

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),
Thomas M. Gartland, as trustee for the next-of-kin of decedent Gary R. Prokop,
Respondent (A10-1243, A10-1247),
vs.

Cirrus Design Corporation,
Respondent (A10-1242, A10-1243),
Appellant (A10-1246, A10-1247),

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

University of North Dakota Aerospace Foundation,
Appellant (A10-1242, A10-1243),
Respondent (A10-1246, A10-1247).

**BRIEF AND APPENDIX OF RESPONDENT
ESTATE OF GARY PROKOP, BY AND THROUGH
KATHERINE PROKOP AS PERSONAL REPRESENTATIVE**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Gary Prokop purchased a Cirrus SR22 aircraft from Cirrus Design Corporation. Cirrus included transition training to Mr. Prokop as part of the purchase price of the SR22 aircraft. Did the district court properly submit the issue of negligence to the jury, when Cirrus and its designated representative, UNDAF, omitted a critical flight lesson set out in the Cirrus Design Initial Training Syllabus?

The district court allowed the jury to consider the question of Cirrus's and UNDAF's negligence in connection with the crash.

Apposite Authority:

Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007)

Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922 (Minn. 1986)

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

2. Did the district court properly determine that the negligence claims against the aircraft manufacturer, Cirrus, and its designated representative, UNDAF, were not barred by the educational malpractice doctrine?

The district court held that the claims against Cirrus and UNDAF were not barred by the educational malpractice doctrine.

Apposite Authority:

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

Glorvigen v. Cirrus Design Corp., No. 06-2661 (PAM/JSM), 2008 WL 398814 (D. Minn. Feb. 11, 2008)

Doe v. Yale Univ., 748 A.2d 834 (Conn. 2000)

In re Cessna 208 Series Aircraft Prod. Liab. Litig., 546 F. Supp. 2d 1153 (D. Kan. 2008)

3. The flight lesson omitted from Gary Prokop's transition training was emergency procedures for inadvertent VFR (Visual Flight Rules) flight into IMC (Instrument Meteorological Conditions) with auto-pilot assistance. Did the district court properly submit the issue of causation to the jury, where the crash occurred as a result of inadvertent VFR flight into IMC-like conditions?

The district court found that the jury properly considered and resolved the issue of causation.

Apposite Authority:

Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995)

Roemer v. Martin, 440 N.W.2d 122 (Minn. 1989)

Smith v. Kahler Corp., Inc., 211 N.W.2d 146 (Minn. 1973)

STATEMENT OF THE CASE

On January 18, 2003, a Cirrus SR22 N9523P airplane piloted by Gary R. Prokop crashed near Hill City, Minnesota, killing Mr. Prokop and his passenger and friend, James Kosak. Rick Glorvigen, as Trustee for the Next-of-Kin of James Kosak, commenced a wrongful death action in the Itasca County District Court against Cirrus Design Corporation (“Cirrus”), the manufacturer of the airplane, and the Estate of Gary Prokop, by and through Katherine Prokop as personal representative. (A 1.)¹ Thomas M. Gartland, as Trustee for the Next-of-Kin of Gary R. Prokop, commenced a wrongful death action in the same venue against Cirrus. (A 9.) University of North Dakota Aerospace Foundation (“UNDAF”), Cirrus’s designated representative with respect to the factory training provided to Mr. Prokop on the SR22, intervened as a Defendant in both actions. (A 42-43.)

Mr. Prokop was provided four days of SR22 transition training at the Cirrus factory in Duluth, Minnesota, from December 9 through December 12, 2002. YuWeng Shipek was the UNDAF instructor who provided the Cirrus Factory Training to Mr. Prokop. Mr. Shipek failed to provide Mr. Prokop with a critical flight lesson on the UNDAF/Cirrus Design Initial Training Syllabus – Flight 4a: IFR Flight (non-rated). (A 90.) The omitted flight lesson included omission of the emergency procedure for

¹ Citations to “A” in this brief refer to the Appendices of UNDAF (A 1-A 142) and Cirrus (A 143-A 326). Citations to “RA” refer to Respondent Estate of Gary Prokop’s Appendix, which is submitted herewith. The Trial Transcript is cited as “Tr.”

recovery from VFR into IMC (auto-pilot assisted). On January 18, 2003, Mr. Prokop crashed as a result of inadvertent VFR flight into IMC-like conditions.

The cases were tried together before the Honorable David J. Ten Eyck. The jury found Cirrus 37.5% causally negligent, UNDAF 37.5% causally negligent, and Mr. Prokop 25% causally negligent. (A 73-75.) The jury awarded plaintiff Glorvigen \$7,400,000 and plaintiff Gartland \$12,000,000 in damages. (*Id.*) Cirrus and UNDAF made numerous post-trial motions which the district court carefully considered, and upon which it ruled, in an 84-page Order and Memorandum filed May 20, 2010. (UNDAF Add. at 1-84.)

In its May 20, 2010 Order and Memorandum, the district court denied Cirrus's and UNDAF's motions for judgment as a matter of law and for a new trial, and declined to disturb the jury's conclusions at trial. The district court determined that the jury properly considered the question of negligence of Cirrus and UNDAF, and that causation was also properly submitted and resolved. Cirrus and UNDAF now appeal.

STATEMENT OF FACTS

Mr. Prokop's Experience as a Pilot

Mr. Prokop began his flight instruction in October, 2000 and obtained his private pilot's license in July of 2001. (Tr. 1170-1171.) Mr. Prokop's private pilot's license allowed him to fly as a pilot-in-command in Visual Meteorological Conditions (VMC). Visual Flight Rules (VFR) are the set of regulations that allow a pilot to operate an aircraft in VMC weather conditions, which are generally clear enough to allow the pilot to see where the aircraft is going. VFR require a pilot to be able to see outside the cockpit to control the aircraft's attitude, navigate, and avoid obstacles and other aircraft. The weather must be better than basic VFR minimums which are, for the purposes of this case, 1,000 foot minimum ceiling with the specified visibility at night. *See* 14 C.F.R. § 91.155.

Mr. Prokop purchased a Cessna 172 aircraft in 2001 and flew that aircraft until he purchased the Cirrus SR22 in December 2002. (Tr. 1171; 1179.) The Cessna 172 Skyhawk is a high wing, entry level aircraft with a fixed tricycle landing gear.

In February 2002, Mr. Prokop began training in his Cessna 172 to obtain his license to fly in Instrument Meteorological Conditions (IMC). (RA 2-5.) Instrument Flight Rules (IFR) have specific training requirements – usually placing a pilot in simulated IMC environment using a view limiting device, sometimes referred to as a “hood.” *See* 14 C.F.R. § 61.65. IFR are regulations and procedures for flying aircraft by

referring to the aircraft instrument panel for navigation. IFR rated pilots are authorized to fly through clouds. (Tr. 1176.)

Mr. Prokop's Purchase of the Cirrus SR22

In the late fall of 2002, Mr. Prokop decided to purchase a SR22 aircraft from Cirrus Design Corporation. The SR22 is a technically advanced aircraft that is different from the Cessna 172 in a number of respects. First, it is a faster, more powerful airplane than the Cessna 172. (Tr. 234; 237; *see also* Tr. 1175.) The Federal Aviation Administration requires a high performance aircraft endorsement in order to pilot the SR22. (Tr. 232, 237.) In addition, the SR22 is operated by a side stick controller instead of a yoke, as on the Cessna 172. (Tr. 229.) The SR22 has a multi-function display not present on the Cessna 172. (*Id.*) And, unlike the Cessna 172, the SR22 is equipped with an autopilot system. (*Id.*)

Cirrus included "Cirrus' standard two-day transition training program" with the purchase of any SR22. (A 188.) Cirrus represented that the training would be conducted by "Cirrus and/or its designated training organization." (*Id.*) Cirrus's designated training organization was UNDAF. (A 207.) Cirrus representative Ian Bentley testified at trial that, after a customer ordered an airplane from Cirrus, Cirrus "set them up to talk to UND[AF] who worked with them as to exactly what their expertise was, what their experience, what their flying history [sic] so that the right training could be put together." (Tr. 1474.)

UNDAF "is a public, non-profit corporation serving the business arm between the

aerospace industry and the John D. Odergard School of Aerospace Sciences at the University of North Dakota.” (RA 11) (emphasis added.) UNDAF asserted it was “excited to become a partner with an innovative aircraft manufacturer like Cirrus” when it communicated with Mr. Prokop. (*Id.*)

The transition training was described in a document entitled “Pilot Training Agreement” for the Cirrus SR22, which stated the training would consist of the following:

1. Aircraft systems training with emphasis on the innovative aspects of the SR22. Examples include combined throttle/propeller control, side yoke and autopilot/trim system.
2. Flight training to proficiency, in accordance with trainer’s standards. Normally this aspect of training will result in 4-5 hours of flight time.
3. Avionics systems training with particular emphasis on the use of GPS and the multi-function display.

(A 188) (emphasis added.)

Mr. Prokop took delivery of his SR22 at Cirrus’s factory in Duluth in December 2002. In Duluth, Mr. Prokop underwent four days of Cirrus’s transition training as provided by UNDAF instructor YuWeng Shipek. Among the procedures that Cirrus set forth in its Initial Training Syllabus was the emergency procedure of “Recovery from VFR into IMC (auto-pilot assisted).” (A 90.) This procedure was contained among other procedures in a section of Mr. Prokop’s Initial Training Syllabus designated “Flight 4a: IFR Flight (non-rated).” (*Id.*) A heading at the top of this and other sections of the

syllabus reads, "Skipped items should be left unchecked." (A 90.) Each procedure in the section contains a corresponding dashed line above which the flight instructor can place a check mark indicating whether the procedure was performed satisfactorily. (*Id.*) None of the procedures in Flight 4a, including auto-pilot assisted recovery from VFR into IMC, were checked, indicating the lessons were not taught. (*Id.*; Tr. 258-260.)

A critical factual dispute at trial was whether Flight 4a was in fact given by Mr. Shipek. Mr. Shipek testified he gave the flight lesson, however the documentary evidence showed otherwise. In his deposition, Mr. Shipek claimed the flight lesson was given as a part of an instrument landing Mr. Prokop made at the Duluth airport. (Tr. 912-913.) However, since recovery from VFR into IMC (auto-pilot assisted) requires a 180° turn, it was not possible the lesson was actually given during the instrument landing in Duluth. (Tr. 301.)

At trial, Mr. Shipek changed his story. Mr. Shipek contended that inadvertent VFR into IMC training was provided to Mr. Prokop but that it "was not documented." (Tr. 792.) Mr. Shipek further claimed this procedure was performed "several" times "under the hood". (Tr. 793.) Mr. Shipek acknowledged, however, that no hood training had been documented in Mr. Prokop's log book, which Mr. Shipek filled out and signed. (Tr. 797-798; RA 6-7.) The jury considered the evidence, and the credibility of Mr. Shipek, on this critical factual issue.

At trial, Captain James Walters testified that Flight 4a was a required part of the transition training given to Mr. Prokop because he was "not a rated IFR pilot." (Tr. 259.)

Mr. Walters opined that, based on the syllabus instruction to leave skipped items unchecked, and the fact that the instructor appeared to be following that instruction throughout the syllabus, Flight 4a was not given. (Tr. 259.) Consequently, Mr. Prokop was not “trained for proficiency.” (Tr. 260.)

The Accident

On January 18, 2003, Mr. Prokop and Mr. Kosak planned to fly from Grand Rapids to St. Cloud to watch both of their sons, who were on the same team, play in a hockey tournament. Their wives and sons had driven to St. Cloud on the evening of January 17, 2003. (Tr. 1305-1307.)

The morning of January 18, Mr. Prokop called the Flight Service Station twice to obtain VFR weather briefings for his intended route of flight. The first briefing at 4:55 a.m. indicated that the weather was improving south of Grand Rapids and Mr. Prokop was advised that “it looks like ah you know if you waited a couple hours ceilings should lift some for ya.” (A 226.) During the second briefing at 5:41 a.m., Mr. Prokop advised that “right now we’re about twenty eight hundred overcast in grand rapids . . .” (A 220.) This inquiry suggested improvement in the weather to the south. (A 222-223.) The weather conditions were significantly better than the VFR minimums for VMC flight, both as to the ceiling and visibility.

Captain Walters testified that, on the morning of the fatal flight, Mr. Prokop entered “IMC-like” conditions near Hill City, Minnesota that prevented him from being able to fly VFR, and that this circumstance was part of the root cause of the crash. (Tr.

222-223.) The evidence suggests Mr. Prokop was making a 180° turn to return to Grand Rapids when the crash occurred.

Captain Walters further testified that Mr. Prokop did not use the autopilot during the attempted return, but was hand-flying the aircraft. (Tr. 223-224.) Significantly, Steven Day, Mr. Prokop's flight instructor, testified that following Mr. Prokop's factory training on the SR22, Mr. Prokop indicated either that he did not "know how to turn the autopilot on" or did not "know how to use the autopilot," which surprised Mr. Day because he thought Mr. Prokop would have been more familiar with the aircraft's avionics at that point. (Tr. 1184-1185.)

Captain Walters' opinions at trial implicate precisely the training that Cirrus through UNDAF omitted, despite its representation through the Initial Training Syllabus that it would be provided. This training was critically important to resolving the difficulties presented by a VFR-rated pilot encountering IMC-like conditions in the SR22. Indeed, Captain Walters testified at trial as follows about the use of autopilot upon entering IMC-like conditions:

Well, an autopilot will do a lot of good things for the pilot of an aircraft depending on the capabilities of that particular autopilot and this one is a very good one. In its most basic form it will keep the wings level. It will also maintain a heading across the ground and it will maintain altitude if it's all programed [sic] properly to do that.

(Tr. 224.) Indeed, Captain Walters testified that had the autopilot been used at a reasonably early point in the unfolding of the incident, it "would have prevented the

accident.” (*Id.*; Tr. 274.)

Captain Walters testified at trial that Mr. Prokop could reasonably have believed that he would be encountering VFR conditions along his flight route on January 18, 2003. (Tr. 304.) Moreover, Captain Walters testified that, based on the weather reports, Mr. Prokop was legal to fly. (*Id.*) When asked at trial whether the failure to train Mr. Prokop to proficiency regarding the inadvertent IMC emergency procedure was the proximate cause of the crash, Captain Walters opined, “Yes, sir.” (Tr. 305.)

LEGAL ARGUMENT

I. STANDARD OF REVIEW

On appeal from the district court's denial of a motion for judgment as a matter of law, this Court must affirm "if there is any competent evidence reasonably tending to sustain the verdict." *Lester Bldg. Sys. v. Louisiana-Pacific Corp.*, 761 N.W.2d 877, 881 (Minn. 2009) (quoting *Rettman v. City of Litchfield*, 354 N.W.2d 426, 429 (Minn. 1984)). Examination of the verdict on appeal considers "the evidence in the light most favorable to the prevailing party" and it will not be set aside "if it can be sustained on any reasonable theory of the evidence." *Id.* (citing *Carpenter v. Mattison*, 219 N.W.2d 625, 628-629 (Minn. 1974)). This analysis "admits every inference reasonably to be drawn from such evidence, as well as the credibility of the testimony for the adverse party . . ." *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979) (citation omitted). The review is *de novo*. *Lester*, 761 N.W.2d at 881 (citing *Diesen v. Hessburg*, 455 N.W.2d 446, 449 (Minn. 1990)).

On appeal from the denial of a motion for a new trial, the "verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. Northern States Power Co.*, 481 N.W.2d 103, 110 (Minn. Ct. App. 1992), *review denied* (Minn. Apr. 29, 1992) (citing *Mervin v. Magney Constr. Co.*; 399 N.W.2d 579, 584 (Minn. Ct. App. 1987)). The district court's decision to grant or deny a new trial is within its sound discretion and will not be disturbed absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d

905, 910 (Minn. 1990) (citing *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 214 N.W.2d 672, 677 (Minn. 1974)).

II. THE DISTRICT COURT'S DECISION PROPERLY RESOLVED CIRRUS'S AND UNDAF'S POST-TRIAL MOTIONS AND SHOULD BE AFFIRMED.

Appellants misconceive three core issues. First, they erroneously claim the court below “created” a new cause of action for negligent performance of contract. Second, they argue the negligence case against them constitutes an impermissible claim of “educational malpractice” that, if affirmed, will unleash a tidal wave of litigation against schools. Finally, they contend the jury “speculated” to reach its verdict, but disregard the various proof offered at trial establishing their negligence. Cirrus overstates the matter when it claims the district court’s decision “is—literally—unprecedented in American jurisprudence . . .” (Cirrus Br. at 17.)

When reviewed in its entirety, the district court’s Order and Memorandum (UNDAF Add. at 1-84) (the “Order and Memorandum”) contains the unremarkable conclusion that product manufacturers and their agents may be held liable in tort when they breach standards of reasonable care in connection with the sale of dangerous products. The authorities upon which appellants rely do not deal with that question, yet it is the central issue on which this case turns. What appellants characterize as a “new” cause of action for negligent performance of contract is nothing but ordinary negligence: duty, breach, causation, and damage.

This case does not involve a “school” or “educational institution,” but rather,

factory training from an aircraft manufacturer and its designated representative.

Educational malpractice is not implicated. That was the conclusion of Judge Paul A. Magnuson of the United States District Court for the District of Minnesota, who rejected the summary judgment motion Cirrus previously brought on this ground. *Glorvigen v. Cirrus Design Corp.*, No. 06-2661 (PAM/JSM), 2008 WL 398814 (D. Minn. Feb. 11, 2008) (“*Glorvigen I*”) (A. 139-140.)² Even if educational malpractice were at issue, negligence claims against appellants are not barred because they had a duty to provide the instructions *they themselves deemed necessary* relative to the use and operation of the product sold – a fast, sophisticated aircraft with high-tech avionics and other features.

The jury evaluated the evidence at trial, assessed the credibility of the witnesses, and found Cirrus and UNDAF failed to live up to the commitment they assumed – to train Mr. Prokop to proficiency in the use and operation of the aircraft – and that this failure proximately caused two deaths. The fact that negligence was established with evidence regarding flight training – specifically, a documented failure to train and testimony concerning that failure – is immaterial. Tort law provides the appropriate redress under these circumstances involving an aircraft manufacturer and its designee. Certainly, the

² Judge Magnuson also rejected Cirrus’s contention that state-law claims against it were precluded on the ground that federal law preempted the field of aviation safety. *Glorvigen II*, 2008 WL 398814 at *2-3. Earlier, Judge Magnuson rejected Cirrus’s related claim that the state-law claims against it were completely preempted by federal law. *Glorvigen v. Cirrus Design Corp.*, Nos. 05-2137 & 05-2138 (PAM/RLE), 2006 WL 399419 (D. Minn. Feb. 16, 2006) (“*Glorvigen I*”) (RA 13.) Thus, the issues raised in the brief of *amicus curiae* AOPA have already been considered and disposed of in this case.

Order and Memorandum does not authorize *carte blanche* litigation against educational institutions, as appellants and certain *amici curiae* appear to claim.

A critical issue of fact presented at trial was whether or not Mr. Shipek gave Flight 4a, which included recovery from VFR into IMC (auto-pilot assisted). Mr. Shipek testified he provided the lesson, but gave inconsistent and contradictory testimony as to when or how the training was provided. The testimony was also contradicted by the syllabus itself – “[s]kipped items should be left unchecked.” Finally, the testimony was contradicted by Mr. Shipek’s failure to enter any “hood” time in Mr. Prokop’s logbook, which Mr. Shipek himself filled out. (RA 6-7.) Viewing the evidence in the light most favorable to the prevailing party, and drawing every reasonable inference, leads to one conclusion: Mr. Shipek never gave flight lesson 4a to Mr. Prokop.

The proof submitted at trial was sufficient to allow the jury to determine appellants’ negligence. Causation determinations are classic fact-finding functions. The jury here properly considered the evidence which was sufficient for it to conclude that appellants were a proximate cause of the damage.

The district court’s decision should be affirmed.

A. The District Court Did Not Create a “New” Cause of Action but Affirmed the Application of Ordinary Negligence Principles to a Product Manufacturer and its Contractual Designee.

In the Order and Memorandum, the district court discussed Minnesota law respecting negligent performance of contract and stated that the negligence claims at issue were “properly framed as a claim for negligent performance of contract which is

permissible under Minnesota law.” (UNDAF Add. at 31.) On this basis, appellants claim the district court impermissibly created a “new” cause of action for negligent performance of contract that should be reversed.

1. The Jury and District Court Properly Applied Ordinary Negligence Principles to This Case.

Appellants misconstrue the district court’s ruling. The Order and Memorandum did not create a new cause of action. Indeed, the court’s holding is not driven by its observations concerning negligent performance of contract, but fundamentally by its recognition that appellants assumed a duty to provide transition flight training to proficiency. (See UNDAF Add. at 30 (“Additionally, the foregoing discussion [concerning negligent performance of contract] *reinforces and highlights* this Court’s conclusion that UNDAF (and by proxy) Cirrus *owed Prokop a duty of care.*”) (emphasis added).) The district court’s recognition of the existence of appellants’ duty of care provides the necessary authorization for the negligence claims that were tried to conclusion in this case. Whether those claims were proven up through contract evidence, or any other type of evidence, is immaterial.

The elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007) (citing *Schmanski v. Church of St. Casimir of Wells*, 67 N.W.2d 644, 646 (Minn. 1954)). Duty is defined as an “obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378 (Minn. 1989) (citing

Rasmussen v. Prudential Ins. Co., 152 N.W.2d 359, 362 (Minn. 1967) (quoting Prosser, *Torts* § 53 (3d ed. 1964))). The question of whether a legal duty to warn exists is a question of law. *Bjerke*, 742 N.W.2d at 664; *Germann v. F.L. Smithe Machine Co.*, 395 N.W.2d 922, 924 (Minn. 1986). In this case, Cirrus included flight training to proficiency as a component to the sale of the SR22 aircraft. Cirrus itself assumed the duty. Issues concerning breach of that duty and causation present questions for the jury to resolve. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987).

In the Order and Memorandum, the district court cited *Germann* and properly considered whether appellants had a duty in this case. On this question, *Germann* provides the following guidance:

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. Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution.

395 N.W.2d at 924-925 (citing *Christianson v. Chicago St. P., M. & O. Ry. Co.*, 69 N.W. 640 (Minn. 1896)).

In *Germann*, plaintiff was seriously injured while he operated an industrial hydraulic press. *Id.* at 923-924. The press manufacturer designed the press with a removable safety bar that, when attached, prevented operators from being caught by a “pinch point” between the moving and stationary parts of the press. *Id.* at 923. The

safety bar had to be removed in order to permit access to the machine for maintenance or repair. *Id.* On the date of the accident, the safety bar was not attached to the press. *Id.* Following trial, the jury found that the press manufacturer was liable because it “failed to provide adequate warnings for the safe use of the product.” *Id.* at 924.

The primary question raised on appeal in *Germann* was whether the press manufacturer had a legal duty to warn users about the dangers of operating the press without the safety bar attached. *Id.* The Minnesota Supreme Court affirmed the jury verdict, finding it was reasonably foreseeable that the safety bar would be removed and that a user could face injury if the press was operated in that condition. *Id.* at 925. The Court held that the press manufacturer had “a legal duty to warn operators of the peril of running the press without a properly attached and operating safety bar.” *Id.*

Here, the district court used the guidance provided by *Germann* to determine that a legal duty existed as to Cirrus and UNDAF, holding, “[a]ircraft are inherently dangerous and it is reasonably foreseeable that failure to provide a specific type of training may lead to injury and even death.” (UNDAF Add. at 20-21.) In addition, the district court observed that “[n]ot finding a duty in this case would be tantamount to finding a total immunity for educational institutions that fail to provide training they deem appropriate against negligence claims.” *Id.* at 21.

Judge Magnuson also cited *Germann* when he denied Cirrus’s summary judgment motion, observing that the duty to warn can arise in the context of a negligence action and “includes the duty to give adequate instructions for the safe use of the product.”

Glorvigen II, supra, 2008 WL 398814 at *3 (quoting *Gray v. Badger Mining Co.*, 676 N.W.2d 268, 274 (Minn. 2004) (A 136-142)). Judge Magnuson reasoned that, “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” to Mr. Prokop and Mr. Kosak. *Id.*, 2008 WL 398814 at *4. In addition, he found that the connection between Cirrus’s alleged negligence and the damage was “not so remote that the Court can conclude that public policy requires awarding summary judgment in favor of Cirrus . . .” *Id.*

In sum, this case involves the straightforward application of negligence principles. The jury was properly instructed on those principles and rendered its verdict accordingly. It need not and should not be disturbed.

2. Negligence Claims Against Cirrus and UNDAF are Not Barred Merely Because the Product was Sold Pursuant to a Purchase Contract.

Cirrus argues that negligence is not a viable theory because any duty that existed was based on “contract” and not imposed by “law.” (Cirrus Br. at 18.) Specifically, Cirrus contends that “Cirrus’s duty undisputedly arose from the terms of the purchase contract; neither the trial court nor the Plaintiffs disputes that if Mr. Prokop had not purchased the plane from Cirrus, Cirrus would have had no duty to train him on use of the autopilot or anything else.” *Id.*

As a preliminary matter, this hypothetical does not shed useful light on the relationship between the parties, because Mr. Prokop *did* purchase the airplane from

Cirrus, and Cirrus *did* undertake to train him to proficiency. Cirrus therefore obligated itself to use reasonable care in undertaking and discharging obligations it assumed. *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975).

However, to the extent Cirrus's hypothetical is posed in order to demonstrate a supposed "contractual" basis to the relationship between Cirrus and Mr. Prokop, respondent respectfully suggests it is misguided. The cases that Cirrus cites on this point all involve pure economic loss, not personal injury. *Cf. D&A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. Ct. App. 1984) (no negligence claim for alleged lost profits owing to failure to timely complete architectural plans); *United States v. Johnson*, 853 F.2d 619 (8th Cir. 1988) (no negligence claim against government relative to administration of farm storage loan contracts); *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) (no "negligent breach" of contract claim relative to economic loss stemming from construction activities). There are sensible reasons to distinguish between tort and contract in cases where no personal injury is involved and there are only economic losses, since the failure to do so would authorize a tort action for any commercial dispute. But that is not the gravamen of this action. Cirrus's position that the sale of the aircraft pursuant to a "purchase contract" invalidates tort claims is untenable. If it were true, tort claims could *never* be maintained by a product purchaser against a manufacturer, since such claims would be deemed to arise from the "contract" of sale. *See* Minn. Stat. § 604.101 (2000) (codifying economic loss doctrine and providing that it "does not apply to claims for injury to the person").

Contrary to appellants' view, the Order and Memorandum does not permit open-ended tort liability for any breach of contract. It merely applies the well-established principle that a party who undertakes a duty must exercise reasonable care or is responsible for damages resulting from the failure to do so. *Isler*, 232 N.W.2d at 822. Once appellants' legal duty is recognized, the jury is entitled to consider the questions of breach, causation, and damages. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1991) (citing *Smith v. Carriere*, 316 N.W.2d 574, 575 (Minn. 1982) (negligence is for the trier of fact and should not be disturbed unless there is "no evidence which reasonably supports the verdict or it is manifestly contrary to the evidence")). That is what occurred at trial and what should be affirmed by this Court.

B. The Educational Malpractice Doctrine as Explicated in *Alsides v. Brown Institute* Does Not Bar Negligence Claims Against Cirrus and UNDAF.

Appellants argue that negligence claims against them sound in "educational malpractice" and must be dismissed under *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999). *Alsides* does nothing to bar these claims. First, neither Cirrus nor UNDAF is an educational institution for whom the educational malpractice doctrine was developed to provide protection, but rather an aircraft manufacturer and factory training representative. Cirrus contractually delegated certain training instruction duties to UNDAF, a corporation which, by its own description, "serv[es] the *business arm* between the aerospace industry and the John D. Odegard School of Aerospace Sciences at the University of North Dakota." (RA 11) (emphasis added.) The jury determined that

UNDAF was operating as an agent of, and in a joint enterprise with, Cirrus when Mr. Prokop was trained. (A 74.) Under these facts, Cirrus and UNDAF are not entitled to the protection of the educational malpractice doctrine.

Second, even if questions of educational malpractice were potentially implicated, scrutiny of the *Alsides* decision supports the viability of negligence claims against Cirrus and UNDAF under the particular circumstances here. None of the public policy concerns identified in *Alsides* is implicated by the Court's May 20, 2010 Order and Memorandum, which the district court carefully emphasized is a "very narrow" holding. (UNDAF Add. at 22.) This Court should reject appellants' claims concerning educational malpractice and affirm the district court's decision.

1. *Alsides* and its Holding

The issue of educational malpractice has been raised before. The United States District Court for the District of Minnesota previously rejected Cirrus's contention that negligence claims in this case constituted claims for educational malpractice that *Alsides* barred. *Glorvigen II, supra*, 2008 WL 398814 at *3-*4 (A 139-140). The court's conclusion was based on its recognition that, in *Alsides*, "plaintiffs did not sue for negligence but rather breach of contract, fraud, and misrepresentation" and that "claims involving alleged failure to 'perform on specific promises' are actionable if 'the claim would not involve an inquiry into the nuances of educational processes and theories.'" 2008 WL 398814 at *3. The court reasoned that, "[t]o the degree that *Alsides* might be applicable in a negligence context, it provides the Court with no grounds to grant

summary judgment in Cirrus' favor.” *Id.* Consequently, the court held that, under the “unique facts” of this case, “general negligence principles apply” and the relevant question was whether Cirrus discharged its duty of ordinary care, measured against “the standard of what an ordinarily prudent designer and manufacturer of airplanes would have done.” *Id.* at *4 (citation omitted).

Appellants’ assertion that *Alsides* “bars” negligence claims is incorrect. Instead, the decision expressly permits claims for breach of contract, fraud, or misrepresentation under a specific set of circumstances. As noted, the court in *Alsides* had no need to deal with the question of negligence, because it was never raised in the case. However, fraud and misrepresentation are, like negligence, legal theories sounding in tort. *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378 (Minn. 1989). Therefore, implicit in the holding of *Alsides* is the potential for a viable tort claim sounding in negligence, provided it involves an alleged failure to perform on specific promises, and does not involve “inquiry into the nuances of educational processes and theories.” *Alsides*, 592 N.W.2d at 473 (citing *Ryan v. Univ. of N.C. Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998) (internal quotations omitted)).

The general rationale of *Alsides* supports this view. *Alsides* observed that a majority of courts reject claims that attack “the *general quality* of education provided to students.” 592 N.W.2d at 472 (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (emphasis added)); *cf. Doe v. Yale Univ.*, 748 A.2d 834, 847 (Conn. 2000) (distinguishing between claim asserting a failure to educate effectively, which is not

cognizable, and the common law duty not to cause physical injury by negligent conduct, which is cognizable). *Alsides* articulated the following public policy grounds supporting the rejection of these types of general claims:

(1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."

Alsides, 592 N.W.2d at 472 (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992)). *Alsides* described the central difficulty of these claims as follows:

[A claim for educational malpractice] necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen. * * * [T]he court would be engaged in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable * * *. Such inquiry would constitute a clear "judicial displacement of complex educational determinations" * * *.

592 N.W.2d at 472 (quoting *Andre v. Pace Univ.*, 170 Misc. 2d 893, 655 N.Y.S.2d 777, 779-780 (N.Y. App. Term 1996)). Under *Alsides*, however, these considerations give way when the alleged conduct does not concern the failure of an institution to adequately perform promised educational services, but rather the failure "to perform that service at all." *Id.* at 472-473 (quoting *Ross*, 957 F.2d at 417). Ultimately, *Alsides* held that educational institutions are not immune from legal action when the claim involves a

failure to “perform on specific promises it made to the student and the claim would not involve an inquiry into the nuances of educational processes and theories.” *Id.* at 476 (internal quotations omitted).

2. Negligence Claims Against Cirrus and UNDAF Do Not Sound in Educational Malpractice.

As Judge Magnuson recognized, Cirrus was not an “educator” but a builder and seller of airplanes. *Glorvigen*, 2008 WL 398814 at *4. Moreover, Cirrus’s legal responsibilities were not altered by the contractual delegation of the transition training function to UNDAF.³ *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624 (Minn. 1984) (manufacturer cannot delegate its duty to “design a reasonably safe product.”) By undertaking to provide transition training to Mr. Prokop, which was included as part of the aircraft’s purchase price, Cirrus and UNDAF as its subcontractor were required to provide the training in a non-negligent fashion. *See Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570 (Minn. 1979) (voluntarily undertaken duty by city to provide fire protection services to airport users, which was contractually delegated to a fixed base operator, required discharge of duty with reasonable care and jury properly apportioned negligence).

Moreover, none of the public policy grounds in *Alsides* applies to the particular circumstances of this case. First, with respect to the potential lack of a standard of care

³ As noted, UNDAF describes itself as a “public, non-profit corporation serving the business arm between the aerospace industry and the John D. Odergard School of Aerospace Sciences at the University of North Dakota.” (RA 11.)

by which to evaluate an educator, the concern does not apply, not merely because Cirrus was not an “educator”, but because Cirrus and UNDAF provided the standard of care for their transition training in the form of the Initial Training Syllabus, which the evidence demonstrated at trial was supposed to be, but was not, followed. Tr. 259; 768.

Second, with respect to “inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment,” the procedures governing a pilot’s response to VFR flight into IMC conditions were of critical importance from a life safety perspective. As the district court properly noted in the Order and Memorandum, analysis of the “student’s attitude, motivation, temperament, past experience, and home environment” is not required in the first instance because the evidence demonstrated the relevant training, Flight 4a, was not conducted. (Order and Memorandum at 19.)

Moreover, substantial evidence presented and considered at trial indicated that (1) the accident was caused by Mr. Prokop’s inadvertent transition from VFR flight into IMC-like conditions; (2) Mr. Shipek omitted flight training procedures concerning VFR flight into IMC conditions; and (3) had Mr. Prokop been able to use the autopilot the accident likely would have been avoided. General issues concerning causation are always present in wrongful death cases. But here, the connection between the omitted training and the events leading up to the incident was logical and direct. The jury heard the evidence over the course of the trial, examined the credibility of the various witnesses, and ultimately rendered a reasonable verdict that should not be disturbed.

Finally, the perceived threats of a “flood of litigation against schools” and the “need to oversee the day-to-day operations of schools” are highly speculative in light of the fact that (1) the Court’s May 20, 2010 Order and Memorandum was described as, and is, “very narrow” in scope; (2) Cirrus is not a school but a product manufacturer held to an ordinary standard of reasonable care concerning matters it voluntarily undertook; and (3) omission of the relevant training was a matter of critical, “life or death” importance.

Appellants’ argument that negligence claims against them are barred by the educational malpractice doctrine leads to the unreasonable conclusion that a party is insulated from tort liability in connection with the sale of its product, provided there is some element of “training” or “education” involved in the sale. This is not, and should not be, the law.

3. Appellants’ Non-Minnesota Authorities Do Not Preclude Legal Action Against Cirrus and UNDAF.

Appellants cite a number of authorities from outside Minnesota suggesting that the *Alsides* “rationale” has been applied to “bar negligence claims against training schools *including flight schools.*” (UNDAF Br. at p. 22) (emphasis in original). But these cases are distinguishable and do not treat the central issue here, which is whether a tort action in negligence can be maintained against an airplane manufacturer and its designee for factory flight training voluntarily offered in connection with the sale of the product, but which the evidence established was not provided.

In both of the aircraft-related cases, *Sheesley v. Cessna Aircraft Co.*, Nos. 02-4185-KES, 03-5011-KES, 03-5063-JES, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) (A

95) and *Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008), the alleged negligence was not premised on an omission of training that was supposed to be provided, but on the substance of the training itself. See *Sheesley*, 2006 WL 1084103 at *15 (claims against flight school were that it negligently “created its curriculum by failing to include emergency procedures relating to an exhaust system failure” and used “negligent teaching techniques by employing a simulator that does not accurately replicate the handling of a Cessna 340A.”); *Dallas Airmotive*, 277 S.W.3d at 699 (claim alleged that flight school failed to warn of “known dangers of shutting down an engine in flight without the ability to properly feather the propeller” and knew that its simulator “did not accurately replicate the extreme drag experienced” in an engine shut down situation).

Similarly, plaintiff in *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 905 (Mich. 2000) contended he was taught particular methods of climbing wooden utility poles that were unsafe, and that the defendant trade school, American Line Builders Apprenticeship Training Program (ALBAT), failed to instruct him regarding the use of independent fall arrest equipment. The *Page* court reasoned that recognizing plaintiff’s claims would require it to “second-guess ALBAT’s decision to teach pole-climbing using the particular methods it chose.” *Id.* As a result, the court believed it “would be practically impossible to determine the precise scope of ALBAT’s undertaking. How much was ALBAT required to teach?” *Id.* at 906.

In *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986), the issue was whether a

chiropractic college could be liable to a third party for an alleged failure to teach its student about certain risks created by neck manipulation techniques, an issue the Court noted was of first impression. 386 N.W.2d at 113. Noting that “academic freedom thrives on the autonomous decision-making by the academy itself,” the *Moore* court declined the perceived invitation of plaintiff “to pass judgment on the curriculum” of the chiropractic school. *Id.* at 115.

Finally, the court in *Moss Rehab v. White*, 692 A.2d 902 (Del. 1997) declined to recognize a cause of action against a driving school for individuals with physical disabilities after a fatal collision involving one of its students. The court noted that the driver’s instructor identified several problems in the driver’s file, including that he was a “little jerky with the steering wheel,” that he needed to slow down, that he had been a “wise guy,” and that he had problems making right-hand turns. 692 A.2d at 904. In addition, despite his completion of the driving school program, the driver failed his first driver’s test administered by the Delaware Department of Public Safety after he hit a cone during the driving test. *Id.* The complaint against the driving school alleged that it was negligent “in evaluating, recommending and training” the driver. *Id.* at 905. The court determined that the “terms of those allegations encompass the traditional aspects of education” and consequently, constituted claims of “educational malpractice.” *Id.*

None of these cases sheds light on the core issue here, which is whether an airplane manufacturer who offers transition training as part of the purchase price is shielded from ordinary negligence principles in connection with the sale. The closest

decision respondent has found to the facts is *In re Cessna 208 Series Aircraft Prod. Liab. Litig.*, 546 F. Supp. 2d 1153 (D. Kan. 2008). In that case, the pilot of a Cessna 208B airplane (also known as a “Cessna Caravan”) and three other individuals died when the airplane in which they were traveling crashed in Arizona, apparently due to icing. 546 F. Supp. 2d at 1156. The pilot’s family brought suit in Texas state district court (Cosby, J.) against the airplane’s manufacturer, Cessna, a flight school, FlightSafety, and other parties. *Id.* at 1157. Among the family’s claims were that FlightSafety negligently failed to instruct pilots of the Cessna Caravan about how to avoid ice accumulation, about the unusual dangers of airframe icing on the Cessna Caravan and about how to control the plane when ice accumulates, and also failed to exercise reasonable care in its performance of flight training services. *Id.* Before the case was removed to federal court and transferred to the MDL in the United States District Court for the District of Kansas (Vratil, J.), FlightSafety moved for summary judgment on educational malpractice grounds, which Judge Cosby denied examining the decisions in *Doe v. Yale Univ.* and *Page v. Klein, supra.* 546 F. Supp. 2d at 1158.

In the MDL, FlightSafety again moved for summary judgment. The court, having considered the *Doe* and *Page* decisions, as well as the *Alsides*, *Dallas Airmotive*, and *Sheesley* holdings, denied the motion and noted:

Because the two recent opinions which involve FlightSafety rely in large part on *Page* and *Doe v. Yale Univ.*, which Judge Crosby [sic] already had before him, the Court declines to re-visit this issue under Texas law. Judge Crosby’s [sic] ruling was a reasonable application of Texas law and is supported by *Doe v. Yale Univ.* and the dissenting opinion in *Page*. The

Court therefore overrules FlightSafety's motion for summary judgment on this ground.

546 F. Supp. 2d 1159.

As in the *Cessna 208 Series* case, the alleged breach of duty here did not implicate issues of general education, but rather very specific, particular tasks that appellants agreed, but failed, to teach. This critical distinction sets this matter apart from the cases appellants cite applying the educational malpractice doctrine to bar negligence claims.

C. The Jury Properly Considered and Determined the Issue of Causation.

Appellants contend the evidence at trial failed to establish causation against them as a matter of law. (UNDAF Br. at p. 38; Cirrus Br. at p. 42.) However, there was ample evidence at trial supporting the verdict.

In order for a party's negligence to be the proximate cause of an injury, "the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, * * * though he could not have anticipated the particular injury which did happen." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citing *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (quoting *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 915 (Minn. 1983))). The negligent act is considered a proximate cause of harm if it was a "substantial factor" in bringing about the harm. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). One cause is sufficient to establish liability "even though other causes may have joined in producing the final result[.]" *Roemer v. Martin*, 440 N.W.2d 122, 124 (Minn. 1989) (citing *Roman*

v. *Minneapolis St. Ry. Co.*, 129 N.W.2d 550 (Minn. 1964)).

Proximate cause is generally a question of fact for the jury, and its determination “must stand unless manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Smith v. Kahler Corp, Inc.*, 211 N.W.2d 146, 151 (Minn. 1973) (quoting *Seivert v. Bass*, 181 N.W.2d 888, 893 (Minn. 1970)). Evidence of causation should be sustained if sufficient evidence exists to permit the jury to find that it was more likely than not that the incident occurred as a result of appellants’ negligence. *Jennie-O Foods, Inc. v. Safe-Glo Prods. Corp.*, 582 N.W.2d 576, 580 (Minn. Ct. App. 1998). Proximate cause becomes a question of law only “when reasonable minds could reach only one conclusion[.]” *Canada v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997) (citing *Lubbers, supra*, 539 N.W.2d at 402)).

With respect to circumstantial evidence, the Court in *Smith v. Kahler Corp., Inc.* observed:

Circumstantial evidence which justifies an inference in support of the verdict upon the issue of negligence is adequate to sustain the verdict, even though it may justify other conflicting inferences, if the supporting inference reasonably outweighs and preponderates over the other conflicting inferences and theories.

211 N.W.2d at 150 (quoting *Knuth v. Murphy*, 54 N.W.2d 771, 775 (Minn. 1952). It is the role of the jury, not the court, to draw inferences. *Id.* (citing *Gardner v. Coca Cola Bottling Co.*, 127 N.W.2d 557 (Minn. 1964)).

In this case, the jury heard substantial evidence linking appellants’ negligence to the crash. In the Order and Memorandum, the district court identified the various

evidence the jury was allowed to consider. (UNDAF Add. at 31-48.) Among other things, Mr. Shipek testified that he was supposed to accomplish the tasks identified in the training syllabus. Tr. 768. Mr. Shipek testified that he conducted the “Recovery from VFR into IMC (auto-pilot assisted)” lesson, but that it was simply not documented. Tr. 792. Mr. Shipek further testified that he conducted the training “under the hood,” however he acknowledged that there “[n]o hood time recorded” in Mr. Prokop’s log book. Tr. 796-798. Mr. Shipek ascribed the omission as “clerical error on my part.” Tr. 798. Mr. Shipek’s credibility was for the jury to consider.

Captain Walters testified that, on the morning of the subject flight, Mr. Prokop entered “IMC-like” conditions that prevented him from being able to fly VFR, and that this circumstance was part of the root cause of the crash. Tr. 222-223. In addition, Captain Walters testified that Mr. Prokop did not use the autopilot during the flight but was hand-flying the aircraft. Tr. 223-224. Captain Walters testified that had the autopilot been used at a reasonably early point in the unfolding of the incident, it “would have prevented the accident.” *Id.*; Tr. 274. In short, Captain Walters’ opinions at trial implicate precisely the training that Cirrus through UNDAF omitted. This training was critically important to resolving the difficulties presented by a VFR-rated pilot encountering IMC-like conditions in the SR22.

The testimony offered directly supports the verdict. Plainly it is not “manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Smith v. Kahler Corp.*, 211 N.W.2d at 151. As such, the jury’s

determination as to proximate causation should stand.

CONCLUSION

This case was properly tried and resolved as a negligence case. The district court did not create a new cause of action for negligent performance of contract, but rather applied ordinary tort principles. The educational malpractice doctrine does not apply because, as an aircraft manufacturer and subcontractor, Cirrus and UNDAF are not entitled to any special protection in connection with the sale of an aircraft with inadequate instructions. In any event, the particularized nature of Cirrus's and UNDAF's breach falls within the recognized exception to the educational malpractice doctrine and is actionable. Finally, the jury appropriately considered and resolved issues concerning proximate cause.

For all of these reasons, the district court's decision should be affirmed.

Respectfully submitted,

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Dated: October 26, 2010

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. Rule 132.01, for a brief produced using a proportional font. The length of this brief is 9,355 words. This brief was prepared using Microsoft Word 2002.

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