

⁴ Moreover, the allegations made in the Complaint, made before discovery and several years of litigation in state and federal court, are deemed to be amended to conform to the evidence. Minn. R. Civ. P. 15.02.

forgotten that the evidence showed that, with regard to Flight Lesson 4a, Prokop was not instructed in safe use at all, making the issue of whether he was “trained to proficiency” irrelevant.

The duty at issue here is the duty that Cirrus admits that it has: a “duty to . . . provide purchasers with any instructions that may be necessary for the safe use of the product.”⁵ Cirrus Br. at 24, citing *Frey*, 258 N.W.2d at 787 (Minn. 1977). Cirrus, however, in an attempt to relieve itself of liability in this case, argues that Plaintiffs seek to impose upon it an “unprecedented” duty to “train.” Cirrus Br. at 33. Plaintiffs are not asking this Court to create such a new duty. They simply propose that the jury’s verdict, that Defendants breached their duty to instruct in safe use of the SR22, be affirmed. It was for the jury to determine if that duty was breached, and the jury found that it was breached. Faced with these facts, Cirrus backs away from its admission that it has this duty. Thus, while arguing that Plaintiffs are seeking to create a new duty, Cirrus argues that the cases cited by Plaintiffs impose only a duty to “provide information to the buyer about product dangers.” Cirrus Br. at 30. Cirrus’s duty, however, is much larger than

⁵ Cirrus also makes a convoluted—and incorrect—semantic argument that its duty to provide adequate “instructions” cannot encompass the duty to provide Flight Lesson 4a, because, according to Cirrus, the plural word “instructions” cannot include an in-person lesson. Cirrus contends that “the legal authorities . . . uniformly use the plural . . . to mean information about how to use or operate a product.” Cirrus Br. at 31-33. Courts, however, move freely back and forth between the plural and singular uses of the word. For example, in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573, 2575 (2011), the United States Supreme Court recognized “a duty to provide adequate *instructions* for safe use of a product,” while discussing the extent of a generic drug maker’s right to “add or strengthen an *instruction*.” (citations omitted) (emphasis added). Cirrus’s hyper-technical, semantic argument, therefore, holds no water. See Minn. Stat. § 645.08 (“the singular includes the plural; and the plural, the singular”).

this. As a product manufacturer it has a duty to give adequate instructions for safe use, not to just “provide information . . . about product dangers.” Plaintiffs do not seek to expand a manufacturer’s duty. It is Cirrus that seeks to radically narrow that duty. Of course, while couched in terms of legal duty, what Defendants really ask this Court to do is invade the jury’s factual finding of breach of the long standing duty that all manufacturers have.⁶

Thus, Defendants’ arguments that Plaintiffs are seeking to establish a new “duty to train” or a duty to train to “proficiency” are red herrings. It is the duty to provide instructions for safe use, that Defendants agree exists, that the jury found was breached.

F. UNDAF Was Giving Product Instruction As Cirrus’s Joint Enterpriser, and Not Acting As A “Flight Instructor” or “Flight School.”

The jury found that UNDAF was Cirrus’s agent and joint enterpriser for the purposes of providing Cirrus’s product instruction—a finding that Defendants do not challenge on this appeal. UNDAF asks the court to view it as a “flight instructor” and argues that public policy does not permit a “flight instructor” to have a duty to protect students after instruction has ended. UNDAF Br. at 19-25. UNDAF cites to cases

⁶ Cirrus accuses Plaintiffs of confusing the legal existence of a duty with the breach of a duty when it is Defendants that do exactly that. *See* Cirrus Br. at 41. It is Defendants that ask this Court to determine that Cirrus’s undisputed duty was not breached because it provided written instructions that it says were adequate, but the jury found were not. Defendant thus misconstrues Plaintiffs’ citation to *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112 (Minn. 1979). *Larson* was not cited for the proposition that failure to give the lessons prescribed by the syllabus creates a duty—as Cirrus intimates. Cirrus Br. at 41. *Larson* was cited to show that the syllabus is evidence of the standard of conduct to be considered by the jury in determining if the legal duty was breached. Glorvigen Primary Br. at 22, n.6.

involving “flight schools” to support its argument. *Id.* UNDAF, however, is not a “flight instructor” or a “flight school” for the purposes of this case. It was simply acting as the agent for Cirrus’s product instruction.

Similarly, because UNDAF was acting as a product instructor, it cannot escape liability by arguing that “the allegedly negligent flight training ended a month before the crash.” UNDAF Br. at 20. Negligent product instruction is routinely found to result in injuries months, or years, after the product instruction was provided. Likewise, UNDAF’s reliance on *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N.W.2d 428 (1961), is misplaced (UNDAF Br. at 22) because *Lange* concerns the responsibilities of a *flight school* during flight school training. *Lange* does not apply where the defendant is providing product instruction as a product manufacturer.

G. Defendants’ Duty Extends To The Passenger Kosak.

Defendants argue they owed no duty to passenger Kosak because there was no “special relationship” between them and Kosak. Cirrus Br. at 34; UNDAF Br. at 36-37. Such a special duty analysis would only be relevant if Glorvigen was claiming that Cirrus had a duty to instruct Kosak. Cirrus Br. at 34. Glorvigen makes no such claim. Glorvigen’s claim—and that which the jury found—is that Cirrus breached its duty to instruct the purchaser of the aircraft in the safe use of the SR22. That duty extends to all foreseeable users, including airplane passengers such as Kosak. *See., e.g., Hauenstein*, 347 N.W.2d at 275 (“a manufacturer’s duty to warn . . . extends to all reasonably foreseeable users”); *Driver v. Burlington Aviation, Inc.*, 430 S.E.2d 476, 480-481 (N.C. Ct. App. 1993) (aircraft passenger stated a claim for relief under “general principles of

negligence” by alleging that manufacturer’s instructional manual “promulgated dangerously inadequate information” that allegedly caused the crash). This is true even if “there is no privity between the user and the manufacturer.” *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956). Thus, the duty owed by Defendants to provide the instruction Cirrus decided was necessary for safe use of the plane extends not only to pilot Prokop, but also to his passenger Kosak.

II. In The Alternative, Defendants Undertook A Duty To Provide Adequate Transition Training, Including Flight Lesson 4a.

Because Defendants had a common law duty of a manufacturer to instruct in safe use, which the jury found was breached in this case by not providing adequate transition training—including Flight Lesson 4a, there is no reason for this Court to reach the issue of whether Defendants assumed a duty. However, if this Court determines that Defendants’ duty to instruct in safe use did not include a duty to provide adequate transition training—including the promised Flight Lesson 4a—then the jury’s verdict should still be affirmed because Defendants assumed a duty to provide that instruction when they promised they would provide it.

The Court of Appeals majority dismissed Plaintiffs’ assumed duty argument with the unsupported—and unsupportable—statement that “[a]lthough one may assume a duty of care . . . the duty must be one that is legally recognized. And Minnesota does not recognize the duty to effectively educate.” *Glorvigen*, 796 N.W.2d at 556. (Add.28-29). To the extent that the majority’s terse statement regarding assumed duties can be understood, it seems to indicate that the majority found that a duty *was* assumed, and that

Defendants could only escape it if this Court finds that the bar of educational malpractice applies in this case.

A. Defendants Misstate The Law Regarding Assumed Duties, As A Party Can Assume A Tort Duty Through Contract.

In arguing that it did not assume a duty, Cirrus fundamentally misstates Minnesota law, claiming that an assumed duty can only arise in the “absence of a contract.” Cirrus Br. at 39. However, the cases Cirrus cites to support this misstatement of the law are either inapposite or flat-out contradict its assertion. *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567 (Minn. 1979), for example, holds that a party *can* assume a tort a duty through a contract.

In *Walsh*, Walsh’s airplane was destroyed by fire at the Mankato airport. Pagra, a private commercial business, functioned as “fixed base operator” at the airport under a lease with the city. *Id.* at 569. Under the terms of its operating agreement, Pagra was required to provide employees trained and available to use firefighting equipment located at the airport. *Id.* Fire destroyed Walsh’s airplane at the airport and he sued Pagra for negligence. The jury found Pagra partially at fault, and Pagra moved for JNOV and appealed its denial. *Id.* at 568, 570. Pagra’s primary argument on appeal was that it owed no legal duty to Walsh. *Id.* at 570. The Court disagreed, finding that the City of Mankato, while having no affirmative duty to assist in the preservation of private property, voluntarily undertook to render fire protection services to airport users. *Id.* More importantly, the court found that “[b]y the terms of its operating agreement with the city, Pagra agreed to undertake the fire-protection duty assumed by the city.” *Id.*

Thus, Pagra assumed a tort duty by its contract with the city and was liable in negligence to Walsh. *Id.* at 570-571; *see also Paul v. Faricy*, 228 Minn. 264, 279, 37 N.W.2d 427, 436 (Minn. 1949) (city could become liable for injuries resulting from negligence in maintenance when it entered into a maintenance contract with the state).

Cirrus cites *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975) and *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), but neither involved a contract, reached this issue, nor held that a duty can only be assumed in the absence of one. Cirrus also relies upon *Vermes v. American Dist. Tel. Co.*, 312 Minn. 33, 38, 251 N.W.2d 101, 103-04 (1977), but *Vermes* only stands for the proposition that extra-contractual duties are not assumed. In *Vermes*, a jewelry store in the Foshay Tower was burglarized when bandits entered the store's vault through the ceiling. *Vermes*, the store owner, sued several entities including its burglar alarm company—ADT—for negligence. On appeal, *Vermes* argued that ADT had assumed duties *outside* of the contract and should be liable in negligence for breaching them. *Id.*, 312 Minn. at 37, 251 N.W.2d at 103. The court disagreed, stating that there was “no question in this case that ADT properly performed the specific terms of its service contract with *Vermes*.” *Id.* Because ADT had performed what it had promised to perform, the relationship was governed by the contract and the question became whether there were any extra-contractual duties assumed by ADT outside the contract. *Vermes* is distinguishable from this case (and from *Walsh* and *Faricy*). In this case—as in *Walsh* and *Faricy*—there is no question of assumption of extra-contractual duties outside the contract. Plaintiffs do not claim that

Defendants failed to do something they did not say they would do. Plaintiffs claim that Defendants failed to do what they said they would do—provide Flight Lesson 4a.

Thus, as is clear from *Walsh*, in Minnesota, a tort duty can be assumed by contract and Defendants have produced no authority to the contrary.

B. Tort Claims That Are Derived From Contract Can Also Proceed Where They Involve Claims Of Physical Injury.

Cirrus quotes a partial passage from *80 South Eighth Street Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 395-96 (Minn. 1992), contending that the differing interests served by contract and tort law militate in its favor and against an assumed duty. Cirrus Br. at 45. The full quote, however, shows that this is precisely the type of case where a tort duty will emanate from a contract and tort damages will be allowed.

In *80 South Eighth*, the plaintiff's tort claims—derived from contract—were allowed to proceed. *Id.* at 398. The plaintiff in *80 South Eighth* sought to recover for the costs of maintenance, removal, and replacement of asbestos-containing fireproofing. *Id.* at 395. The court reviewed the differing goals of tort and contract law and the role of the “economic loss doctrine”—a doctrine that has no applicability to this case. The court found that there must be a balance between the two conflicting societal goals “of encouraging marketplace efficiency through the voluntary contractual allocation of economic risks with that of discouraging conduct that leads to physical harm.” *Id.* at 396. Because the damages sought were *not* purely economic losses, the court *allowed the plaintiff's negligence claim*:

We believe that allowing 80 South Eighth to proceed in tort for damages relating to the maintenance, removal and replacement of asbestos-containing fireproofing advances both the rationale and public policy objectives of tort law and the Uniform Commercial Code. In the seminal economic loss case, Justice Traynor stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. *The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.*

He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.

Id. at 398 (emphasis added) (quotation omitted).⁷

Cirrus cites other cases where the tort actions were not allowed, but in each case the court found the damages to be *purely economic*—they did not involve physical injuries or an independent duty. Thus, the plaintiffs in those cases were limited to their contractual claims. Those cases have no applicability to this wrongful death case. For example, in *D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. App. 1984) (Cirrus Br. at 45), the only damages sought—lost profits because of the delay in building a new

⁷ The “economic loss doctrine”—even when it was fully viable in Minnesota—never limited an injured plaintiff’s rights to sue a product manufacturer for physical injuries. See *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (“economic 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*”) (emphasis added), *partially overruled by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990); see Minn. Stat. § 604.101.

warehouse—were purely economic. *Id.* at 158. The court distinguished it from cases, such as here, where personal injuries are claimed:

A consideration of damages sought by D & A also leads to the conclusion that the action is essentially contractual. D & A asked only for lost profits. Under Minnesota law and the majority view, purely economic losses that arise out of commercial transactions are not recoverable in negligence. Minnesota does allow the recovery of economic damages when they accompany personal injury or damage to other property. *There is no personal injury* or damage to other property alleged in this case. *D & A has alleged no breach of a recognized tort duty owed to it by respondents, nor are the damages sought by D & A recoverable in a negligence action because they are based purely on disappointment of commercial expectations.*

Id. at 158-159 (emphasis added) (citations omitted). Likewise, in *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) (Cirrus Br. at 45), the court concluded that the only claims available were contractual because the only damages sought were economic losses for “defects and lateness in construction of a grain storage building.” 330 N.W.2d at 97, 102.

Finally, in a related argument, Cirrus contends that Plaintiffs’ reliance on an assumed duty would be a “back door for a breach of contract claim” and would “impose on Cirrus the very responsibility that parties disclaimed: ensuring Prokop’s competency as a pilot.” Cirrus Br. at 42-44. This argument ignores the holdings of *80 South Eighth*, and *D & A Dev. Co. v. Butler*, and again ignores that the Plaintiffs do not contend that Cirrus breached a duty to “ensure that Prokop was competent.” The duty was the duty to adequately instruct in the safe use of the product. In this regard, Glorvigen agrees that the trial court mischaracterized Plaintiffs’ claim as a claim for “negligent breach of contract” (Add.75, 81-82), but since that characterization was never made to the jury—

and the jury was never instructed on any such theory—the court’s post-trial mischaracterization of Plaintiffs’ claims was harmless.

C. There is No Requirement That The Jury Be Instructed That The Duty It Is Considering May Have Been An Assumed Duty.

Finally, Cirrus argues that Plaintiffs’ assumed duty claims somehow fail because they “were not presented to the jury.” Cirrus Br. at 41. There is, however, no requirement that the jury be informed of the legal genesis of the duty. Here, the jury was informed that Defendants had a duty of reasonable care and was asked whether they breached that duty. There is no requirement that the jury be specifically told that that duty of reasonable care was assumed or otherwise existed, and *Isler*, which is cited by Cirrus, does not say otherwise. *Isler* simply recites the instruction that was given in that case, which happens to state that the duty in that case was an assumed duty. *Isler* does not hold that the jury must be told that the duty it is to consider was an assumed one.

III. This Is Not An Educational Malpractice Case.

Glorvigen agrees with Cirrus that “courts overwhelmingly reject educational malpractice claims.” Cirrus Br. at 49. This case, however, is not an educational malpractice case. Therefore, this Court need not, and should not, reach the issue of whether the bar of educational malpractice—as formulated in *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. App. 1999)—will be the law in Minnesota in cases involving education and educational institutions.

As stated in Plaintiffs’ primary briefs, the decision of the Court of Appeals to extend the bar of educational malpractice to a product manufacturer is unprecedented.

No other court in the nation has extended “educational malpractice” protection to a product manufacturer. Under this ruling, Minnesota stands alone as the only jurisdiction that has carved out such an exception to a product manufacturer’s duty to instruct in the safe use of its product.

A. The “Educational Malpractice” Bar Does Not Apply To A Cause Of Action Against A Product Manufacturer.

Cirrus cannot be subject to the educational malpractice bar because *it is not an educator, and it was not engaging in education*. It is a product manufacturer choosing to discharge its duty to provide instruction in safe use through transition training that includes flight lessons. Educational malpractice cases—as the Court of Appeals recognized—involve suits against educational institutions charged with the education of students. *Glorvigen*, 796 N.W.2d at 552-553. (Add.21-22). Allowing Defendants to benefit from a bar designed to keep the courts out of the inner workings of schools would greatly limit long-standing Minnesota products and tort law and open the door for abuse as manufacturers manipulate their product instruction to take advantage the new-found immunity. *See* *Glorvigen* Primary Br. at 36-37.

B. The Policy Considerations Upon Which Educational Malpractice Rests Do Not Apply Where A Product Manufacturer Is Negligent In Providing Product Instruction.

Cirrus contends that it provided “education” to Prokop, seizing upon the fact that it used flight lessons as part of its product instruction—and hired a third-party, which sometimes acts as a flight school, to act as its surrogate. Defendants then jointly ask this Court to blindly import the policy reasons used to keep the courts out of the schools into

this product instruction case. *See, e.g.*, Cirrus Br. at 47-49, 57-60; UNDAF Br. at 33-36. However, as detailed in Glorvigen’s previous brief, none of those policy reasons apply here:

1. There is no lack of satisfactory standard for judging a product manufacturer that has a duty to provide instruction in the safe use of its product—it is held to the standard of a reasonable manufacturer; *see Gray*, 676 N.W.2d at 274 (manufacturer must exercise “reasonable care” as a supplier of chattel) (quotation omitted);

2. There was no evidence here that there were any causation issues caused by Prokop’s “attitude, motivation, temperament, past experience or home environment”—on the contrary the evidence was that Prokop could not perform the necessary maneuver because he was never given Flight Lesson 4a;

3. There will be no potential flood of litigation against flight schools as a result of this case since this case does not involve a flight school. Moreover, the threat that manufacturers such as Cirrus will “likely stop offering pilot education at all” (Cirrus Br. at 59) also rings hollow. Manufacturers such as Cirrus have a duty to instruct in safe use, and they must act reasonably to discharge that duty. They cannot just walk away from that duty. Nothing is gained if, in response to a threat that they will stop offering adequate instruction, they are given immunity to provide instruction negligently;

4. There is no danger of embroiling the courts in the day-to-day operations of school since this case does not involve a school. Thus, Cirrus’s reliance on the

MAJ's observation that "each institution must be allowed 'to set its own standard of conduct about what it will and will not choose to teach'" is misplaced. Cirrus Br. at 59-60. The MAJ was referring to schools, not product manufacturers. Product manufacturers are not free to choose what instructions they will or will not provide. They are held to the standard of a reasonable product manufacturer as developed in decades of black letter Minnesota case law;

5. To the extent Defendants (and *amici*) seek to imply that federal regulations bar Plaintiffs' claims, those claims of preemption were denied by the federal district court. *Glorvigen v. Cirrus Design Corp*, No. 05-2137, 2006 U.S. Dist. LEXIS 8741, 2006 WL 399419, at *4-6 (D. Minn. Feb. 16, 2006) (A.31-43); *Glorvigen v. Cirrus Design Corp.*, 2008 U.S. Dist. LEXIS 10899, *7-9 (D. Minn. Feb. 11, 2008). (Add.139).

The Court of Appeals majority did not examine these policy considerations in detail, but found, without explanation, that the first two policy considerations "potentially are implicated any time there is a challenge to the effectiveness of education or instruction provided by an institution—even if the institution is not primarily in the business of education." *Glorvigen*, 796 N.W.2d at 555. (Add.25). Such a broad standard would go well beyond opening up the availability of the bar to product manufacturers and

would implicate the bar whenever an “institution” could creatively characterize what it was doing as “education.”⁸

C. The Few Educational Malpractice Cases That Defendants Point To As Not Involving “Traditional” Educational Institutions Are Distinguishable From This Case And Do Not Support Application Of The Bar To A Product Manufacturer.

Because the educational malpractice bar is designed to bar cases against educational institutions, the cases relied upon by Defendants are cases against educational institutions—with those in the airplane crash realm being against flight schools. Neither Defendant points to a single case where educational malpractice was used to bar a claim against a product manufacturer. Moreover, the few cases that Defendants point to as not involving “traditional” educational institutions (Cirrus Br. at 63) involved non-product manufacturers who were providing general educational services. *Bunker v. Assn Mo. Elec. Coop.*, 839 S.W.2d 608, 611 (Mo. App. 1992) (with no discussion of “educational malpractice,” court found that trade association that put on seminars had no duty under Missouri law “to effectively educate its students” and further found that “the record is devoid of any evidence that the teaching by the Association was inadequate, negligent, or that they failed to teach the proper method of repair”); *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111, 118 (Conn. 1996) (where terminated medical resident challenged his

⁸ Cirrus adopts this broad interpretation of the bar, stating that “there is no rational reason to base the applicability of the educational malpractice doctrine on whether the sponsoring institution is a public university or a private company.” Cirrus Br. at 61. It would seem that a private school would be subject to the bar to the same extent as a public school. But that is irrelevant here, where Cirrus seeks the unprecedented application of the bar to a private product manufacturer, and the majority’s formulation would make it even more widely applicable.

dismissal from the hospital's residency program, court concluded that the suit was subject to the educational malpractice bar because the hospital "assumed educational responsibilities related to, *but distinct from*, its function as an institution for healing the sick") (emphasis added); *Page v. Klein Tools*, 610 N.W.2d 900 (Mich. 2000) (educational malpractice barred claim against apprenticeship organization that put on three week class on how to climb utility poles).⁹

Finally, Cirrus cites *Johnson v. Peterson*, 734 N.W.2d 275 (Minn. App. 2007) as generally holding that "Minnesota does not recognize a cause of action for negligent training." Cirrus Br. at 46. In fact, *Johnson* held that there is no cause of action for negligent training against an employer "*where a claimant sues an employer in negligence for injuries caused by one of its employees.*" *Johnson*, 734 N.W.2d at 277 (emphasis added), quoting *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn. App. 1995), *review denied* (Minn. July 20, 1985). *Johnson* is not an educational malpractice case and is limited to suits brought against an employer for the acts of an employee. It does not hold that there is no "duty to train" in the product instruction context, and it has no applicability to this case.¹⁰

⁹ No party in *Klein* claimed that the educational malpractice doctrine would apply to bar plaintiff's products liability claims stemming from the organization's sale of a pole strap to the plaintiff. Those claims had been dismissed by the Michigan Court of Appeals because the organization, which was not a product manufacturer, had no duty to instruct or warn with regard to a component part.

¹⁰ Defendants' attacks on the cases relied upon by Plaintiffs are also unavailing, as Defendants' basis for distinguishing and discounting them lies in Defendants' faulty insistence that they are acting as educators rather than a product manufacturer. *See, e.g.*, Cirrus Br. at 65.

D. Because It Is Undisputed That Cirrus Cannot Delegate Its Duty To Provide Instructions For Safe Use Of Its Product, UNDAF Was Standing In Cirrus's Shoes As A Product Manufacturer And Was Not Acting As An Educational Institution Subject To The Educational Malpractice Bar.

Cirrus also tries to invoke its use of UNDAF as its transition trainer to bolster its argument that it was providing “educational services” subject to the bar. Cirrus Br. at.57. Cirrus does this while at the same time claiming that “the Court of Appeals decision here did nothing to affect Minnesota’s rule that a product maker cannot avoid liability simply by delegating a portion of its production of the product.” Cirrus Br. at 29. Cirrus cannot have it both ways. If the delegation of its duty to UNDAF implicates the educational malpractice bar, then, under the Court of Appeals ruling, Cirrus’s delegation creates a very large loophole for product manufacturers. A manufacturer would be able to delegate its duty to provide instruction in safe use to an “educational institution” and claim protection under the bar. On the other hand, if Cirrus cannot delegate its duty—as it admits and as case law makes clear—then UNDAF could not have been acting as an educational facility for the purposes of giving the transition training. UNDAF, as agent and joint enterpriser, was simply standing in Cirrus’s shoes, as a product manufacturer, and the educational malpractice bar has no applicability. *See Bilotta v. Kelly Co., Inc.*, 346 N.W.2d 616, 624 (Minn. 1984) (a manufacturer remains ultimately responsible for the safety of its products, even where it delegates a portion of its production to others).

E. The Educational Malpractice Bar Cannot Be Applied To This Case Regardless Of Whether The Jury's Verdict Was Based On Defendants' Failure To Give Flight Lesson 4a Or More General Negligence In The Way They Gave The Transition Training.

As a way of trying to shoehorn this case into an educational malpractice case, Defendants claim that this case was tried on issues broader than whether Flight Lesson 4a was given, and the jury's verdict "may" have been based upon other more general failures on their part. *See, e.g.*, Cirrus Br. at 16-17, 52-53; *see also* UNDAF Br. at 38-39. First, this argument cannot be properly raised on this appeal because Minnesota follows the rule that it is not a court's function to determine on what theory the jury arrived at its verdict. *Nihart v. Kruger*, 291 Minn. 273, 276, 190 N.W.2d 776, 778 (1971) (the court needs only examine the record to decide whether the verdict was supported on *any* theory).¹¹ Second, the educational malpractice bar cannot apply to a products manufacturer regardless of what "theory" the jury based its verdict on—even if it were possible to know what "theory" it is was based on. Third, much of the evidence regarding Defendants' general shortcomings in the transition training came back to the

¹¹ Defendants also intimate that Plaintiffs are solely responsible for the jury "*only*" being asked whether Defendants were negligent in training Prokop, ignoring that they had every opportunity to request that the trial court submit more specific verdict questions to the jury and failed to do so. Cirrus Br. at 16-17 (emphasis in the original); *see also* UNDAF Br. at 38-39. UNDAF cites *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 94 n.2 (Minn. 1987) that "it is preferable that the trial courts submit a separate interrogatory on each theory" (UNDAF Br. at 39), but there is no such requirement and Defendants did not request that it be done.

fact that Flight Lesson 4a was not given. (*See, e.g.*, T.258-261, 274-277, 291).¹²

F. Even If Viewed As An Educational Malpractice Claim, Plaintiffs' Claim Survives Because It Alleges The Breach Of A Promise To Provide Specific Instruction.

Cirrus contends that this case does not fit within the *Alsides* exception for claims that specific promised instruction was not provided. Cirrus Br. at 55-56. There is, however, no basis for the Court of Appeals majority's distinction, now championed by Defendants, that claims based on a failure to provide specific, promised instruction cannot sound in tort. *Glorvigen*, 796 N.W.2d at 555. (Add.25-26). Whether the claim will present prohibited entanglement in a schools' educational, pedagogical, and administrative methods and policies does not depend on whether it sounds in negligence or contract or otherwise. All that matters is whether the claim is that specific, promised instruction was not given.

Here, at its heart, Plaintiffs' claim at trial was that Defendants were negligent in failing to provide the specific instruction they promised—Flight Lesson 4a. Even the vast majority of evidence regarding more generalized short-comings in the transition training comes back to Defendants' failure to provide Flight Lesson 4a. *See supra*, n.12. Thus, Plaintiffs' claim is primarily one for failure to provide specific, promised

¹² UNDAF argues that Plaintiffs' expert, Captain Walters, identified other "causally related" factors contributing to the crash. (UNDAF Br. at 13). Plaintiffs agree, but many of those criticisms relate directly to the omission of Flight Lesson 4a. For example, his opinion about a lack of "management oversight" of training documentation is directly related to the failure to give Flight Lesson 4a because he testified that had oversight occurred, the omission of Flight Lesson 4a would have been noted and Prokop could have been called in to complete his training. (T.276-277). Likewise, his opinion about a lack of "scenario based training" is linked directly to Flight Lesson 4a because the scenario based training he was referring to was Flight Lesson 4a. (T.290-291).

instruction, and is not barred by *Alsides*. 592 N.W.2d at 472-73; see also *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1153, 1159 (D. Kan. 2008) (*Alsides* recognized cognizable claims to the extent the allegation was that the institution failed to perform on specific promises): *Glorvigen*, 796 N.W.2d at 560 (Klaphake, J. dissenting). (Add.37) (“the record evidence is that this promised aspect of training was not provided . . . precisely the type of claim that the *Alsides* court concluded was permissible”).

IV. Responses To UNDAF’s Cross-Review Arguments.

Glorvigen joins in arguments made by Gartland and the Estate of Gary Prokop in response to Defendants’ cross-review arguments that the verdict was not supported by sufficient evidence of causation and that UNDAF cannot be held liable to either Plaintiff.¹³

CONCLUSION

For all the reasons stated above, the Court of Appeals decision should be reversed and the trial court’s judgment against the Defendants should be affirmed in all respects.

¹³ Though not pertinent to this appeal, Glorvigen also notes that the jury award to Glorvigen was \$7,400,000, not \$9,000,000 as Cirrus states in its Brief on p. 5. (Add.51).

Dated: October 3, 2011

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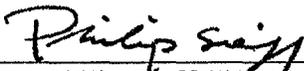
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant Rick Glorvigen, as trustee for the Next-of-kin of decedent James Kosak, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface using Microsoft Word 2003 and contains 9,006 words, according to the Microsoft Word 2003 "Word Count" function, which was set to specifically include headings, footnotes, and quotations.

Dated: October 3, 2011

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