

Nos. A10-1242, A10-1243, A10-1246, and A10-1247

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

and

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

vs.

Cirrus Design Corporation,
Appellant (A10-1246, A10-1247),

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

and

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

REPLY BRIEF OF APPELLANT CIRRUS DESIGN CORPORATION

Bruce Jones, #179553
Daniel J. Connolly, #197427
Daniel J. Herber, #0386402
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 766-7000

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

Counsel for Appellant Cirrus Design Corporation

Philip Sieff, #169845
Vincent J. Moccio, #184640
ROBINS, KAPLAN, MILLER
& CIRESI LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Tel: (612) 349-8500
*Counsel for Respondent Rick Glorvigen as
Trustee for Next-of-Kin of James Kosak*

Timothy R. Schupp, #130837
FLYNN, GASKINS & BENNETT, LLP
333 South Seventh Street, Ste. 2900
Minneapolis, MN 55402
Tel: (612) 333-9500
*Counsel for Estate of Gary Prokop and
Katherine Prokop*

Charles E. Lundberg, #6502X
Steven P. Aggergaard, #336270
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
Tel: (612) 333-3000
and
William J. Katt, #390715
LEIB & KATT, LLC
740 N. Plankinton Ave., Ste. 600
Milwaukee, WI 53203
Tel: (414) 276-8816
and
Thomas R. Thibodeau, #108960
Thibodeau, Johnson & Feriancek, PLLP
800 Lonsdale Building
302 West Superior Street
Duluth, MN 55802
Tel: (218) 722-0073
*Counsel for University of North Dakota
Aerospace Foundation*

Eric J. Magnuson, #66412
BRIGGS AND MORGAN
80 South Eighth Street
Minneapolis, MN 55402-2157
Tel: (612) 977-8400
and
Edward J. Matonich, #68603
Darrold E. Persson, #85364
David Arndt, #149330
MATONICH & PERSSON,
CHARTERED
2031 Second Avenue East
Hibbing, MN 55746
P. O. Box 127
Tel: (218) 263-8881
*Counsel for Respondent
Thomas M. Gartland, as Trustee for the
Next-of-Kin of Gary R. Prokop*

Robert J. Hajek, #39512
HAJEK & BEAUCLAIR, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305
Tel: (612) 801-5067
and
Ronald D. Golden
Raymond C. Speciale
Yodice Associates
411 Aviation Way
Frederick, MD 21701
Tel: (301) 695-2300
*Counsel for Amicus Curiae Aircraft
Owners and Pilots Association*

Andrea B. Niesen, #343493
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue SE, Ste. 305
Rochester, MN 55904
Tel: (507) 282-1503
*Counsel for Amicus Curiae Minnesota
Association of Justice*

William M. Hart, #150526
Damon L. Highly, #0300044
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Tel: (612) 338-0661
*Counsel for Amicus Curiae Minnesota
Defense Lawyers Association*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REPLY REGARDING FACTS	1
ARGUMENT	3
I. PLAINTIFFS' CLAIMS REST ON EDUCATIONAL MALPRACTICE, NOT PRODUCT LIABILITY.	3
A. Plaintiffs Pursued Educational Malpractice Claims.	4
1. Plaintiffs actually tried educational malpractice.	4
2. Respondents' legal arguments do not alter the character of the educational malpractice claims here.	6
3. The fact that Cirrus is not a traditional educational institution d oes not undercut the bar on educational malpractice claims.	11
4. MAJ premised its participation in this case on extending the Alsid exception to the educational malpractice bar to negligence claims.	13
B. Plaintiffs' Claims Are Not Product Liability Claims.	14
1. Plaintiffs did not plead or try a product liability case.	14
2. Judge Ten Eyck did not treat Plaintiffs' claims as product liability claims.	15
3. Judge Magnuson's grant of summary judgment on Plaintiffs' strict- liability failure-to-instruct claim forecloses as a matter of law any negligent failure-to-instruct claim.	16
II. RESPONDENTS' MUDDLED DISCUSSION OF DEFENDANTS' DUTY DOES NOT SUPPORT THE JUDGMENT HERE.	18
A. Defendants Had No Common Law Duty to Train Mr. Prokop to Proficiency on the Autopilot.	19
B. Any Contractual Duty Defendants Had to Mr. Prokop Cannot Sustain Liability in this Case.	21

III. Plaintiffs Have Abandoned the Trial Court’s Ground for Sustaining
the Judgment. 23

IV. PLAINTIFFS FAILED AS A MATTER OF LAW TO PROVE
CAUSATION..... 25

CONCLUSION 27

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<u>Alsides v. Brown Inst., Ltd.</u> , 592 N.W.2d 468 (Minn. App. 1999).....	passim
<u>Anderson v. Anoka Hennepin Ind. Sch. Dist. 11</u> , 678 N.W.2d 651 (Minn. 2004).....	8
<u>Andre v. Pace Univ.</u> , 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996).....	5
<u>Berkebile v. Brantly Helicopter Corp.</u> , 311 A.2d 140 (Pa. 1973)	10
<u>Bunker v. Ass’n Mo. Elec. Coop.</u> , 839 S.W.2d 608 (Mo. App. 1992).....	12
<u>Cont’l Ins. Co. v. Loctite Corp.</u> , 352 N.W.2d 460 (Minn. App. 1984)	18
<u>Cretex Cos., Inc. v. Const. Leaders, Inc.</u> , 342 N.W.2d 135 (Minn. 1984).....	22
<u>D&A Dev. Co. v. Butler</u> , 357 N.W.2d 156 (Minn. App. 1984)	23
<u>Dallas Airmotive, Inc. v. Flightsafety Int’l, Inc.</u> , 277 S.W.3d 696 (Mo. App. 2008).....	passim
<u>Dallas Airmotive, Inc. v. Flightsafety Int’l, Inc.</u> , No. 02-CV-213425-01 (Cir. Ct. Jackson County, Mo.)	7
<u>Davis v. Am. Family Mut. Ins. Co.</u> , 521 N.W.2d 366 (Minn. App. 1994)	21
<u>Doe v. Yale University</u> , 748 A.2d 834 (Conn. 2000)	9
<u>Driver v. Burlington Aviation, Inc.</u> , 430 S.E.2d 476 (N.C. App. 1993).....	10

<u>Gerster v. Special Adm’r for Estate of Wedin,</u> 199 N.W.2d 633 (Minn. 1972).....	25, 26, 27
<u>Gupta v. New Britain Gen. Hosp.,</u> 687 A.2d 111 (Conn. 1996).....	4
<u>Harper v. Herman,</u> 499 N.W.2d 472 (Minn. 1993).....	21
<u>Hauenstein v. The Loctite Corp.,</u> 347 N.W.2d 272 (Minn. 1984).....	17
<u>Hodder v. The Goodyear Tire & Rubber Co.,</u> 426 N.W.2d 826 (Minn. 1988).....	10
<u>Hunter v. Bd. of Educ.,</u> 439 A.2d 582 (Md. 1982)	7
<u>Johnson v. Peterson,</u> 734 N.W.2d 275 (Minn. App. 2007).....	4, 13
<u>Kirchner v. Yale Univ.,</u> 192 A.2d 641 (Conn. 1963)	9
<u>Larson v. Indep. Sch. Dist. No. 314,</u> 289 N.W.2d 112 (Minn. 1979).....	8, 9
<u>Lesmeister v. Dilly,</u> 330 N.W.2d 95 (Minn. 1983).....	22
<u>Loram Maint. of Way, Inc. v. Consol. Rail Corp.,</u> 354 N.W.2d 111 (Minn. App. 1984)	17
<u>M.L. v. Magnuson,</u> 531 N.W.2d 849, 856 (Minn. App. 1995).....	4
<u>Page v. Klein Tools,</u> 610 N.W.2d 900 (Mich. 2000).....	7
<u>Swidryk v. St. Michael's Med. Ctr.,</u> 493 A.2d 641 (N.J Super. Ct. Law Div. 1985).....	7
<u>Terwilliger v. Hennepin County,</u> 561 N.W.2d 909 (Minn. 1997).....	8

Walden Bros. Lumber, Inc. v. Wiggin,
408 N.W.2d 675 (Minn. App. 1987) 25

Wicken v. Morris,
527 N.W.2d 95, 98-99 (Minn. 1995) 20

FEDERAL CASES

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) (Blackmun, J. concurring) 12

DeVito v. United Air Lines, Inc.,
98 F. Supp. 88 (E.D.N.Y. 1951) 10

Glorvigen v. Cirrus Design Corp.,
2008 WL 398814 (D. Minn. Feb. 11, 2008) 6, 15, 17

In re Cessna 208 Series Aircraft Products Liability Litigation,
546 F. Supp. 2d 1153 (D. Kan. 2008) 7

In re Complaint of Bay Runner Rentals, Inc.,
113 F. Supp. 2d 795 (D. Md. 2000) 10

Ross v. Creighton Univ.,
957 F.2d 410 (7th Cir. 1992) 6

Sheesley v. Cessna Aircraft Co.,
2006 WL 1084103 (D.S.D. Apr. 20, 2006) 7

United States v. Johnson,
853 F.2d 619 (8th Cir. 1988) 23

FEDERAL STATUTES

Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264 § 271, 110
Stat. 3213, 3238 (1996) 12

RULES

Minn. R. Civ. P. 54.02 24

Minn. R. Civ. App. P. Rule 128.02 1

OTHER AUTHORITIES

Black's Law Dictionary at 971 (7th ed. 1999) 6

REPLY REGARDING FACTS

Plaintiffs mistakenly accuse Defendants of violating Rule 128.02, subd. 1(c) by not fully summarizing the facts on which Plaintiffs wish to focus. Glorvigen Br. 7; Gartland Br. 5. Defendants presented the facts bearing on the legal analysis in Judge Ten Eyck's decision denying Defendants' posttrial motions, assuming that Plaintiffs would try to defend the trial court's decision. Instead, as discussed below, Plaintiffs have almost entirely abandoned Judge Ten Eyck's posttrial liability analysis and instead urge a different analysis based on a pretrial order by Judge Magnuson. Obviously, the facts bearing on Judge Ten Eyck's decision—his "extension" of the educational malpractice bar's exception (ADD-19-20) to claims of "negligent performance of contract" (ADD-24) based on a version of "negligence" that is violated only "when there is a **total omission**...in providing specific instruction included in the curriculum" (ADD-20)—differ from those bearing on Respondents' arguments that this is an ordinary product-liability failure-to-warn case.

Moreover, Plaintiffs' Statements of Fact themselves offers factual assertions not supported by the record. For example, both Plaintiffs assert that "Cirrus officials agreed that Cirrus was responsible for seeing that there was a transition program," implying that Cirrus agreed that it had a common-law duty to provide such a program. Gartland Br. 8-9, Glorvigen Br. 7-8 (both citing Tr.1509). In fact, the witness in the passage cited testified *only* that he was *personally* responsible for the transition training program that Cirrus had chosen to offer, *not* that Cirrus was obligated to offer such a program:

Q But you were in charge of transition training with regard to the Cirrus operation, were you not?

[objection omitted]

A Yes, I was responsible, you know, for insuring that there was a transition training program and recruited UND to do it.

Tr. 1508:24-1509:8.

Similarly, Plaintiff Gartland asserts (without record citation) that Mr. Prokop “had received no instruction” on IFR-into-IMC using autopilot. Gartland Br. 7. But it is undisputed that Defendants provided Mr. Prokop with written training materials and over two hours of ground instruction in what the syllabus describes as “VFR into IMC Procedures.” A-90; A-253-254(Tr. 403:16-404:6); A-198, 217(Exhs. 10, 210); A-197(Exh. 9); A-212-216(Exh. 88); A-252(Tr. 387:6-23). Gartland also asserts that UNDAF’s course manager “acknowledged that there is no portion of the syllabus that lists ‘VFR into IMC autopilot assisted’ other than lesson 4a.” Gartland Br. 13 (citing Tr. 514). What the cited testimony *actually* said was that no portion of the syllabus other than Lesson 4a listed VFR-into-IMC autopilot assisted *as a flight lesson*, a critical distinction that Plaintiffs’ attorney’s questioning makes clear:

Q [Glorvigen attorney] And there is no place in this syllabus anywhere where recovery from VFR into IMC autopilot assisted *as a flight lesson* is listed, correct?

A That terminology, that exact terminology is not used in any other place in this document.

Q There's no other place that that specific lesson is denoted, that had specific maneuver *in flight*, correct?

A There's no other place in the document that that terminology is used.

Tr. 513:25-514:10 (emphasis added).

ARGUMENT

I. PLAINTIFFS' CLAIMS REST ON EDUCATIONAL MALPRACTICE, NOT PRODUCT LIABILITY.

Respondents and amicus Minnesota Association for Justice now assert that Plaintiffs' claims do not involve educational malpractice or negligent training. See Gartland Br. 30-35, Glorvigen Br. 28-43, Estate Br. 21-31; MAJ Br. 6-7. This belated position, however, cannot be reconciled with the case Plaintiffs actually tried. Plaintiffs pursued educational malpractice and negligent training claims that go to the heart of the educational decisions and public policy concerns protected by the Alsides court and other courts nationwide. See UNDAF Reply Br. 9-12. Indeed, it is difficult to see how a claim that asks a jury whether a defendant was "negligent in its training of Gary Prokop" (ADD-80) can be anything other than a claim for negligent training.

Respondents' *post hoc* attempt to recharacterize their claims as product claims alleging failure to instruct fails for a number of reasons. Neither Plaintiff pleaded a product-based negligence claim, the case was not tried as a product case, the jury was not instructed on negligent failure to instruct about a product, and Judge Ten Eyck's lengthy posttrial decision did not treat the negligence claim as a product-based claim. Finally, Judge Magnuson's unappealed summary judgment on Plaintiffs' strict-liability failure-to-instruct claim forecloses as a matter of law the substantively identical negligent failure-to-instruct claim that Respondents now belatedly advance.

A. Plaintiffs Pursued Educational Malpractice Claims.

Plaintiffs' claims here rest on allegations of educational malpractice and negligent training, neither of which Minnesota law permits. See Alsides v. Brown Inst., Ltd., 592 N.W.2d 468 (Minn. App. 1999); Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. App. 2007) (“[C]urrent Minnesota law does not recognize a cause of action for negligent training.”) (citing M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. App. 1995)).

1. Plaintiffs actually tried educational malpractice.

Respondents' denial that their claims allege educational malpractice and negligent training essentially ignore the case that Plaintiffs put in at trial:

- Plaintiffs asserted that the training Defendants provided was not adequate. E.g., Tr. 258:19-259:5; 450:10-451:12. This claims educational malpractice. Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119 n.15 (Conn. 1996) (educational malpractice claim involves student suing educator “for *tortiously* failing to provide adequate educational services” (emphasis in original)).
- Plaintiffs asserted that the training defendants provided was not “reasonable.” See A-237(Tr. 260:24-261:1 “Q. Was the...transition training that he received reasonable? A. I don't believe so.”); see also A-235, 239-240(Tr. 242:22-243:14; 274:15-275:8. This claims educational malpractice. Dallas Airmotive, Inc. v. Flightsafety Int'l, Inc., 277 S.W.3d 696, 700 (Mo. App. 2008) (“If a negligence claim raises questions concerning the reasonableness of the educator's conduct in providing educational services, then the claim is one of educational malpractice.”).

- Plaintiffs asserted that the training Defendants provided did not meet industry standards. E.g., A-237(Tr. 260:21-24 “Q. Do you have an opinion as to whether [the transition training] meets industry standards? A. My opinion is, no, it does not meet industry standards.”). This claims educational malpractice.

Dallas Airmotive, 277 S.W.3d at 700 (noting claim that educational services are “substandard” “constitutes a claim of educational malpractice”).

- Plaintiffs asserted that the Defendants’ ground training in VFR-into-IMC using autopilot was not effective and that the training had to include in-flight training as well. E.g., A-237(Tr. 258:19-23). This claims educational malpractice.

See Alsides, 592 N.W.2d at 473 (holding educational malpractice claim

“necessarily entails an evaluation of...the effectiveness of the pedagogical method chosen,” quoting Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996)).

In a footnote, Plaintiffs try to minimize the scope of their attacks on the transition training program, asserting that their claims “were narrowly focused on the specific undertaking of Cirrus and UNDAF to provide transition training that included instruction from VFR into IMC, and the failure to provide that training.” Gartland Br. 31 n.15.

Cirrus respectfully submits that no reasonable review of the record, and particularly of the direct examination of Plaintiffs’ expert Walters (Tr. 151:20-296:15) could reach such a conclusion. The record passages cited above and in Cirrus’s opening brief, see Cirrus Br. 33-37, demonstrate beyond peradventure that Plaintiffs consistently attacked, not just the omission of Lesson 4a, but the transition training’s adequacy, reasonableness,

effectiveness, and compliance with industry standards, including in their arguments to the court, A-301(Tr. 1421:19-23), and to the jury, A-311-312, 316 (Tr. 1922:16-20; 1943:12-15; 1967:14-18).

2. Respondents' legal arguments do not alter the character of the educational malpractice claims here.

Respondents' attempts to avoid Alsides and to invoke other cases does not bear scrutiny. Respondents repeat the error that Judge Magnuson made, focusing on the Alsides court's omission of any specific mention of negligence. Gartland Br. 28-29; Glorvigen Br. 31-33; MAJ Br. 7; Glorvigen v. Cirrus Design Corp., 2008 WL 398814, at *3 (D. Minn. Feb. 11, 2008) (“[T]he [Alsides] plaintiffs did not sue for negligence but rather for breach of contract, fraud, and misrepresentation.”). But this argument elevates form over substance. Malpractice claims are inherently negligence claims, see, e.g., Black's Law Dictionary at 971 (7th ed. 1999) (defining “malpractice” as “[a]n instance of negligence or incompetence by a professional”). In Alsides, plaintiffs specifically alleged “that the education they received was inadequate and the instructors were incompetent,” 592 N.W.2d at 471, the very claims that courts have identified as the negligence claims at the core of the educational malpractice doctrine. See Dallas Airmotive, 277 S.W.2d at 700. And the Alsides court itself found that the educational malpractice doctrine barred those claims, despite the fact that plaintiffs framed them as contract or fraud claims. See 592 N.W.2d at 473.

In addition, many of the cases on which the Alsides court relied made clear that educational malpractice by its nature involves negligence, see, e.g., Ross v. Creighton

Univ., 957 F.2d 410, 412 (7th Cir. 1992) (describing “educational malpractice” as type of negligence); Hunter v. Bd. of Educ., 439 A.2d 582, 583-84 (Md. 1982) (equating claim of educational negligence with educational malpractice); Swidryk v. St. Michael's Med. Ctr., 493 A.2d 641, 642 (N.J Super. Ct. Law Div. 1985) (same). And contrary to another of Respondents’ arguments, see Glorvigen Br. 21-23 & n.3, the educational malpractice bar and the Alsides analysis apply to cases involving personal injury as well as economic injury. See, e.g., Swidryk, 493 A.2d at 642 (involving underlying claim of infant brain damage), cited by Alsides; see also Page v. Klein Tools, 610 N.W.2d 900, 901, 903 (Mich. 2000) (citing Alsides, alleging fall from utility pole); Dallas Airmotive, 277 S.W.2d at 698, 700 (citing Alsides, wrongful death claim).

None of the other authority Respondents cite permits them to avoid the educational malpractice bar. Respondents rely heavily on In re Cessna 208 Series Aircraft Products Liability Litigation, 546 F. Supp. 2d 1153 (D. Kan. 2008). See Glorvigen Br. 32-33, 42-43; Estate Br. 29-31. But In re Cessna is an outlier decision that specifically notes that multiple other cases—*including Alsides*—“have rejected educational malpractice claims *in analogous circumstances*.” Id. at 1158 (emphasis added, also citing Dallas Airmotive v. FlightSafety Int'l, Inc., No. 02-CV-213425-01 (Cir. Ct. Jackson County, Mo.), and Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006)). Faced with this body of authority, the Cessna court makes clear that it is deferring to an earlier Texas state court judge’s analysis of Texas law (which it does not discuss) and “declines to revisit this issue under Texas law.” Id.

Respondents also rely extensively on Larson v. Indep. Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1979), and several similar cases involving claims for injuries suffered *during* classes or training. See Glorvigen Br. 38-40, Gartland Br. 33-34; MAJ Br. 6. In Larson, the teenage plaintiff claimed that a teacher negligently taught and a principal negligently supervised a required headspring in a gymnastics class, resulting in a paralyzing injury. 289 N.W.2d at 115-16. Larson does not support the judgment here for several reasons. First, as Respondent Gartland hints in his footnote 17, the issue in Larson was *not* whether the school had a duty to teach a headspring adequately, but whether the duty at issue was ministerial or discretionary for purposes of common law official immunity.¹ Id. at 119-23. Second, in contrast to Respondents' position here, the Larson court held that the curriculum's inclusion of particular items did *not* establish duties for the school:

the activities and courses of study prescribed in Curriculum Bulletin No. 11 were intended to be used as *guidelines* and did not establish mandatory affirmative duties for teachers, principals, or superintendents.

Id. at 117 n.8 (emphasis added). This holding puts the lie to Respondent's assertion that "appellants' own curriculum established the standard of conduct by which their actions

¹ The other Minnesota case cited by Gartland and amicus MAJ, Anderson v. Anoka Hennepin Ind. Sch. Dist. 11, 678 N.W.2d 651 (Minn. 2004), is also inapposite here. Anderson also addressed the distinction between ministerial and discretionary duty, and in fact held that the school and the teacher were *not* liable. In addition, contrary to MAJ's implication, the Anderson court's reference to "concern about creating a shield to malpractice," see MAJ Br. 6 n.3 (citing 678 N.W.2d at 661) actually refers back to Terwilliger v. Hennepin County, 561 N.W.2d 909 (Minn. 1997), a *medical* malpractice case that expressed concern over treating public and private health care providers differently with respect to common law official immunity. See 678 N.W.2d at 661 (citing Terwilliger, 561 N.W.2d at 913).

could be judged.” Gartland Br. 31. Compare Larson, 289 N.W.2d at 118 (describing discretion afforded to teachers under curriculum) with A-86 (Cirrus syllabus noting maneuvers “may be discontinued and remain incomplete at the instructor’s discretion”).

Finally, the Larson court addressed the duty that the school had to keep the student safe *while the student was in class*. 289 N.W.2d at 115-16. It is one thing to require a teacher to safeguard a minor student from injury *during* a required activity in a gymnastics class where the teacher is in control; it is quite another to impose a duty on a flight instruction provider to protect the whole world from the conduct of a licensed pilot *after* he finishes its course and the provider has no control.

The court in Doe v. Yale University, 748 A.2d 834, 846-47 (Conn. 2000) (also cited by Respondents) emphasized this very distinction in the context of the educational malpractice bar. The court recognized that, under the educational malpractice doctrine, a claim based on a “the duty to educate effectively...is not cognizable.” Id. at 847. The Doe court permitted the claim before it to proceed, however, because that claim alleged a breach of “[t]he duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee *during the course of instruction or supervision*.” Id. (emphasis added); see also Kirchner v. Yale Univ., 192 A.2d 641, 642-43 (Conn. 1963) (permitting claim based on injuries plaintiff sustained in school’s woodworking shop *during* performance of coursework), cited at Glorvigen Br. 38.

The cited case law also fails to support Respondents’ claim that Cirrus had a duty to train Mr. Prokop in “the proper use of an airplane.” Glorvigen Br. 24-26. All of the cases Respondents cite involve claims that written instructions, flight manuals, or

warning placards failed to provide inadequate information for safe operation of a vehicle. See Driver v. Burlington Aviation, Inc., 430 S.E.2d 476, 482 (N.C. App. 1993) (reversing dismissal where plaintiff claimed instruction manual for plane failed to warn of and “wrongfully instructed” concerning icing dangers); Berkebile v. Brantly Helicopter Corp., 311 A.2d 140, 142-45 (Pa. 1973) (remanding claim that helicopter manufacturer “gave no adequate warnings” in the flying manual or on the cockpit placard concerning “need for instantaneous reaction in emergency power failure”); DeVito v. United Air Lines, Inc., 98 F. Supp. 88, 96 (E.D.N.Y. 1951) (holding evidence sufficient to hold plane manufacturer liable where manufacturer did not instruct pilots of proper procedure “in any manual” or warn of risks of rebreather mask use). Here, Respondents do not dispute that the written training materials that Defendants provided Mr. Prokop were complete and accurate. Glorvigen Br. 35 (“Respondents do not complain that the training materials...were deficient.”).

Instead, Respondents argue that Defendants had a common law duty, not just to provide Mr. Prokop with warnings or instructions about the safe operation of the plane, but to “ensure that purchasers of the plane were adequately trained to fly it.” Gartland Br. 8. That is not the law, and the cases do not support such a rule. In each case Respondents cite, the court held the seller had a duty to *provide information* to the buyer about product dangers, *not* to insure that the buyer is competent to use the product. See, e.g., Hodder v. The Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833 (Minn. 1988) (imposing continuing post-sale duty to warn of newly discovered danger of product); In re Complaint of Bay Runner Rentals, Inc., 113 F. Supp. 2d 795, 803 (D. Md. 2000).

Respondents fail to cite a single case from any jurisdiction that does what Respondents ask this Court to do: impose on a manufacturer an affirmative legal duty to ensure that a purchaser is adequately trained to safely operate a product.

In sum, the failure-to-warn cases Respondents cite do not impose the duty Respondents propose, and do not permit Plaintiffs to escape the fact that theirs are prohibited claims for educational malpractice and negligent training.

3. The fact that Cirrus is not a traditional educational institution does not undercut the bar on educational malpractice claims.

Respondents and the MAJ also assert that the educational malpractice bar cannot apply here because Cirrus is primarily an aircraft manufacturer that provides education, not an institution whose primary function is education. See Estate Br. 21-22, 25; Glorvigen Br. 29-31; MAJ Br. 3 n.2. As a threshold matter, although two days of Mr. Prokop's transition training was included with his purchase of the plane, it is undisputed that Mr. Prokop separately paid UNDAF for an *additional* one and a half days of training. (Tr. 619:7-620:9, 931:21-23; Trial Ex. 303). Nothing in the record suggests that the claimed negligence—the omission of Lesson 4a—fell within the Cirrus-provided training, rather than within the separate training that Mr. Prokop purchased from UNDAF, an established flight-training school.

Second, Plaintiffs' characterization of Cirrus as a "non-teaching entity" (Glorvigen Br. 29) contradicts the fundamental premise of their case: that Cirrus had a common-law *duty to teach* Mr. Prokop how to fly his plane safely. Gartland Br. 8.

Finally, and most importantly, Respondents offer no support for limiting the educational malpractice bar based on type of teaching entity. Respondents cite no case law that makes such a distinction and offers no analysis supporting the distinction. In fact, the law recognizes education generally and the training of pilots specifically as a public good. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 437 (1993) (Blackmun, J. concurring) (“Our cases have consistently recognized the importance of education to the professional and personal development of the individual.”); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104–264 § 271, 110 Stat. 3213, 3238 (1996) (enumerating congressional findings on value of FAA certification of training schools, pilot examiners, and pilots). Plaintiffs do not and cannot reasonably question the benefits of training already-licensed pilots to improve their skills. Whether this is done by a traditional educational institution or a manufacturer does not alter the value of the training or the considerations weighing against interference with teaching decisions. See Alsides, 592 N.W.2d at 472 (noting lack of satisfactory standard of care and risk of court involvement with day-to-day teaching decisions).

And in fact, courts *have* rejected educational malpractice and negligent training claims against defendants that were not “traditional” educational institutions. For example, the Missouri Court of Appeals rejected a claim by an injured electrician that a trade association “failed to exercise reasonable care in furnishing educational services to him...in safety matters which caused his injuries,” holding (among other things) that plaintiff had “failed to establish any duty which the law would impose on the defendant Association for failure to effectively educate its students.” Bunker v. Ass’n Mo. Elec.

Coop., 839 S.W.2d 608, 609, 611 (Mo. App. 1992); see also Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. App. 2007) (rejecting negligent training claim against insurance company and insurance agent’s supervisor).

4. MAJ premised its participation in this case on extending the Alsides exception to the educational malpractice bar to negligence claims.

Finally, it is telling that the amicus MAJ, aligned with Plaintiffs, premised its request to participate in this case on the very issue that Plaintiffs now deny exists here: educators’ liability for negligent teaching. In its petition seeking amicus status, the MAJ encouraged the Court to “recogni[ze] ‘educational malpractice’ or ‘negligent training’ under both tort and contract theories.” Notice and Petition to File Amicus Curiae Brief by Minnesota Association for Justice at 2 (8/18/10). The MAJ urged the Court to hold that “[e]ducation institutions and providers” “have a duty to provide that education and training that the entities themselves have already deemed appropriate and necessary.” Id. Most importantly, the MAJ read Judge Ten Eyck’s decision just as the judge wrote it: as “extending the holding in Alsides... from contract to tort claims.” Id.

After Defendants served their briefs addressing the educational malpractice issue, however, the MAJ’s brief abandoned these positions without explanation, adopting instead Respondents’ present arguments and omitting any mention of extending the Alsides holding. See generally MAJ Br. 2-7. Cirrus respectfully submits that the MAJ’s unexplained abandonment of an issue it earlier represented

had “statewide significance,” *id.* at 2, undermines any suggestion that educational malpractice plays anything less than a central role in this appeal.

B. Plaintiffs’ Claims Are Not Product Liability Claims.

Plaintiffs’ effort to retroactively characterize their claims as product liability negligence claims is unsupported by the record, inconsistent with Judge Ten Eyck’s posttrial decision, and barred as a matter of law by Judge Magnuson’s earlier ruling, which Respondents did not appeal.

1. Plaintiffs did not plead or try a product liability case.

Plaintiffs did not plead product liability claims of negligent failure to train, that is, claims based on a common law duty of reasonable care in instructing about the safe use of a product. Each Plaintiff alleged that Cirrus owed a duty, not simply because it had sold the plane, but because it contracted to provide the training. The Glorvigen complaint does not allege negligence at all, but simply alleges that as part of the sale of the plane, Cirrus “undertook by contractual agreement to provide Gary Prokop with ground and flight training” and that the crash resulted from Cirrus’s “breach of undertaking and duty.” A-4-6. The Gartland complaint likewise bases its training claim on Cirrus’s contractual assumption of the training obligation, asserting that Cirrus “was negligent in the flight training it undertook to provide Gary Prokop.” A-10. This was just how Judge Magnuson described Plaintiffs’ claims in his summary judgment order:

According to Plaintiffs, Cirrus agreed to provide “transition training” as described in an “SR-22 Specifications and Description” document.... There appears to be no dispute that the training was included in the SR-22’s purchase price.

Gartland asserted claims against Cirrus for negligent training [and] strict products liability.... Glorvigen alleged that Cirrus breached its undertaken duty to provide adequate pilot training....²

Glorvigen, 2008 WL 398814, at *1 (RA-425-26).

Nor did Plaintiffs try the case based on any product-based duty to instruct. On the contrary, as discussed above, the entire thrust of Plaintiffs' case was that Defendants' transition training was poorly designed, inadequate, unreasonable, and non-compliant with industry standards.

Even in arguing the posttrial motions, Respondents did not claim that Defendants had breached a product-based common-law duty, but that Defendants had violated their agreement to provide autopilot training. See, e.g., 2/19/10 Hrng at 19:17-19 (Glorvigen attorney: "The question was, did they promise to give him certain training and did they give it to him?"); id. at 29 (Estate's attorney: "They didn't provide what they promised."). Respondents' product-based negligence claim is a new creation for this appeal.

2. Judge Ten Eyck did not treat Plaintiffs' claims as product liability claims.

Judge Ten Eyck plainly did not regard the case as a product case, either at trial or afterward. After hearing the evidence, he rejected Plaintiffs' suggestion of a product-based failure-to-warn jury instruction. Tr. at 1768:21-1769:8; 2/19/10 Tr. at 43:14-22; see CIVJIG 75.25. In his posttrial decision, Judge Ten Eyck based his finding that

² Both complaints also included breach of warranty claims that Judge Magnuson dismissed. Glorvigen, 2008 WL 398814 at *5-6 (RA-429-30).

Defendants owed Plaintiffs a duty, not on any common law duty to provide instructions about the plane, but on Cirrus's own contractual undertaking to provide training, holding:

[T]he claim of negligence is not in regards to **training that was provided** or training that **should have been included in the curriculum**. Rather, the claim here is that training that **was to be provided** as part of **UNDAF's curriculum**, **was not provided.**"

ADD-18 (emphasis in original). Because he recognized that Defendants' duties depended on the agreement to provide training, Judge Ten Eyck went through the lengthy discussion he needed to create a contract-based theory through which to sustain the negligence-based verdict. See ADD-7-31. And it was his recognition of the lack of any existing viable negligence theory—product-based or otherwise—that eventually led him (erroneously in Cirrus's view) to “extend” the Alsides exception to the educational malpractice bar to include a tort that he termed “negligent performance of contract.” See Add-24, 26, 29-30 (“[T]he educational malpractice doctrine carves out an exception within the theory of negligent performance of contract which holds educational institutions to a different standard than other professionals.”). Had this case been an ordinary product-based negligent failure-to-warn case, none of his elaborate effort would have been necessary.

3. Judge Magnuson's grant of summary judgment on Plaintiffs' strict-liability failure-to-instruct claim forecloses as a matter of law any negligent failure-to-instruct claim.

Finally, Respondents' supposed product-based *negligent* failure to instruct claims are foreclosed as a matter of law by Judge Magnuson's grant of summary judgment on Plaintiffs' *strict-liability* failure-to-instruct claim. As noted above, the Gartland

complaint asserted a claim for strict product liability based on failure to instruct. A-10; RA-429. Judge Magnuson granted Cirrus summary judgment on that strict product liability claim, holding that “[Gartland’s] attempt to assert that the aircraft was ‘defective because of inadequate instructions’ fails.” Glorvigen, 2008 WL 398814 at *5 (RA-429). Respondents did not timely seek review of that ruling, so that decision is final. See Loram Maint. of Way, Inc. v. Consol. Rail Corp., 354 N.W.2d 111, 113 (Minn. App. 1984).

Under Minnesota law, a claim for strict-liability failure to warn or instruct like Mr. Gartland asserted is identical in substance to a claim for *negligent* failure to warn or instruct, meaning that Plaintiffs’ failure to establish facts sufficient to take their strict-liability failure-to-warn claim to the jury necessarily forecloses any recovery for negligent failure to warn. The Minnesota Supreme Court directly addressed this issue in Hauenstein v. The Loctite Corp., 347 N.W.2d 272 (Minn. 1984). In Hauenstein, the plaintiff had asserted both negligent and strict-liability failure-to-warn claims, and the jury found the defendant negligent but found that the product was not defective. Id. at 273. The court held these two findings inconsistent, concluding that “[u]nder both theories, Loctite’s duty to warn was defined in terms of reasonableness.” Id. at 275. The court directed that in future courts should not submit *both* negligent and strict liability failure to warn to a jury, and that plaintiffs must elect between them. Id.

Treating Plaintiffs’ claims here as product-based negligent failure-to-instruct claims, as Respondents urge, would result in exactly the irreconcilable result that the Hauenstein court rejected: concurrent findings of liability for *negligent* failure to warn

but *no* liability for *strict-liability* failure to warn. See 347 N.W.2d at 275 (“We therefore conclude that the jury's finding that Loctite was negligent cannot be reconciled with its finding that the product was not defective.”); see also Cont'l Ins. Co. v. Loctite Corp., 352 N.W.2d 460, 463 (Minn. App. 1984) (holding that verdicts “finding negligence and breach of warranty but no strict liability were inconsistent” given failure-to-warn instructions). Because of the identity of these claims, Judge Magnuson’s grant of summary judgment on Gartland’s strict-liability failure-to-instruct claim necessarily forecloses as a matter of law any claim for negligent failure to instruct about a product.

In sum, Respondents’ efforts to belatedly recharacterize their negligent training claim as a product liability negligence claim fail both on the record and on the law. This is an educational malpractice/negligent training case, and this Court should resolve it as such.

II. RESPONDENTS’ MUDDLED DISCUSSION OF DEFENDANTS’ DUTY DOES NOT SUPPORT THE JUDGMENT HERE.

Respondents’ briefs also try to justify Defendants’ liability through an analysis of the duty owed by Defendants. Gartland Br. 27-30; Glorvigen Br. 17-28. Respondents’ analysis, however, mistakenly jumbles together the concepts of tort and contract duties and ultimately undermines any basis for holding Defendants’ liable.

The source Respondents posit for Defendants’ duty is inconsistent and contradictory. In some places, Respondents assert that Cirrus had a common law tort duty to “adequately train” already-licensed pilot Mr. Prokop how to fly his new plane, regardless of any contractual obligation. See, e.g., Gartland Br. 8 (“Because Cirrus was

marketing its plane to people who were casual aviators, Cirrus had an obligation to ensure that purchasers of the plane were adequately trained in how to fly it.”); Glorvigen Br. 24. In other places, Respondents clearly look to the Cirrus-Prokop contract as the source of the duty. See, e.g., Glorvigen Br. 31 (“The claim is nothing more than a negligence claim based on Appellants’ failure to provide the specific instruction promised.”)

In fact, neither tort law nor contract law is sufficient to sustain the jury’s verdict here, which is why Judge Ten Eyck tried so hard to amalgamate the two theories into a contract-based tort he called “negligent performance of contract.” ADD-30-31. As detailed in Cirrus’s opening brief (pages 15-28), Judge Ten Eyck failed, and neither tort nor contract law can sustain the judgment against Defendants here.

A. Defendants Had No Common Law Duty to Train Mr. Prokop to Proficiency on the Autopilot

The Court should reject Respondents’ suggestion that Defendants owed Mr. Prokop a duty to “ensure” that he was “adequately trained” to operate an aircraft. Gartland Br. 8. As discussed above, as a manufacturer Cirrus had the duty to provide adequate “instructions” concerning the safe use of its product. Here, Plaintiffs do not claim that the Cirrus Training Manual or any other written instructional materials that Cirrus provided—including in their instructions concerning operation of the autopilot in VFR-into-IMC conditions—were deficient in any way. Glorvigen Br. 35.

But a duty to provide a buyer with “instructions” is not the same as the “duty to train” a buyer about every foreseeable danger that Respondents urge. Respondents cite

no case from any jurisdiction that suggests that Cirrus had a common-law duty to provide Mr. Prokop with actual in-flight training on autopilot operation, much less a duty to “ensure” that that Mr. Prokop was “adequately trained” to operate the autopilot properly. Gartland Br. 8. Because the nature of flying means that almost any task a pilot undertakes could “foreseeably” cause a crash if improperly performed, the imposition of the duty Respondents urge here would effectively make an aircraft manufacturer the guarantor of the competence of any pilot who buys its plane.³ Nor would such a duty logically stop with the aircraft industry; if an aircraft manufacturer has duty to ensure that everyone who buys its product is properly trained, then so does every manufacturer of a car, or a farm machine, or a power tool, or even a bicycle. After all, each of these products could “foreseeably” injure or kill the operator or a bystander if the operator is not “adequately” trained.

The problem is even more glaring when Respondent Glorvigen tries to justify such a tort duty to passenger Kosak. Respondent Glorvigen argues that he need not prove that Mr. Kosak had a “special relationship” with Defendants because Defendants bore the “general duty that ‘any individual owes another . . . to refrain from conduct that might reasonably be foreseen to cause injury to another.’” Glorvigen Br. 28 (quoting Wicken v. Morris, 527 N.W.2d 95, 98-99 (Minn. 1995)). The case here, however, does not involve a

³ Such a duty would be particularly incongruous here given that Federal Aviation Regulations already set the training requirements for licensed pilots like Mr. Prokop. See generally AIOA Br. 3-9. Regardless of whether the federal regulations legally preempt state law, their existence certainly weighs heavily against imposing on a plane manufacturer a common law duty to train.

duty to *refrain* from injurious conduct; instead, Plaintiffs seek to impose on Cirrus an *affirmative* duty to protect Mr. Kosak from Mr. Prokop's negligent conduct. Absent a special relationship between Cirrus and passenger Kosak, which Gartland does not claim, Minnesota law imposes no such affirmative duty. See, e.g., Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) (holding host who had actual knowledge of shallow water had no affirmative duty to warn guest). And contrary to Respondent Glorvigen's footnoted dismissal of this rule, Glorvigen Br. 20 n.2, this doctrine is not limited to criminal conduct; absent a special relationship, a party has no duty to affirmatively act to protect another from *any* kind of harm. See Harper, 499 N.W.2d at 474.

B. Any Contractual Duty Defendants Had to Mr. Prokop Cannot Sustain Liability in this Case.

Even as they try to avoid the educational malpractice bar, Respondents' briefs make plain their claims' dependence on the contractual promises Cirrus made in the Cirrus-Prokop contract:

Rather than a general claim that the training was not adequate, here the claim was that the precise training which Cirrus specified was necessary to allow the safe operation of the SR22, and which Cirrus *contractually promised to provide*, was not, in fact, provided.

Gartland Br. 32 (emphasis added); see also Glorvigen Br. 31 ("The claim here is that Cirrus failed to deliver on the specific promises it undertook to give flight instruction to Prokop...."). This concession undermines Plaintiffs' claims for several reasons.

Most fundamentally, and most obviously, Plaintiffs did not assert and the jury did not decide any contract claim, A-1-11; ADD-94-96, so no judgment can be based on such a claim. Davis v. Am. Family Mut. Ins. Co., 521 N.W.2d 366, 371 (Minn. App. 1994)

(holding plaintiff who, after trial, raises claim not pleaded or tried by consent “should be held to” original claim only).

Second, because the parties did not try and the jury did not decide a contract claim, the trial here did not involve all the issues and defenses that arise in contract cases. In effect, Plaintiffs want the benefit of the obligation that Cirrus assumed under the Cirrus-Prokop contract without the inconvenience of any of the conditions or limitations that obligation carries with it. Some of those conditions and limitations are imposed by law, including a limitation of the contractual duty to intended beneficiaries, see Cretex Cos., Inc. v. Const. Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984), and limiting consequential damages. See, e.g., Lesmeister v. Dilly, 330 N.W.2d 95, 101 (Minn. 1983). Others conditions and limitations arise from the terms of the contract itself, which here includes provisions granting flight instructors discretion to omit lessons, A-86 (syllabus stating maneuvers “may be discontinued and remain incomplete at the instructor’s discretion”) and providing that Cirrus and UNDAF will not be responsible for Mr. Prokop’s competence after the completion of training. A-188 (“Neither Cirrus, nor its training contractor [UNDAF], will be responsible for competency of purchaser [Mr. Prokop]...during or after the training.”).

Reduced to its most basic flaw, Respondents’ analysis improperly mixes tort law and contract law by trying to base a claim for negligence on Cirrus’s contractual promise. But a claim for “negligence,” like the claim submitted to the jury here, cannot *by its nature* rest on a “specific promise” by an educator to a student. If the claim rests on a promise, it is necessarily a claim for breach of contract, fraud, or misrepresentation. See

Alsides, 592 N.W.2d at 473-74 (permitting claims based on “specific promises and representations”). And if the duty arises from the terms of a contract, there can be no claim for negligence. See United States v. Johnson, 853 F.2d 619, 622 (8th Cir. 1988). Minnesota law permits a plaintiff to recover damages in tort *only* if the defendant had “some duty imposed by law, not merely one imposed by contract.” D&A Dev. Co. v. Butler, 357 N.W.2d 156, 158 (Minn. App. 1984). Respondents’ duty analysis is fatally flawed and cannot sustain the judgment here.

III. PLAINTIFFS HAVE ABANDONED THE TRIAL COURT’S GROUND FOR SUSTAINING THE JUDGMENT.

As set forth in Cirrus’s and UNDAF’s opening briefs, the analysis the district court employed in denying Defendants’ posttrial motions is both legally unsustainable on its own and inconsistent with the instructions and questions given the jury. Cirrus Br. 16-28. Although Respondents pay lip service to the decision, they not only fail to defend but actually *ignore* the district court’s liability analysis. Specifically:

- The district court acknowledged that to sustain the verdict it was “extending” the Alsides exception to the educational malpractice bar to negligence claims. ADD-19-20. Neither the Respondents’ briefs nor the MAJ brief defends or even mentions this critical holding. See Cirrus Br. 15-16.
- The district court adopted a new standard of care for negligence, abandoning reasonable care in favor of a “total omission” standard:

The only time the standard of care may be violated is when there is a **total omission**...in providing specific instruction included in the curriculum.

ADD-20 (emphasis in original); see also ADD-21, -22, -30 n.9.

Respondents do not defend or otherwise address this new standard in any way, much less try to reconcile it with the instructions and questions actually given to the jury. See Cirrus Br. 39-42.

- Finally, and most surprisingly, Respondents actually *deny* that the trial court concluded that Plaintiffs' claims allege "negligent performance of contract." See Estate Br. 13; Gartland Br. 35-38. Judge Ten Eyck could not have been clearer in his decision: "the negligence claim in this case was properly framed as a claim for negligent performance of contract."

ADD-30-31.

Respondents cite repeatedly to Judge Magnuson's pretrial decision denying Cirrus summary judgment, but err badly in suggesting that Judge Magnuson and Judge Ten Eyck reached "the same decision" on educational malpractice. Gartland Br. 4. On the contrary, Judge Ten Eyck's posttrial order did not even mention Judge Magnuson's earlier Order and took an entirely different analytical approach to the educational malpractice issue. See Cirrus Br. 15-16. Judge Ten Eyck effectively overwrote Judge Magnuson's earlier decision and relied instead on the three new holdings described above, none of which Judge Magnuson adopted or even addressed. Judge Ten Eyck of course had the power to revise Judge Magnuson's analysis based on either a different view of the law or intervening events at trial. See Minn. R. Civ. P. 54.02 (providing trial

court may revise earlier orders at any time prior to judgment); Walden Bros. Lumber, Inc. v. Wiggin, 408 N.W.2d 675, 677 (Minn. App. 1987). Thus, whatever its persuasive value, Judge Magnuson's pretrial decision in this case is *not* (as Respondents suggest) "legal authority" in this appeal. Glorvigen Br. 28.

Cirrus respectfully submits that Respondents' abandonment of Judge Ten Eyck's analysis can only reasonably be viewed as a concession of the vulnerability of that analysis.

IV. PLAINTIFFS FAILED AS A MATTER OF LAW TO PROVE CAUSATION

Respondents' efforts to demonstrate a factual basis for the jury's causation finding here confirms the same missing links noted in Defendants' original briefs. Plaintiffs' expert causation testimony here closely parallels the testimony that the supreme court rejected in Gerster v. Special Adm'r for Estate of Wedin, 199 N.W.2d 633, 636 (Minn. 1972), a case that respondents fail to address. In Gerster, although the plaintiff's expert opined based on circumstantial evidence (e.g., decedent Wedin smoked cigarettes, Wedin had been drinking, Wedin had just arrived home) that Wedin's careless smoking probably caused the fire, the supreme court rejected the expert's opinion for lack of foundation because "there is no evidence whatever that Mr. Wedin was smoking in his apartment at or just prior to the time of the fire." 199 N.W.2d at 636.

Plaintiffs face the same problem here. Plaintiffs and Judge Ten Eyck rely on evidence of three facts as foundation for Plaintiffs' expert Walters to opine that Defendants' conduct caused the crash:

1. Mr. Prokop did not receive lesson 4a, in-flight training on autopilot assisted VFR-into-IMC conditions;
2. Mr. Prokop did not employ the autopilot during the flight; and
3. Had Mr. Prokop employed the autopilot, the crash would not have occurred.

Glorvigen Br. 12-14, 3-44; Gartland Br. 22-24, 38-41; ADD-31-48.

Under Minnesota law, particularly Gerster, this evidence is not sufficient foundation for an expert causation opinion that goes beyond speculation. In Gerster, the court focused on the critical unanswered question “Was Mr. Wedin smoking?” So here, the evidence leaves unanswered several critical questions, including:

1. “Did Mr. Prokop try to use the autopilot?” Expert Walters could not opine whether Mr. Prokop tried or even wanted to use the autopilot, A-262(Tr. 445:9–17), and the trial court conceded that “Prokop may not have tried to activate the autopilot or may not have wanted to.” ADD-48.
2. “Did Mr. Prokop have time after he realized the emergency to activate the autopilot?” See Tr. 221:19-22 (expert Walters: “The airplane rapidly descended to the ground, and I don't think anybody can tell you exactly how that happened because we just don't know.”)
3. “Did Mr. Prokop decide to get out of trouble by means other than the autopilot?” See Tr. 361:4-7 (expert Walters acknowledging the possibility that Mr. Prokop intended his sharp descent).

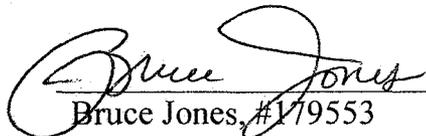
And beyond these questions, Plaintiffs of course encounter the causation problem inherent in educational malpractice cases: even if Mr. Prokop *had* received Lesson 4a in addition to his ground training, would he have learned enough? Even the best teachers cannot successfully teach every student every lesson, and even the best students sometimes fail to effectively apply what they learn. Imposing liability on a teacher for a student's later failings poses the core causation policy problem in educational malpractice claims like this one. See, e.g., Dallas Airmotive, 277 S.W.3d at 701 (“[M]any factors contribute to the quality of a student’s education and the quality of his later performance. The recognition of liability, of course, would be a great invitation to speculation as to causation.”). Plaintiffs’ expert Walters lacked the factual foundation to opine on causation, see Gerster, 199 N.W.2d at 636, and this Court should reverse on that ground.

CONCLUSION

Cirrus Design Corporation urges the Court to reverse the judgment and direct entry of judgment in Cirrus’s favor or, in the alternative, to remand the case to the trial court for a new trial on all issues.

DATED: November 16, 2010.

FAEGRE & BENSON LLP



Bruce Jones, #179553
Daniel J. Connolly, #197427
Dan Herber, #0386402
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
Phone: (612) 766-7000
Fax: (612) 766-1600

and
Patrick E. Bradley
Tara E. Nicola
REED SMITH LLP
Princeton Forrestal Village
136 Main Street; Suite 250
Princeton, New Jersey 08540
Phone: (609) 987-0050
Fax: (609) 951-0824

**COUNSEL FOR DEFENDANT
CIRRUS DESIGN CORPORATION**

STATE OF MINNESOTA
IN COURT OF APPEALS

Rick Glorvigen, as Trustee for the next-of-
kin of decedent James Kosak,

Respondent,

vs.

Cirrus Design Corporation and the Estate
of Gary Prokop, by and through Katherine
Prokop as Personal Representative,

Appellant.

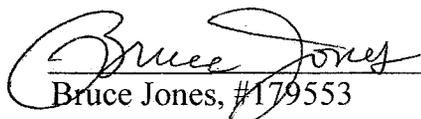
CERTIFICATION OF
BRIEF LENGTH

Appellate Court Case Numbers
A10-1242, A10-1243, A10-1246,
and A10-1247

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App.
P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of
this brief is 6,999 words. This brief was prepared using Microsoft Word 2007 software.

Dated: November 16, 2010

FAEGRE & BENSON LLP



Bruce Jones, #179553
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-7000