

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 Prokup, 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).

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NEXT-OF-KIN OF DECEDENT JAMES KOSAK**

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STATEMENT OF ISSUES

1. **Does Cirrus, as the manufacturer and seller of a product, have a duty to refrain from conduct that might reasonably be foreseen to cause injury to another and a duty to provide adequate instructions for the safe use of its product?**

The district court found that Cirrus had these duties.

Apposite Authorities:

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

Austin v. Metropolitan Life Ins. Co., 152 N.W.2d 136 (Minn. 1967)

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

2. **Does UNDAF, as Cirrus's agent and joint venturer, appointed by Cirrus to give Cirrus's product instruction, have a duty to refrain from conduct that might reasonably be foreseen to cause injury to another and a duty to provide adequate instructions for the safe use of Cirrus's product?**

The district court found that UNDAF had these duties.

Apposite Authorities:

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

Austin v. Metropolitan Life Ins. Co., 152 N.W.2d 136 (Minn. 1967)

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

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

3. **Are Respondents limited to bringing a contract action and recovering only contractual damages where the plane crash that caused decedents' deaths was caused by Appellants' negligence?**

The district court found that Respondents could maintain negligence claims and recover tort damages.

Apposite Authorities:

Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1989)

4. Does the so-called “educational malpractice” doctrine bar the wrongful death claims of the Respondents where 1) Cirrus is a product manufacturer, not an educational institution; 2) UNDAF is Cirrus’s agent and joint venturer for the purposes of giving Cirrus’s product instruction and is not acting as an educational institution in giving Cirrus’s instruction; 3) Respondents claim that specific promised and required product instruction was not given; 4) the policy rationales for refusing to find a duty in educational malpractice cases do not apply; and 5) the duty at issue is one not to cause physical injuries by negligent conduct?

The district court rejected the Appellants’ contention that Respondents’ negligence claims were barred as educational malpractice claims.

Apposite Authorities:

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

Larson v. Indep. School Dist. No. 314, 289 N.W.2d 112 (Minn. 1979)

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

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

5. Where Appellants undertook to supply instruction and training necessary for the safe operation of the Cirrus SR22 airplane, and Respondents presented evidence that required instructions and training were not provided concerning recovery from the very emergency situation that ultimately caused the fatal crash, was there sufficient evidence, considering the record as

a whole in the light most favorable to the verdict, to support the jury's apportionment of 75% of the causal fault to Cirrus and its agent, UNDAF?

The district court carefully reviewed the evidence and concluded that there was more than ample evidence to support the jury's findings of fault and causation.

Apposite Authorities:

Int'l Fin. Servs., Inc. v. Franz, 534 N.W.2d 261 (Minn. 1995)

- 6. Did the district court properly enter judgment against UNDAF in light of the fact that UNDAF intervened in the case as a Defendant, actively participated in the pre-trial and trial proceedings, fully litigated both liability and damages, and was found to be both Cirrus's agent and joint venturer, findings which are not challenged on appeal?**

The district court determined that it was appropriate, based on the jury's verdict, to enter judgment against UNDAF jointly and severally.

Apposite Authorities:

State ex rel. J. F. Konen Constr. Co. v. United States Fid. & Guar. Co., 382 P.2d 858 (Or. 1963)

State ex rel. J. F. Konen Constr. Co. v. United States Fid. & Guar. Co., 401 P.2d 48 (Or. 1965)

STATEMENT OF THE CASE

In July 2005, Rick Glorvigen, as trustee for the heirs and next-of-kin of James Kosak, and Thomas Gartland, as trustee for the heirs and next-of-kin of Gary Prokop, brought separate actions in the Itasca County District Court against Cirrus Design Corporation, seeking to recover damages for the wrongful deaths of pilot Prokop and his passenger Kosak. Both Prokop and Kosak were killed when a Cirrus SR-22 airplane, owned and piloted by Prokop, crashed near Hill City, Minnesota, in the early morning hours of January 18, 2003. Glorvigen's action also alleged negligence on the part of Prokop. A1-11.

In September 2005, Cirrus removed both cases to the United States District Court for the District of Minnesota, arguing that the claims asserted against it implicated "significant federal issues." RA1-4; RA6. Alternatively, Cirrus contended that the Federal Aviation Act ("FAA") completely preempted state law claims based on an alleged failure to provide adequate pilot training. RA3; RA6.

In February 2006, Judge Paul Magnuson rejected Cirrus's claims and remanded both cases to state court. Judge Magnuson found, *inter alia*, that Congress did not expressly preempt state law claims, and that, for removal purposes, there was insufficient evidence of an intent by Congress to preempt. RA5-17.

In May 2006, Cirrus brought third-party actions against employees of the United States Federal Aviation Administration, asserting that they were negligent in the weather briefing they provided to Prokop prior to the crash. The case was again removed to federal court, this time by the new third-party defendant, the United States. RA18-21.

While the action was again pending before Judge Magnuson, Cirrus again sought summary judgment on federal preemption grounds and also on the grounds that the so-called “educational malpractice” doctrine barred Respondents’ claims. Judge Magnuson again denied Cirrus’s claim of federal preemption, and also rejected Cirrus’s claim—which Cirrus again makes on this appeal—that Respondents’ causes of action were barred because they constituted “educational malpractice.” A168-71.

In June 2008, based on his prior rulings, Judge Magnuson remanded the case to the state district court. RA24-28.

In September 2008, The University of North Dakota Aerospace Foundation (“UNDAF”) intervened in the case “to control the strategy of and to present its own defense for any claims for which UNDAF may have indemnity liability under the indemnity agreement between UNDAF and Cirrus.” A13.

Also in September 2008, Cirrus appealed Judge Magnuson’s remand of the case to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed Judge Magnuson’s remand by order dated September 16, 2009. *See Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737 (8th Cir. 2009).

In May 2009, this case was tried to a jury in the District Court for the Ninth Judicial District—Itasca County, the Honorable David J. Ten Eyck presiding by designation.

On June 4, 2009, the jury returned a verdict for Respondents finding Prokop 26% negligent and Cirrus and UNDAF each 37.5% negligent. The jury also found that

UNDAF was Cirrus's agent and that Appellants were engaged in a joint enterprise—a finding not challenged by Appellants on this appeal.

STATEMENT OF FACTS

Respondent Glorvigen incorporates the Statement of Facts in Respondent Gartland's brief. Respondent Glorvigen agrees with Respondent Gartland that Appellants have recited the facts "without complete fidelity to Minn. R. Civ. App. P. 128.02, subd. 1(c)," by failing to summarize the facts that support the verdict. Instead, Appellants have provided this Court with a cherry-picked, one-sided summary of the evidence that Appellants submitted to defeat Respondents' claims and that were either explicitly or implicitly rejected by the jury in reaching its verdict. Respondent Glorvigen also provides the following supplemental facts that are intended to be read in conjunction with the facts provided by Respondent Gartland.

I. The History of Cirrus's Transition Training

Transition training is training designed to ensure that a pilot, already licensed and with some degree of flight experience, is trained in the differences between the planes he has flown and the ones he will be flying. Moving from one plane to another requires the pilot to become familiar with the differences in controls, handling, and flight characteristics between the new plane and other planes the pilot may have flown. As expert witness Captain James Walters explained, "Transition training is a specialized type of training that is done when a pilot is qualified, typically in one type of airplane, and is moving for whatever reason into another type of airplane. He's a pilot, and he knows how to fly, but he doesn't know all of the intricacies of the new airplane he's going to be flying. So obviously we take that pilot and give him extensive training and teach them the differences." Tr. 156-57. Cirrus officials agreed that Cirrus was responsible for

seeing that there was a transition training program. Tr. 1509. Like Cirrus, UNDAF also recognized the need for transition training when a pilot moved from one aircraft to another. Tr. 498.

The initial transition training program was developed for Cirrus by a company known as Wings Aloft. Tr. 708-09. From about 1999 until October 2001, Wings Aloft designed the training materials and delivered the transition training through employees working at the Cirrus Duluth plant. Tr. 708:10-710:15, 711:8-15. In October of 2001, Cirrus fired Wings Aloft and conducted the transition training using their own employees. Tr. 709:19-23, 711:4-713:19. Until July 2002, Cirrus provided the transition training directly. Tr. 712:1-4, 713:10-12.

In July of 2002, Cirrus hired UNDAF to conduct the Cirrus transition training. Tr. 488:19-22, 713:10-12. UNDAF is a separate legal entity from the University of North Dakota. Tr. 488:6-12. In its agreement with UNDAF, Cirrus retained tight control of the transition training and ownership over all of the transition training materials. RA247-50. The agreement with UNDAF states that Cirrus already had available training course materials for the SR-20 and the SR-22 in use for its customer training. RA247. These were the materials designed by Wings Aloft. Tr. 490:11-14, 713:13-20. These Cirrus-owned training course materials would be made available to UNDAF for the purposes of presenting the training for Cirrus customers. RA248; Tr. 490:6-10, 723:2-724:5. Cirrus retained the right to approve whatever training materials were used by UNDAF for the Cirrus transition training. Tr. 491:3-5, 715:21-720:13.

The actual transition training for purchasers of Cirrus aircraft took place not at the University of North Dakota, but at the “Cirrus Factory Training Center” in Duluth. *See* Tr. 488:13-18. The UNDAF offices were in the Cirrus factory building, and Cirrus had access to the training materials, including completed syllabi, if it wanted to review them. Tr. 662:2-663:21, 499:24-500:7. John Walberg, UNDAF manager at the Cirrus Factory Training Center in December of 2002 when Gary Prokop received his transition training, testified that the transition training materials used by UNDAF with Prokop came from Cirrus and had been developed by Wings Aloft. Tr. 605:6-16, 609:11-15. Any changes to the training materials were subject to Cirrus approval. Tr. 491:3-5.

II. Overwhelming Evidence of Appellants’ Negligence Was Presented to the Jury

The overwhelming evidence—accepted by the jury and ignored by Appellants in their recitations of the facts—shows that Flight Lesson 4a was a required part of the Cirrus transition training, that Flight Lesson 4a was never given to Prokop, and that, in particular, no flight training whatsoever was given to Prokop for the subject matter of Flight Lesson 4a: “Recovery from VFR into IMC (autopilot assisted).”¹ UNDAF picks and chooses selected testimony regarding Prokop’s knowledge of the SR-22 autopilot, in an attempt to give the impression that he knew how to use the SR-22’s autopilot.

¹ Appellants recite the testimony of Prokop’s instructor, YuWeng Shipek that this training was given “under the hood,” meaning that Prokop was made to fly the plane under a hood so that he could not see outside the airplane. UNDAF brief at 13. No hood training, however, was documented for Prokop in his log book for the transition training. Tr. 792:4-796:21, 798:19-799:2, 892:4-14; RA217-45. The jury apparently disregarded Shipek’s testimony, which was contradicted by the documentary evidence.

UNDAF brief at 12-13. However, the weight of the evidence, particularly the testimony of Steven Day, supports the jury's finding—which is not explicitly challenged by either Appellant—that Prokop was not trained to proficiency in the use of the SR-22's autopilot or in how, more importantly, to execute the autopilot assisted recovery from VFR into IMV maneuver called for by Cirrus:

Q Did you ever talk to Gary about his familiarity with operation of that plane?

...

A He wasn't completely comfortable with the avionics in the airplane.

Q How do you know that?

A One flight after he had taken delivery of the airplane --

Q This would have been timeline when?

A January of '03.

Q Do you know what date?

A I do not. It would be one of the flights. I just remember we were talking as we were taxiing down runway 3, 4, getting ready to go fly, we were talking about the instrument rating and go so forth. And he said that, "Steve, I don't even know how to turn the autopilot on in the plane," or "I don't know how to use the autopilot." One or the other, I don't recall which he said. Either "I don't know how to turn the autopilot on" or "I don't know how to use the autopilot," which surprised me at that point.

Tr. 1183:18-1184:19.

Appellants seek to minimize their failure to provide Prokop with Flight Lesson 4a, which Cirrus specifically called for, and which would have taught Prokop the autopilot assisted maneuver for escaping IMC and getting back to where he could make visual contact with the ground. UNDAF intimates that the omitted training was not important, claiming that Prokop knew how to turn on the autopilot. UNDAF brief at 12. It also states that Prokop was "already trained on what to do when a VFR-rated pilot such as himself inadvertently enters IMC-conditions with or without an autopilot."

Id. Turning on the autopilot, however, is completely different from being able to utilize the autopilot while executing an autopilot assisted recovery from VFR into IMC maneuver—a fact recognized by the district court. As the district court explained in its detailed 90-page order upholding the jury’s verdict, the speed of the Cirrus SR-22 made flight training on the autopilot assisted maneuver critical:

Recovery from VFR into IMC or IMC-like conditions requires a pilot to think and act quickly. . . . At cruising speed, Prokop would have been moving much faster than he was used to. . . . The practical effect of this was that Prokop would have had less time than usual to recognize what was going on and less time than usual to extricate himself from the situation. . . . The relationship between reaction times and the speed of the plane is likely one of the reasons why the maneuver that would have been taught in lesson 4-A is autopilot assisted. The autopilot gives an additional resource in conducting the recovery maneuver. This is because without the autopilot the pilot has to make the same adjustments as the autopilot would. Therefore, the autopilot makes the maneuver easier. . . . One of the leading causes of VFR crashes is VFR into IMC conditions and that is why the autopilot assisted maneuver exists. The reason that a pilot uses the autopilot in the SR-22 during an emergency recovery from VFR to IMC is to make the procedure safer. . . . It is also important because in addition to being faster, the SR-22 also handles differently than the Cessna 172 that Prokop had before. . . . These differences in handling and equipment is another reason that it is important to train the specific procedure which was omitted in flight 4-A.

Add. 44-46 (citations omitted). The previous training Prokop received on escaping IMC came in his 35-year-old Cessna—which had a top speed of 127 knots. Tr. 234:16-19. The SR-22 had a top speed of 180 knots, and the faster the plane is going, the faster the pilot has to react. Tr. 234:10-15; 518:4-7. Therefore, the fact that Prokop had previous training on how to deal with inadvertently flying into IMC in his Cessna—a much slower plane with much differently handling characteristics and no autopilot—is of little consequence.

UNDAF also pretends that the only evidence that Prokop did not receive Flight Lesson 4a and learn how to successfully execute the recovery from VFR into IMC (auto-pilot assisted) maneuver was an “assum[ption]” by Captain Walters that, because Flight Lesson 4a is not checked as completed on Prokop’s training syllabus, it was not given to Prokop. UNDAF brief at 8. In fact, Captain Walters’s testimony was based on the requirements of the syllabus itself, which states that “Skipped Items Should be left Unchecked.” A87; Tr. 255:14-256:15. Flight Lesson 4a was unquestionably left unchecked. YuWeng Shipek, Prokop’s instructor, testified that skipped syllabus items were left unchecked so that Cirrus would have an accurate record of the training that was completed. Tr. 924:2-5. John Wahlberg, Shipek’s supervisor testified with regard to the absence of a “check” of Flight Lesson 4a as completed:

Q It should have been checked?

A It should have been checked.

Q It’s a requirement that it be checked, that some grade be given, in order for a pilot through transition training to be deemed proficient at that maneuver, correct?

A Yeah, it should have been checked.

Tr. 513:18-24. The documentary evidence clearly proves that Flight Lesson 4a was not completed, let alone given, and supports the jury’s finding that it was not.

III. The Negligence of Cirrus and UNDAF Caused the Crash and Respondent Glorvigen’s Damages

Both Appellants’ factual recitations attack the jury’s finding of causation, highlighting overruled objections that they made at trial, without actually challenging those evidentiary rulings in this appeal. The court, however, made it clear that the jury’s findings of causation were well supported:

The . . . evidence . . . indicates that the jury need not have speculated to have determined that there was causation in this case. Here Prokop was confronted with VFR into IMC conditions. He attempted to turn back. Both causation experts agree there was no evidence he ever activated the autopilot. He begins to conduct the maneuver listed in Exhibit 9 on page 126. This is apparent from the tracking data in Exhibit 55 which indicates an attempted 180 degree turn (which is part of the maneuver in the training manual). Without the autopilot assist to maintain his orientation, Prokop's attempt to return to Grand Rapids culminated in an accelerated stall which caused the plane to rapidly descend into the ground. **Had Prokop been trained in the VFR into IMC autopilot assisted emergency procedure there would not have been any crash.**

Add. 46-47 (emphasis added).

Cirrus also attacks the jury's finding of causation in its recitation of the facts by insisting that there can be no causation because there is no evidence that Prokop tried to use the autopilot while attempting to escape the IMC-like conditions. The district court, considering the evidence as a whole, rejected that argument, noting that Prokop's failure to use the autopilot while attempting to escape IMC was, in fact, evidence supporting the jury's finding of causation:

Based on his training by UNDAF Prokop should have activated the autopilot if he were attempting to properly conduct the recovery maneuver as set forth in the training manual and syllabus. The purpose of the maneuver was to make recovery in the SR-22 safer. Prokop may not have tried to activate the autopilot or may not have wanted to. However, the use of the autopilot in the maneuver was designed primarily to avoid what happened in this case. The use of the autopilot was designed to avoid plane crashes.

Therefore, the fact that Prokop did not activate the autopilot as he should have when attempting recovery from VFR into IMC-like conditions, suggests causation. The evidence adduced at trial suggested that if he used the autopilot the plane would not have crashed. He did not use the autopilot but he did attempt the recovery maneuver, this coupled with the omitted training makes it possible for the jury to find causation. More specifically, the jury could have found that because of the omission of the

UNDAF training Prokop was unable to conduct the maneuver properly and this inability led to the crash.

Add. 48.

IV. The Negligence of Gary Prokop

The jury assigned 25% of the negligence to pilot Prokop. A74. A finding of negligence against Prokop is supported by the evidence. Respondent Glorvigen's expert, Captain James Walters, testified that there were three "root causes" of the crash, and one was Prokop's "poor decision to go flying that day." Tr. 227:2-9. The evidence showed that Prokop observed low clouds at his departure point in Grand Rapids (Tr. 331:14-16), was informed that there was a cold front coming through that created a "potential for some IFR" (Tr. 332:22-333:5), was informed that there would be gusty winds—which he knew would cause turbulence (Tr. 333:9-334:10), and was informed of two ceilings at 1,300 and 2,900 feet—near the 1,000 foot limit for VFR pilots such as Prokop (Tr. 335:10-23). As Captain Walters testified, the facts showed that Prokop was taking off in the dark, with turbulence and clouds. Tr. 446:10-21. The jury also heard from Captain Walters that, although it was legal for Prokop to take off, he had an obligation to consider that he did not know how to use the autopilot before taking off. Tr. 437:23-438:10. Captain Walters agreed that he "would have been a lot better off if he had stayed on the ground" (Tr. 446:25-447:6), that "[Prokop] made a bad choice" (Tr. 412:8-11), and stated that "I would have recommended that he not take off." Tr. 357:8-11.

SUMMARY OF ARGUMENT

There is no basis for reversing the district court's conclusion that Appellants owed a duty of care to Respondents. Respondents' negligence claims are based on time-honored legal principles—that every member of society has a duty to refrain from conduct that might reasonably be foreseen to cause injury to another, and that a manufacturer of a dangerous product has a duty to provide adequate instructions for the safe use of that product. The arguments advanced by Appellants that they owed no such duties were properly rejected by the district court and also by Federal District Court Judge Paul Magnuson while this case was pending in federal court.

There is also no basis for a broad rejection of tort remedies in this case, or for limiting Respondents to contractual remedies. The authorities relied upon by Appellants concern commercial transactions and purely economic losses and are inapplicable to this wrongful death case.

Likewise, UNDAF's argument that passenger James Kosak must be in a "special relationship" with UNDAF for UNDAF to owe a duty to him is contrary to established Minnesota law. The general duty that "any individual owes another . . . to refrain from conduct that might reasonably be foreseen to cause injury to another" requires no special relationship. *See Wicken v. Morris*, 527 N.W.2d 95, 98-99 (Minn. 1995). Moreover, "a manufacturer's duty to warn . . . extends to all reasonably foreseeable users." *Hauenstein v. The Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984).

Appellants' contention that this is an educational malpractice case fails for numerous reasons, including: 1) Cirrus is not an educational institution—it is a product

manufacturer; 2) UNDAF, as Cirrus's agent and joint venturer, appointed by Cirrus to give Cirrus's product instruction, is not acting as an educational institution for the purposes of giving Cirrus's product instruction; 3) Respondents' claim is that specific promised and required product instruction was not given; 4) the policy rationales for refusing to find a duty in educational malpractice cases do not apply here; and 5) the duty not to cause physical injuries by negligent conduct does not disappear simply because the negligent conduct occurs in the educational setting.

ARGUMENT

I. Standard of Review

Appellants claim that they owed no duty to Respondents. The existence of a duty is a question of law which is reviewed *de novo* by the Court of Appeals. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

Appellants also claim there was insufficient evidence to support the jury's verdict on causation. Causation is "a question of fact for the jury to decide." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008). Factual conflicts "are to be resolved by the jury, and its verdict will not be set aside unless it is manifestly and palpably contrary to the evidence as a whole." *Robinson v. Butler*, 48 N.W.2d 169, 170 (Minn. 1951). Accordingly, "[a] jury determination of causation . . . 'will not be upset unless the court finds it to be manifestly contrary to the weight of the evidence[.]'" viewing the evidence in the light most favorable to the jury's verdict. *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980); *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. App. 2005). "Verdicts are upset only in extreme circumstances." *Bolander*, 703 N.W.2d at 545.

II. Defendants Owed a Duty of Reasonable Care to Pilot Prokop and His Passenger James Kosak

Respondents' negligence claims against Cirrus and UNDAF are based on time-honored legal principles—that every member of society has a duty to refrain from conduct that might reasonably be foreseen to cause injury to another and that a manufacturer of a dangerous product has a duty to provide adequate instructions for the

safe use of that product. As proven at trial, the Cirrus transition training program— instruction on how to safely use the SR-22—was included in the purchase price of the SR-22 and was used by Cirrus in the marketing and sale of the airplane. Because Cirrus decided to provide instruction on the safe use of the SR-22 via a “transition training” program included as part of the product Cirrus sold to Mr. Prokop, the law imposes a duty on Cirrus to use reasonable care in providing that instruction and training. That duty was breached by Appellants when they failed to administer training Flight Lesson 4a to Prokop, leaving him without flight instruction on how to escape from IMC in a Cirrus SR-22, or, more specifically, leaving him without instruction on how to accomplish the very maneuver that Cirrus itself designated for escape from IMC in an SR-22—autopilot assisted recovery from VFR into IMC. The failure to give this instruction was a direct cause of the crash, the deaths of Prokop and Kosak, and the Respondents’ damages—the amount of which, as found by the jury, are not disputed by Appellants.

A. Appellants Had a Duty to Prokop and His Passengers to Use Reasonable Care in Providing Transition Training—Including Flight Lesson 4a

Whether a duty exists is a question of law. *Bjerke*, 742 N.W.2d at 664. “Under general concepts of tort law, ‘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) (quoting *Rasmussen v. Prudential Ins. Co.*, 152 N.W.2d 359, 362 (Minn. 1967)). Therefore, an analysis of whether or not a duty of care is owed to a particular plaintiff “begs the essential question—whether the plaintiff’s interests are entitled to legal

protection against the defendant's conduct.” *Id.* (quoting W. Page Keeton et al., *Prosser & Keeton on Torts* § 53 at 357 (5th ed. 1984)).

Ultimately, questions of duty turn on whether the consequences of the action or inaction taken are foreseeable or are too remote to impose liability as a matter of public policy. As the Minnesota Supreme Court stated in *Germann v. F. L. Smithe Machine Company*, 395 N.W.2d 922 (Minn. 1986):

[T]he 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 warning, breach of duty and causation remain for jury resolution.

Id. at 924-25. Here, the district court—after reviewing these basic tenets of Minnesota tort law—found that it was “reasonably foreseeable that [Appellant’s] failure to provide a specific type of training [Flight Lesson 4a] may lead to injury and even death.” Add. 20-21. Notably, Appellants do not challenge this finding of foreseeability, but nonetheless argue that they have no “duty” to those who they foreseeably could have harmed by their conduct. Black letter Minnesota law, however, is that “[a]n individual owes a plaintiff a duty if the injury to the plaintiff was foreseeable.” *Moorhead Econ. Dev. Auth. v. Anda*, A07-1918, A07-1930, 2010 Minn. LEXIS 534, *73 (Minn. Sept. 2, 2010) (citing *Austin*

v. Metropolitan Life Ins. Co., 152 N.W.2d 136, 138 (Minn. 1967)).²

Appellants ask this Court to reject this basic tenet of tort law because the relationship between Appellants and Prokop was based, in the first instance, in a contract—the contract for sale of the SR-22 that included “transition training” as part of the purchase price. Cirrus brief at 17-18. In support of this novel argument, the Appellants cite a number of cases that are inapposite and do not, in any way, support a broad rejection of a tort remedy in this case. Moreover, neither Appellant cites a single case involving a claim for personal injuries or wrongful death where the court limited the plaintiff’s recovery to contractual remedies or ruled that the presence of a contractual relationship barred a tort action.

Cirrus cites *80 South Eighth Street Ltd. P’ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 395-96 (Minn. 1992), for example, but, in *80 South Eighth*—where all the duties were derived from contract—the plaintiffs’ tort claims **were allowed** to proceed. *Id.* at 398. The plaintiff in *80 South Eighth* sought to recover for the costs of maintenance, removal, and replacement of asbestos-containing fireproofing. *Id.* at 396. The court reviewed the differing goals of tort and contract law and the role of the “economic loss doctrine”—a doctrine that has no applicability to this case. The court found that there must be a balance between the two conflicting societal goals “of encouraging marketplace efficiency through the voluntary contractual allocation of economic risks

² There are certain exceptions to this general rule, none of which are applicable here, such as the general common law rule that a person has no duty to protect another from harm caused by the foreseeable criminal actions of a third party. *See, e.g., Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001).

with that of discouraging conduct that leads to physical harm.” *Id.* Because the damages sought were not purely economic losses, the court allowed the plaintiff’s negligence claim:

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

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

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

Id. at 398 (quotation omitted).³

Like *80 South Eighth*, the other cases relied upon by Appellants involved commercial transactions but, unlike *80 South Eighth*, they involved losses that the court found to be purely economic. Because they did not involve physical injuries, they did not

³ The “economic loss doctrine”—even when it was fully viable in Minnesota—never limited an injured plaintiff rights to sue a product manufacturer for physical injuries. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (“economic losses that arise out of commercial transactions, **except those involving personal injury or damage to other property**, are not recoverable under the tort theories of negligence or strict products liability” (emphasis added)).

implicate the duty to refrain from acting in a manner that can cause physical injury to others. See *Wicken*, 527 N.W.2d at 98-99 (recognizing “the duty any individual owes another arising from normal daily social contact--the duty to refrain from conduct that might reasonably be foreseen to cause injury to another”). Thus, the plaintiffs in those cases were limited to their contractual claims. These cases have no applicability to this wrongful death case.

For example, in *D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. App. 1984), the only damages sought—lost profits because of the delay in building a new warehouse—were purely economic. *Id.* at 158. The court distinguished it from cases where personal injuries are claimed:

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

Id. at 158-159 (emphasis added) (citations omitted).

Likewise, *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983), *United States v. Johnson*, 853 F.2d 619 (8th Cir. 1988), and the string-cite of cases on pages 35-36 of UNDAF’s brief, including *Overbee v. Herzog*,⁴ *Am. Home Assur. Co. v. Major Tool &*

⁴ 1993 WL 328747 (Minn. App. Aug. 31, 1993).

Mach. , Inc.,⁵ *Mies Equip., Inc. v. NCI Bldg. Sys., L.P.*,⁶ and *City of East Grand Folks v. Steele*,⁷ all involved commercial transactions and purely economic losses rather than personal injuries. In *Lesmeister*, economic losses were sought for “defects and lateness in construction of a grain storage building.” 330 N.W.2d at 97. In *Johnson*, defendant’s counterclaims sought economic losses related to the government’s administration of the farm storage loan program. 853 F.2d at 620. On these types of facts, the courts concluded that the only claims available were contractual. *Lesmeister*, 330 N.W.2d at 102; *Johnson*, 853 F.2d at 622. None of these cases hold that plaintiffs claiming wrongful death, such as the Respondents here, are limited to contractual remedies.

B. Minnesota Law Imposes on a Manufacturer/Seller a Duty to Provide Adequate Instructions for the Safe Use of a Product

In addition to the general duty imposed on Cirrus and UNDAF to refrain from conduct that might reasonably be foreseen to cause injury to Respondents, Minnesota law also recognizes that Cirrus—and thus its agent and joint venturer UNDAF that was appointed to give the instruction—had a duty to warn end users of its product if it was reasonably foreseeable that an injury could occur in its use. *See Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987). Respondent Glorvigen joins in the arguments of Respondent Gartland that Appellants owed this duty—imposed by law—to Respondents.

⁵ 767 F.2d 446 (8th Cir. 1985).

⁶ 167 F. Supp. 2d 1077 (D. Minn. 2001).

⁷ 141 N.W. 181 (Minn. 1913).

1. This Duty Exists in the Context of Failing to Adequately Instruct a Pilot in the Proper Use of an Airplane

This long-recognized duty to provide adequate instruction for the safe use of a product has been applied in plane crash cases. In *Driver v. Burlington Aviation, Inc.*, 430 S.E.2d 476 (N.C. Ct. App. 1993), for instance, a passenger in a Cessna model 152 aircraft brought a negligence action against Cessna Aircraft Co., alleging that Cessna published an instructional manual that “promulgated dangerously inadequate information about preventing carburetor icing and wrongfully instructed concerning carburetor icing and slow-flight characteristics of the aircraft.” *Id.* at 480. These were the precise conditions that allegedly caused the aircraft to crash and caused plaintiffs’ injuries. *Id.* The North Carolina court concluded that plaintiffs stated a claim for relief under “general principles of negligence.” *Id.* at 481. Specifically, the court reasoned:

The courts of this State have long acknowledged that **the manufacturer of a chattel is under a duty to use reasonable care in its manufacture, and when reasonable care so requires, to give adequate directions for its use.** Furthermore, the manufacturer of a chattel is liable to those whom he should expect to use the chattel, or be in the vicinity of its reasonable use, for injuries resulting to persons or property from a failure to perform his duty. **Liability of the manufacturer for resulting injuries when he knows that an article is to be used for a specific purpose rests upon general principles of negligence.**

Id. (emphasis added) (citations omitted).

Applying these principles to the facts of the plane-crash case, the court in *Driver* explained:

[P]laintiffs’ amended complaint alleged that Cessna **had a duty to the pilot and his passengers “to provide complete and adequate instruction concerning carburetor icing and the slow-flight operation of the [a]ircraft,”** that Cessna “**omitted information** concerning carburetor icing from the

Cessna Information Manual and the . . . Manual **wrongfully instructed** concerning carburetor icing and the slow-flight characteristics of the [a]ircraft,” that Cessna “knew or should have known, that the [a]ircraft would be operated for slow-flight with a passenger aboard,” and that “the negligence of Cessna . . . actually and proximately caused the damages to the plaintiffs.” **Clearly, these allegations are sufficient to state a claim for relief based on a theory of negligence against Cessna in the preparation and publication of the Cessna Information Manual.**”

Id. at 482 (emphasis added); *see also Berkebile v. Brantly Helicopter Corp.*, 311 A.2d 140, 142-43, 145 (Pa. 1973) (remanding for trial claim that helicopter manufacturer “gave no adequate warnings” in the flying manual or on the cockpit placard “of the need for instantaneous reaction in emergency power failure” because the law was “eminently clear that a manufacturer of a potentially dangerous substance owes a duty to the user to exercise reasonable care and to give adequate warnings of the dangerous nature of the substance”); *DeVito v. United Air Lines, Inc.*, 98 F. Supp. 88, 93, 96 (E.D.N.Y. 1951) (evidence was sufficient to hold airline manufacturer liable where plaintiff presented evidence that the manufacturer knew of previous issues with excessive CO₂ entering the cockpit, but failed to “instruct pilots of [the] DC-6 to use one hundred percent oxygen masks” or to warn United that “rebreather type oxygen masks were inadequate to protect the wearer against the possible hazards of carbon dioxide concentrations in the cockpit”).

The only distinction between *Driver* and the facts here is the **medium** of the instruction—a written instruction manual rather than instruction given orally during flight instruction. The specific means chosen to fulfill a duty to provide adequate instructions for the safe use of dangerous product, however, does not change the nature of the duty or the foreseeability of the injury. *See Hodder v. The Goodyear Tire & Rubber*

Co., 426 N.W.2d 826, 834 (Minn. 1988) (upholding jury verdict against tire manufacturer on failure to warn theory after considering “warnings and instructions by means of **safety films, posters, manuals, and advertising**”); *see also In re Complaint of Bay Runner Rentals, Inc.*, 113 F. Supp. 2d 795, 799, 803 (D. Md. 2000) (concluding that owner of personal water craft was liable for negligently failing to adequately instruct users of the watercraft, after reviewing the instructions in the operator’s manual, “**Play it Safe**” **video**, and **in-person instruction** by rental company employees); *In re Mentor Corp. OBtape Transobturator Sling Prods. Liab. Litig.*, 4:08-MD-2004, 2010 U.S. Dist. LEXIS 39672, at *26, 34, 77-78 (M.D. Ga. April 22, 2010) (denying summary judgment in favor of medical device manufacturer on duty to warn claim where manufacturer provided doctors with written instructions and warnings regarding device, **instructional videos**, and **regular contact with sales representatives**); *Clark v. Oshkosh Truck Corp.*, 1:07-cv-0131, 2008 U.S. Dist. LEXIS 52829, at *12-13 (S.D. Ind. July 10, 2008) (concluding that plaintiffs presented sufficient evidence on “failure to instruct” theory of negligence because, according to plaintiffs, “neither [defendant’s] **safety video** nor its operations manual adequately instructs on the use of the rollback bed and truck”) (emphasis added).

Thus, regardless of the medium through which the instruction was given, Cirrus still had a duty to give complete and adequate instructions for the product’s use and to use reasonable care in guarding against foreseeable injuries accompanying use of the product. Whether the instructions and means chosen were adequate was a question for the jury, and the jury here found they were not.

2. The Federal District Court Ruled That Cirrus and UNDAF Owed a Duty to Respondents

In addition to being rejected by the district court, Appellants' argument that they owed no duty was also heard and rejected by Federal District Court Judge Magnuson while this case was pending before him. Specifically, in considering "whether Cirrus owed a duty regarding Prokop's 'transition training,'" Judge Magnuson found that "general negligence principles apply" and reasoned:

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

It is true that most negligence cases against aircraft manufacturers involve allegedly faulty equipment. However, "[i]n cases decided on negligence theories, there is general agreement that the duty of care owing by a manufacturer of aircraft or aircraft equipment is a duty of ordinary, reasonable care." Ultimately, "the question of whether a manufacturer of airplanes has departed from a standard of ordinary care is to be resolved by measuring his conduct against the standard of what an ordinary prudent designer and manufacturer of airplanes would have done."

Glorvigen v. Cirrus Design Corp., 06-2661, 2008 WL 398814, at *4 (D. Minn. Feb. 11, 2008) ("*Glorvigen II*") (citations omitted). He also noted that "one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so." *Id.* at *3 (quoting *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975)).

C. The Duty Extends to Prokop's Passenger, James Kosak

Contrary to UNDAF's argument, passenger James Kosak need not be in a "special relationship" with UNDAF for UNDAF to owe the above described duties to him. The general duty that "any individual owes another . . . to refrain from conduct that might reasonably be foreseen to cause injury to another" requires no special relationship. *See Wicken*, 527 N.W.2d at 98-99. Moreover, the duty of a manufacturer to provide adequate safety instructions for the use of its product is not limited in any way that would exclude Kosak. *See, e.g., Hauenstein*, 347 N.W.2d at 275 ("a manufacturer's duty to warn . . . extends to all reasonably foreseeable users"); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 79 N.W.2d 688, 693 (Minn. 1956) (it is "well established" Minnesota law that a manufacturer may be liable to all "those who it should expect will use the chattel" if it fails to exercise reasonable care in the design of the product or if it fails to furnish adequate warnings for the safe use of the product). This is true even though "there is no privity between the user and the manufacturer." *Lovejoy*, 79 N.W.2d at 693.

Thus, the duty owed by Cirrus and UNDAF to provide the instruction Cirrus decided was necessary for safe use of the plane extends not only to pilot Prokop, but also to his passenger, James Kosak.

III. This Is Not an Educational Malpractice Case

In an attempted end-run around the duty they clearly owed Respondents, Appellants try to recast this case as one of "educational malpractice." The negligence theories pled here and the facts proven at trial, however, do not fit within the "educational malpractice" line of authority. Numerous reasons why this is not an educational

malpractice case include: 1) Cirrus is a product manufacturer, not an educational institution, 2) UNDAF is Cirrus's agent and joint venturer for the purposes of giving Cirrus's product instruction and is not acting as an educational institution in giving Cirrus's instruction; 3) Respondents do not challenge the general quality of, or contents of, the instruction but claim that specific promised instruction to be given was not given; 4) the policy rationales for refusing to find a duty in educational malpractice cases do not apply here; and 5) the duty not to cause physical injuries by negligent conduct does not disappear simply because the negligent conduct occurs in the educational setting.

A. Because Cirrus Is Not an Educational Institution—and Its Agent and Joint Venturer, UNDAF, Stands in Its Shoes for the Purposes of Giving Its Instruction—a Claim Against It Cannot Be Barred by the Doctrine of “Educational Malpractice”

Cirrus is not a teaching institution. It is not in the business of providing generalized piloting education. It is not a general flight training school. It is an airplane manufacturer that marketed and sold the SR-22 to Prokop and included “transition training” as part of the sales price. Cirrus seeks to use the fact that it chose to provide its product instruction via UNDAF as a means to hide behind the doctrine of “educational malpractice” and avoid liability. Appellants, however, cite no case where the public policy concerns implicated by “educational malpractice” cases were used to bar a negligence action against a product manufacturer, or, for that matter, any non-teaching entity.

Likewise, while UNDAF is an educational institution, here it stands in the shoes of Cirrus as its appointed instructor. The jury found that UNDAF was Cirrus's agent and

joint venturer for the purposes of providing Cirrus's product instruction—a finding that Appellants do not challenge on this appeal. As such, UNDAF was not acting as an educational institution. It was simply the conduit for Cirrus's product instruction. The fact that UNDAF was not acting as an autonomous educational institution is most clearly illustrated by the history of the transition training program. The materials used were developed by Wings Aloft—which gave the instruction on Cirrus's behalf—long before UNDAF was involved. Tr. 708:10-710:15, 711:8-15. After firing Wings Aloft, **Cirrus gave the training itself from October 2001 until July 2002.** Tr. 709:19-23, 711:4-713:19. Cirrus made the training course materials that were developed by Wings Aloft available to UNDAF. RA247-48; Tr. 723:2-724:5. In its contract with UNDAF—which is a separate legal entity from the University of North Dakota—**Cirrus retained tight control of the transition training and ownership over all of the transition training materials.** RA247-50; Tr. 488:6-12. **Cirrus retained the right to approve whatever training materials were used by UNDAF for Cirrus transition training.** Tr. 491:3-5, 715:21-720:13. The product instruction was conducted at Cirrus's factory in Duluth. *See* Tr. 488:13-18. UNDAF was simply Cirrus's agent for delivering Cirrus's instruction for the safe operation of Cirrus's product.

Surely, Cirrus's decision to contract with UNDAF to provide the promised instruction does not transform this case into one for "educational malpractice." The mere fact that Cirrus contracted with UNDAF to give the instruction cannot serve to negate Cirrus's existing duty to provide adequate instructions for the safe use of the planes it sells. If it could, then all product manufacturers could contract out their training

programs—or even the very writing of their instruction manuals—to an educational institution in order to claim “educational malpractice” and avoid liability.

B. Respondents’ Claims Are Simple Negligence Claims That Appellants Did Not Provide the Specific Product Instruction That They Promised They Would

Respondents do not “challenge the general quality of the instructors and the education . . . received” by Prokop. *See Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. App. 1999). The claim here is that Cirrus failed to deliver on the specific promises it undertook to give flight instruction to Prokop—a VFR pilot—through Flight Lesson 4a, on how to extract himself from IMC with the use of the autopilot while flying a Cirrus SR-22.⁸ The claim is nothing more than a negligence claim based on Appellants’ failure to provide the specific instruction promised. As such, it does not require the court to conduct a disfavored “comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies” *Id.* at 472 (quoting *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996)). As the court in *Alsides* made clear, a claim such as this is not one that will be rejected as an “educational malpractice” claim:

⁸ Appellants assert broadly that Respondents challenged the overall quality and content of the Cirrus/UNDAF instructional program—an assertion that is not supported by the record. Respondents’ claims were narrowly focused on the specific undertaking of Cirrus and UNDAF to provide transition training that included instruction on recovery from VFR into IMC (autopilot assisted), and the failure to provide that training. While Captain Walters did opine—in passing and without objection—that the training did not comport with industry standards because it did not include scenario-based training (Tr. 290), the clear focus of his testimony and Respondents’ claims was the failure to provide the training called for in the syllabus and the lack of oversight to ensure that that training was provided. Tr. 254, 259, 276-77, 296, 467-68.

[C]ourts have recognized claims by students for breach of contract, fraud, or other intentional wrongdoing that allege a private or public educational institution **has failed to provide specifically promised educational services**, such as the failure to offer classes in a particular subject or to provide a promised number of hours of instruction. . . . In these cases, the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, **but rather that it failed to perform that service at all**. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.

Alsides, 592 N.W.2d at 472-73 (emphasis added) (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992)).

Faced with the *Alsides* court's ruling that claims based on failure to provide specific, promised instruction are not barred as "educational malpractice," Appellants argue that *Alsides* excepts only contract and fraud claims—not negligence claims—from "educational malpractice." *See, e.g.*, Cirrus brief at 14. The fact that Respondents' claims sound in negligence, however, is not a relevant distinction. It is the entanglement in the schools' educational and pedagogical methods and administrative policies that is to be avoided. Whether the claim will present such entanglements does not depend on whether it sounds in negligence or not. It depends on whether it challenges the defendant's general educational standards—and therefore runs the risk of such entanglement—or simply claims—as in this case—that specific, promised instruction was not given. Since Respondents' claims do not threaten such entanglements, they are not "educational malpractice," even though they are negligence claims. *See In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1153, 1159 (D. Kan. 2008) (court allowed negligence claim to go forward against a flight school that claimed plaintiffs'

claims should be barred as “educational malpractice,” noting that *Alsides* recognized cognizable claim to the extent the allegation was that the institution failed to perform on specific promises).

C. This Case Does Not Implicate the Same Public Policy Rationales That Would Preclude Finding the Existence of a Duty of Care

Because the claim at issue does not “challenge the general quality of the instructors and the education [they] received,” this Court need not consider the public policy reasons given for rejecting claims of educational malpractice. However, even such an examination reveals that those policy considerations are not implicated here and do not mitigate against finding a duty of care in this case.

In *Alsides*, students asserted claims both attacking the “general quality” of the education they received at Brown Institute and claiming that specific instruction they were promised was not provided. Specifically, they alleged that the education they received was inadequate, that the instructors were incompetent, that the certification and qualification of the instructors was misrepresented, that the instructors lacked a curriculum, that it was misrepresented that students would be prepared to take the relevant exam and certification test, that students were not taught in modern, up-to-date facilities, and that students were not provided the 960 hours of course instruction they were promised. *Alsides*, 592 N.W.2d at 471. As stated above, the court allowed the claims based on Brown’s failure to deliver on specific promises and representations, but rejected the claims attacking the “general quality” of the education provided, finding that “[t]he majority of courts that have addressed the issue have rejected claims that attack the

general quality of education provided to students.” *Id.* at 472 (quoting *Ross*, 957 F.2d at 414). The court noted that:

these claims have been rejected by courts on a number of public-policy grounds, including: (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.”

Id. These reasons for refusing to recognize a duty flowing from an educational institution to its students to generally provide a quality education simply do not apply here.

1. Lack of a Standard of Care “by Which to Evaluate an Educator” Is Not an Issue Here

The Court need not be concerned with determining a standard of care “by which to evaluate an educator.” Cirrus is not an educator—it is a product manufacturer, and UNDAF simply provided the product instructions that Cirrus promised to provide as Cirrus’s agent and joint venturer. As federal District Court Judge Magnuson explained in his opinion denying summary judgment to Cirrus, “the question of whether a manufacturer of airplanes has departed from a standard of ordinary care is to be resolved by measuring his conduct against the standard of what an ordinary prudent designer and manufacturer of airplanes would have done.” *Glorvigen II*, 2008 WL 398814, at *4 (quoting *Germann v. F. L. Smithe Mach. Co.*, 395 N.W.2d 922, 925 (Minn. 1986)) (emphasis added). Moreover, as developed in detail in the brief of Respondent Gartland, Cirrus set the standard of conduct by which its duty of reasonable care must be measured when it decided that it was critical that Prokop be given Flight Lesson 4a, *i.e.*,

training in recovery from IMC by use of the autopilot. *See, e.g., Mervin v. Magney Const. Co.*, 416 N.W.2d 121, 124-25 (Minn. 1987) (a contract does not define the standard of care, which is imposed by operation of law, but it does provide evidence of the standard of conduct, which the jury may decide is reasonable, and if not met, may be found to be a lack of reasonable care).

Appellants argue that there is a “lack of a satisfactory standard” in educational malpractice cases because they “necessarily entail[] an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen.” Cirrus brief at 10 (quoting *Alsides*, 592 N.W.2d at 472). Here, Respondents do not complain that the training materials—the Initial Training Syllabus (A86-94), the Cirrus SR-22 Training Manual (RA29-216), and the PowerPoint slides used during the training (RA255-368)—were deficient. On the contrary, they complain that the specific instruction that Cirrus’s own materials indicate should have been given was not given. Likewise, no complaint is made about the “pedagogical method” used to give instruction to Prokop. It was the **failure** to give the critical flight instruction—Flight Lesson 4a—that constituted the negligence.

2. No Evidence Was Presented Regarding “Intervening Factors Such as the Student’s Attitude, Motivation, Temperament, Past Experience, and Home Environment”

In this case there are no “inherent uncertainties about causation and the nature of damages in light of such intervening factors as the student’s attitude, motivation, temperament, past experience, and home environment.” *Alsides*, 592 N.W.2d at 472. There was no evidence presented that Prokop’s ability to receive product instruction was

affected by any of these factors. To the extent Appellants argue that there was insufficient evidence of causation, that is a wholly separate argument that does not implicate this policy consideration or impact the question of whether Appellants owed a duty of care to Respondents.

3. Affirming the District Court's Decision Will Not Create a "Flood of Litigation"

Appellants allude to a "flood of litigation" that will occur if this Court allows Cirrus and its appointed instructor UNDAF to be sued for deaths caused by their failure to give the flight instruction they promised. *Amicus* MDLA—whose arguments differ little, if at all, from Appellants'—provides a list of all the negligence claims for "complete failure to teach" that it insists could follow if this Court affirms the district court. The MDLA's list, however, does not contain a single example that is analogous to this case. Not one of the scenarios they conjure up involves a product manufacturer that specified instruction necessary for the safe use of its product and then failed to provide the very instruction that it considered necessary. The "flood of litigation" argument is therefore belied by the fact that Appellants are not educational institutions.

For the same reasons, *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986), relied upon by UNDAF, is inapposite. There is no threat of creating malpractice claims against schools here because Cirrus is not a school, and for the purpose of giving Cirrus's product instruction, neither is UNDAF. Because they are not, holding that they have a

duty in this case does not create any new cause of action or expand any existing cause, and therefore cannot result in some imaginary new “flood of litigation.”⁹

4. Allowing Respondents’ Claim Will Not “Embroid the Courts Into Overseeing the Day-To-Day Operations of Schools”

A final policy reason cited by the *Alsides* court for denying claims of generally inadequate education is that they threaten to “embroil the courts into overseeing the day-to-day operations of schools.” 592 N.W.2d at 472. Again, this is not a claim of generally inadequate education, and the Appellants are not educational institutions. The product instruction did not take place in a school system or University setting—it took place at the Cirrus factory, under Cirrus’s direction, and using Cirrus’s materials. Tr. 490-91, 605, 609, 662-63, 715-20, 723-24. It does not implicate the overseeing of the “day to day operations of **schools**.” The imposition of a duty of care in this case will also not “necessarily implicate[] considerations of academic freedom and autonomy.” *See Ross*, 957 F.2d at 415 (quoting *Moore*, 386 N.W.2d at 115). UNDAF was giving Cirrus’s product training as directed by Cirrus. It had no “academic freedom” or “autonomy” to be compromised or interfered with.

⁹ Additionally, whether the “fear of a flood of litigation” *per se* is even a proper justification for barring a plaintiff’s cause of action is debatable. *See, e.g., Doe v. Bd. of Education*, 453 A.2d 814, 823 (Md. 1982) (argument that there will be a “flood of litigation” is an “argument from mere expediency [that] cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy”); *see also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 12 at 56 (5th ed. 1984) (“It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation,’ and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.”).

D. The Duty Not to Cause Physical Injury by Negligent Conduct Does Not Disappear When the Negligent Conduct Occurs in the Educational Setting

In addition, and importantly here, the “duty not to cause physical injury by negligent conduct does not disappear when the negligent conduct occurs in the educational setting.” *Dallas Airmotive, Inc. v. Flightsafety Int’l Inc.*, 277 S.W.3d 696, 700 (Mo. Ct. App. 2008) (citation omitted). Thus, as developed in more detail in the brief of Respondent Gartland, the Minnesota Supreme Court has affirmed liability for personal injuries caused in the educational context. *See Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 117-18 (Minn. 1979); *see also Kirchner v. Yale Univ.*, 192 A.2d 641, 642-43 (Conn. 1963) (plaintiff had cognizable negligence action against university for injuries he sustained in woodworking class while operating a machine because both the teacher and the university had a duty to the student “to exercise reasonable care . . . to **instruct and warn students in the safe and proper operation of the machines provided for their use . . .**”).

The reasoning of *Kirchner* was adopted in a later case, *Doe v. Yale University*, 748 A.2d 834 (Conn. 2000). There, the plaintiff contracted HIV following a botched arterial line insertion she performed without the supervision of her third-year resident. *Id.* at 841. Plaintiff sued the university for negligence, claiming her injuries were caused by the university’s failure “to properly and adequately train, supervise, and evaluate the plaintiff.” *Id.* at 841 n. 11. Following a jury verdict in plaintiff’s favor, the university argued on appeal that the allegations sounded in “educational malpractice” and should not have been submitted to the jury. *Id.* at 845. In upholding the jury verdict, the court

distinguished between impermissible educational malpractice claims and cognizable negligence claims alleging a failure to properly train or instruct a student:

We recognize that, at first blush, the distinction between an educational malpractice claim . . . and a cognizable negligence claim arising in the educational context . . . may not always be clear. We conclude, however, that the distinction lies in the duty that is alleged to have been breached. If the duty alleged to have been breached is the duty to educate effectively, the claim is not cognizable. **If the duty alleged to have been breached is the common-law duty not to cause physical injury by negligent conduct, such a claim is, of course, cognizable. That common-law duty does not disappear when the negligent conduct occurs in an educational setting.**

...

The duty that the plaintiff alleged was breached here is not some general duty to educate her effectively Instead, the plaintiff alleged that, in the course of instructing her, the defendant caused her to suffer physical injury as a result of its negligent conduct. Accordingly, we conclude that the plaintiff did not assert an educational malpractice claim, but instead stated a viable negligence claim.

Id. at 847 (emphasis added).

The key distinction between an actionable and nonactionable claim is not the timing of the injury, as Appellants argue, but the “**result of the claimed educational inadequacy.**” *Id.* at 849 (emphasis added). The *Doe* court explained:

We acknowledge that the jury in the present case was asked to determine, in part, whether [the resident’s] training and particular aspects of the residency program were adequate. We also acknowledge that these and similar assessments . . . require the kind of judicial oversight of the educational process that, for policy reasons, we eschewed [in educational malpractice cases.] **What tips the balance here, however . . . is the result of the claimed educational inadequacy. When the claimed result is an inadequate education, there is no viable claim because we are unwilling to recognize such a legal duty as a matter of public policy. When, however, the result is physical harm . . . we are willing to recognize the claim because it falls within the traditionally recognized duty not to cause physical harm by negligent conduct.**

Id. (emphasis added) (citations omitted). Certainly, here, the **result** of Appellants' negligence was physical harm.

E. The Cases Appellants Cite Involving Suit Against Training Schools—Including Out-of-State Flight Training Schools—Are Not Analogous to This Case

Appellants rely on *Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103 (D.S.D. 2006) and *Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008)—negligence actions brought outside Minnesota against flight training schools—and *Page v. Klein Tools, Inc.*, 610 N.W.2d 900 (Mich. 2000), a case involving a three week class on how to climb utility poles. But these cases are inapposite. They were brought against training schools that were in the business of providing generalized pilot instruction or other instruction. None were brought against a manufacturer or seller of an aircraft that was providing specific transition training on how to fly the particular aircraft being purchased. Judge Magnuson had the chance to consider these cases in the context of the facts of this case, and rejected them:

Cirrus also cites several foreign cases where negligence actions against flight schools were denied. *See, e.g., Sheesley v. Cessna Aircraft Co.*, Nos. 02-4185, 03-5011, 03-5063, 2006 WL 3042793 (D.S.D. Apr. 20, 2006) (claim against third-party defendant flight school was educational malpractice barred under South Dakota law). However, Cirrus' primary business is building and selling airplanes, not training pilots. No party has cited a case involving an aircraft manufacturer that allegedly undertook a duty to train a pilot by including transition training as part of the aircraft's purchase price. Nor has the Court found one. Therefore, general negligence principles apply.

Glorvigen II, 2008 WL 398814, at *4.

Moreover, the district court further distinguished these cases because they involved claims that the method of instruction was inadequate, rather than claims that instruction that was supposed to be given was simply not given:

The *Page*, *Dallas Airmotive* and *Sheesley* decisions all have various factors in common. In all three cases some sort of training **was provided**. In all three cases the Plaintiffs alleged that the **provided training** was insufficient or of a low quality. *Sheesley* added the additional factor that the Plaintiffs claimed that emergency procedure training **should have been included in the curriculum**. In all three cases Plaintiffs wanted the respective court to conduct an “inquiry into . . . the nuances of educational processes and theories” thus requiring the “. . . [T]he court [to] [engage] in a comprehensive review of a myriad of educational and pedagogical factors.” As a result, in all three cases the courts found that no duty existed as a matter of public policy.

In this case the Court finds that as a matter of law UNDAF owed the Plaintiffs a duty of care. Unlike other cases, this case does not implicate the same public policy rationales that would preclude finding the existence of a duty of care. This case is decidedly different than *Page*, *Dallas Airmotive* and *Sheesley* because here the 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. 14-18 (emphasis, ellipses, and parentheticals in original) (citations omitted)¹⁰

¹⁰ UNDAF also relies on *Moss Rehab v. White*, 692 A.2d 902 (Del. 1997), where a passenger killed in a motor vehicle accident sued the driving school the driver had attended, alleging that the school “failed to properly evaluate [the driver] and train him to drive a motor vehicle.” *Moss Rehab*, 692 A.2d at 904. The school was unquestionably in the business of training drivers, and the claim was unquestionably that the school had generally failed to properly instruct him on how to drive. *Moss Rehab* is distinguishable from this case for all the reasons given by Judges Magnuson and Ten Eyck regarding *Page*, *Dallas Airmotive* and *Sheesley*. Further, to the extent that UNDAF suggests that *Moss Rehab* indicates that Congressional and FAA regulation of flight schools is an additional reason for barring Respondents’ claims (UNDAF brief at 30), this ground for relief, which appears to be in the form of a federal preemption argument, was never advanced below either in state or federal court, and is neither properly developed nor properly before this court.

While citing *Dallas Airmotive*, *Sheesley*, and *Page*, Appellants outright ignore *In re Cessna 208 Series Aircraft Products Liability Litigation*, 546 F. Supp. 2d 1153 (D. Kan. 2008), a flight training case much more analogous to this case. *Cessna* involved two pilots and two passengers killed in the crash of a Cessna. *Id.* at 1156. Both pilots had attended a Cessna Caravan Pilot Initial Course at FlightSafety's Cessna Learning Center a few months before the crash. *Id.* at 1156-57. As part of the training, the pilots were supposed to be taught how to handle icing conditions in the Cessna Caravan. *Id.* at 1157. The plane crashed due to icing. The pilots' families sued FlightSafety, alleging that FlightSafety negligently failed to properly instruct the pilots on how to avoid ice accumulation, how to control the plane if icing did occur, and fraudulently withheld information and breached warranties. *Id.*

FlightSafety moved for summary judgment, asserting that the claims sounded in "educational malpractice." The Texas state court denied the motion and allowed the claims to move forward. *Id.* at 1158. After the case was removed, FlightSafety renewed its summary judgment motion, again alleging the claims were barred as "educational malpractice." In deciding this issue, the federal court acknowledged the key distinction in *Alsides*: "that plaintiffs' claims for breach of contract, fraud or misrepresentation are cognizable to the extent they allege that the institution failed to perform on specific promises and such claims would not involve an inquiry into the nuances of educational processes and theories." *Id.* at 1159. The court also cited the dissent in *Page v. Klein Tools*, 610 N.W.2d 900 (Mich. 2000), noting that there the plaintiff had asserted a distinct claim of negligence based on improper instruction in using a particular piece of

equipment, which did not fall within the disfavored realm of educational malpractice. *Id.* at 1158-59. Based in part on *Alsides* and the reasoning of the dissent in *Page*, the federal court, like its Texas state court counterpart, rejected FlightSafety's "educational malpractice" defense and allowed **negligence** claims against it to go forward. *Id.* at 1159.

IV. There Is Ample Evidence of Causation

Respondent Glorvigen joins in the arguments of Respondent Gartland that there was more than a sufficient basis for the jury to decide that the standard of conduct established by the product training curriculum here was not met, that crucial aspects of the curriculum were skipped, and that this breach was a cause of the accident. The district court conducted a thorough review of the evidence presented to the jury showing a breach, *i.e.*, that the flight training at issue was not provided, and the evidence from which the jury could find that the breach caused the crash. Add. 31-48. Although some of the evidence presented to the jury was circumstantial, cumulative circumstantial evidence can be "sufficient to take the inference of causation out of the realm of speculation." *Int'l Fin. Servs., Inc. v. Franz*, 534 N.W.2d 261, 266 (Minn. 1995). There is no basis for disturbing the jury's finding of causation, because, as the district court stated:

The causation evidence . . . indicates that the jury need not have speculated to have determined that there was causation in this case. Here Prokop was confronted with VFR into IMC conditions. He attempted to turn back. Both causation experts agree there was no evidence he ever activated the autopilot. He begins to conduct the maneuver listed in Exhibit 9 on page 126. This is apparent from the tracking data in Exhibit 55 which indicates an attempted 180 degree turn (which is part of the maneuver in the training manual). Without the autopilot assist to maintain his orientation, Prokop's attempt to return to Grand Rapids culminated in an accelerated stall which

caused the plane to rapidly descend into the ground. Had Prokop been trained in the VFR into IMC autopilot assisted emergency procedure there would not have been any crash.

All the omitted training was a substantial factor in this crash. Prokop was in a plane that substantially altered the amount of time he had to react. In a plane that handled substantially different than the plane he was used to. UNDAF was aware of these differences and that is why it created (or more appropriately continued to use) the autopilot assisted recovery maneuver. This maneuver was supposed to make a very dangerous situation safer. UNDAF totally failed Prokop by not providing the training and this lack of training caused a fatal plane crash.

Add. 46-47.¹¹

V. UNDAF, as Intervenor, Is Liable to Respondents

UNDAF's authorities for its argument that it cannot be held liable because it was never served with the Complaint are at best inapposite, and can be more accurately described as misrepresented. UNDAF cites Minn. R. Civ. P. 3.01 and *Avery v. Campbell*, 157 N.W.2d 42 (Minn. 1968) as if these authorities require service of the Complaint on the intervenor and have any bearing on whether UNDAF can be liable to Respondents. UNDAF brief at 46. They do neither. Rule 3.01 doesn't even mention intervenors, and *Avery* is simply a case where the plaintiff **did** make a direct claim against the potential intervenor. *Avery*, 157 N.W.2d at 44-45. It does not hold that there must be such a direct claim in order for there to be liability.

Likewise, the two *Konen Construction* cases, mined by UNDAF from early-1960s Oregon, do not support UNDAF's extraordinary claim that after voluntarily intervening

¹¹ The trial court also found that this evidence was equally applicable to Cirrus. Add. 65-68.

in this case and fully participating in its trial they cannot be liable. In *State ex rel. J. F. Konen Constr. Co. v. United States Fid. & Guar. Co.*, 382 P.2d 858 (Or. 1963), the court did not rule that judgment could not be entered against the intervenors. On the contrary, it remanded the matter back to the trial court to “proceed in whatever manner is deemed necessary to determine whether or not judgment in the second cause of action shall be entered against the intervening defendants.” *Id.* at 860. When the lower court, in its discretion, declined to enter such judgment, the plaintiff again appealed to the Oregon Supreme Court. Again, the Oregon Supreme Court refused to order the trial court to enter such a judgment, stating that it had previously committed the decision back to the lower court’s “general discretion to regulate the proceedings in its court.” *State ex rel. J. F. Konen Constr. Co. v. United States Fid. & Guar. Co.*, 401 P.2d 48, 50-51 (Or. 1965).

VI. Federal Aviation Regulations Do Not Preempt Plaintiffs’ Claims

Amicus Curiae Aircraft Owners and Pilots Association (AOPA) asserts a federal preemption argument that is procedurally impermissible and substantively wrong. Procedurally, AOPA raises an argument that no party in this case has raised on appeal or in the district court.¹² Typically, an *amicus* may not raise an issue not addressed by the parties. *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 687 n. 7 (Minn. 1997). Thus, this Court should decline to consider the issue.

¹² Appellants did raise preemption as a defense in front of Judge Magnuson while this case was pending in the federal district court. Twice, Judge Magnusson ruled that Respondents’ claims were not preempted. *Glorvigen v. Cirrus Design Corp*, No. 05-2137, 2006 WL 399419, at *4-6 (D. Minn. Feb. 16, 2006) (“*Glorvigen I*”) (RA5-17); *Glorvigen II*, 2008 WL 398814, at *3.

Even if this Court does consider the issue, however, AOPA's argument fails. In this very case, Judge Magnuson "thoroughly examined whether legislative history or case law evinces a federal intent of field preemption and found no such intent." *Glorvigen II*, 2008 WL 398814, at *3 (citing *Glorvigen I*, 2006 WL 399419, at *4-6). For all the reasons set forth in Judge Magnuson's order—including his rejection of many of the very cases cited by AOPA—Respondents' claims are not preempted by federal law.

CONCLUSION

For all the reasons stated above, the judgment against the Appellants should be affirmed in all respects.

Dated: October 27, 2010

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: _____



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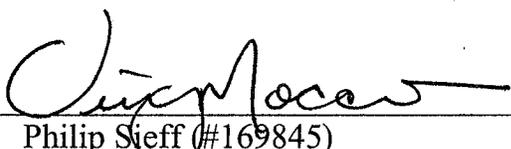
**ATTORNEYS FOR RICK GLORVIGEN, AS
TRUSTEE FOR THE NEXT-OF-KIN OF
DECEDENT JAMES KOSAK**

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Rick Glorvigen, as trustee for the Next-of-kin of decedent James Kosak, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface using Microsoft Word 2003 and contains 12,934 words, according to the Microsoft Word 2003 "Word Count" function, which was set to specifically include headings, footnotes, and quotations.

Dated: October 27, 2010

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