

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

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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).*

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**BRIEF OF RESPONDENT THOMAS GARTLAND,  
AS TRUSTEE FOR THE NEXT-OF-KIN OF DECEDENT GARY R. PROKOP**

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## TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Issues.....	1
Statement of Case.....	3
Statement of Facts.....	5
A.    Cirrus And UNDAF Undertook To Provide Necessary Transition Training To Prokop So That He Could Safely Fly His New High Performance Plane, And Failed To Do So.....	8
1.    Transition Training In General.....	8
2.    Cirrus' Transition Training Program.....	10
3.    Claimed Lack of Adequate Transition Training For Prokop.....	11
B.    Respondents Claimed That The Lack Of Adequate Transition Training Was A Cause Of The Crash.....	17
1.    Evidence That The Crash Occurred When Prokop Tried To Manually Escape An Emergency Situation.....	17
2.    Evidence That Cirrus/UNDAF's Failure To Provide Adequate Transition Training Was A Cause Of The Crash.....	19
C.    The Trial Court's Review Of The Record On Negligence And Causation.....	22
Argument.....	25
I.    Standard Of Review.....	26
II.   Respondents' Theory Of Liability Is Well Founded In Established Minnesota Law.....	27
A.    Minnesota Law Imposes On A Manufacturer And Seller A Duty To Provide Adequate Instructions For The Safe Use Of A Product.....	27
B.    Educational Malpractice Is Not The Claim Here.....	30
C.    Negligent Breach Of Contract Is Not The Claim Either.....	35
III.  There Was More Than Sufficient Evidence of Causation.....	38

IV.	Judgment Was Properly Entered Jointly And Severally Against Cirrus And UNDAF, Its Agent And Joint Venturer Who Voluntarily Intervened In The Litigation As A Defendant And Participated Fully In All Aspects Of The Trial .....	42
V.	The District Court Did Not Abuse Its Discretion In Denying A New Trial.....	44
	Conclusion .....	48

## TABLE OF AUTHORITIES

### Cases

<i>Alsides v. Brown Inst., Ltd.</i> , 592 N.W.2d 468 (Minn. Ct. App. 1999).....	Passim
<i>Blaeser &amp; Johnson, P.A. v. Kjellberg</i> , 483 N.W.2d 98 (Minn. Ct. App. 1992).....	2, 43
<i>Bolander v. Bolander</i> , 703 N.W.2d 529 (Minn. Ct. App. 2005).....	26
<i>Bondy v. Allen</i> , 635 N.W.2d 244 (Minn. Ct. App. 2001).....	26
<i>Bradley v. Hubbard Broad., Inc.</i> , 471 N.W.2d 670 (Minn. Ct. App. 1991).....	44
<i>Canada By &amp; Through Landy v. McCarthy</i> , 567 N.W.2d 496 (Minn. 1997) .....	36
<i>Connolly v. Nicollet Hotel</i> , 258 Minn. 405, 104 N.W.2d 721 (1960) .....	2
<i>Country Joe, Inc. v. City of Eagan</i> , 560 N.W.2d 681 (Minn. 1997) .....	4
<i>Dornack v. Barton Constr. Co.</i> , 272 Minn. 307, 137 N.W.2d 536 (1965) .....	36
<i>Eklund v. Lund</i> , 301 Minn. 359, 222 N.W.2d 348 (1974) .....	2, 44
<i>Erickson v. Bennett</i> , 409 N.W.2d 884 (Minn. Ct. App. 1987).....	42
<i>Faricy v. St. Paul Inv. &amp; Sav. Soc’y</i> , 110 Minn. 311, 125 N.W. 676 (1910) .....	2, 42
<i>Flom v. Flom</i> , 291 N.W.2d 914 (Minn. 1980) .....	26
<i>Frey v. Montgomery Ward &amp; Co.</i> , 258 N.W.2d 782 (1977) .....	28, 36

<i>Fritz v. Arnold Mfg.</i> , 305 Minn. 190, 232 N.W.2d 782 (Minn. 1975).....	40
<i>Germann v. F.L. Smithe Mach. Co.</i> , 395 N.W.2d 922 (Minn. 1986) .....	1, 29-30
<i>Glorvigen v. Cirrus Design Corp.</i> , 581 F.3d 737 (8th Cir. 2009) .....	1, 4
<i>Glorvigen v. Cirrus Design Corp.</i> , Civ. No. 06-2661, 2008 WL 398814 (D. Minn. Feb. 11, 2008).....	1, 28-30
<i>Gray v. Badger Mining Co.</i> , 676 N.W.2d 268 (Minn. 2004) .....	28, 36
<i>Gruenhagen v. Larson</i> , 310 Minn. 454, 246 N.W.2d 565 (1976) .....	40
<i>Int'l Fin. Servs., Inc. v. Franz</i> , 534 N.W.2d 261 (Minn. 1995) .....	1, 39
<i>Jurgensen v. Schirmer Transp. Co.</i> , 242 Minn. 157, 64 N.W.2d 530 (1954).....	45
<i>Lake George Park, L.L.C. v. IBM Mid Am. Emps. Fed. Credit Union</i> , 576 N.W.2d 463 (Minn. Ct. App. 1998).....	26
<i>Larson v. Anderson, Taunton &amp; Walsh, Inc.</i> , 379 N.W.2d 615 (Minn. Ct. App. 1985).....	33, 45
<i>Larson v. Indep. Sch. Dist. No. 314, Braham</i> , 289 N.W.2d 112 (Minn. 1979) .....	Passim
<i>Lavender v. Kurn</i> , 327 U.S. 645 (1946).....	39
<i>Mervin v. Magney Constr. Co.</i> , 416 N.W.2d 121 (Minn. 1987) .....	36-37
<i>Osborne v. Twin Town Bowl, Inc.</i> , 749 N.W.2d 367 (Minn. 2008) .....	1, 26
<i>Peterson v. BASF Corp.</i> , 657 N.W.2d 853 (Minn. Ct. App. 2003), <i>aff'd</i> , 675 N.W.2d 57 (2004), <i>vacated</i> , 544 U.S. 1012 (2005).....	4

<i>Peterson v. Burlington N. R.R. Co.</i> , 399 N.W.2d 175 (Minn. Ct. App. 1987).....	45
<i>Pierce v. Nat'l Farmers Union Prop. &amp; Cas. Co.</i> , 351 N.W.2d 366 (Minn. Ct. App. 1984).....	40
<i>Pomani by Pomani v. Underwood</i> , 365 N.W.2d 286 (Minn. Ct. App. 1985).....	2, 44
<i>Rausch v. Julius B. Nelson &amp; Sons, Inc.</i> , 276 Minn. 12, 149 N.W.2d 1 (1967) .....	36
<i>Robinson v. Butler</i> , 234 Minn. 252, 48 N.W.2d 169 (1951) .....	1, 26
<i>Sather v. Snedigar</i> , 372 N.W.2d 836 (Minn. Ct. App. 1985).....	2, 45
<i>Sauter v. Wasemiller</i> , 389 N.W.2d 200 (Minn. 1986) .....	40
<i>Schwartz v. Consol. Freightways Corp. of Del.</i> , 306 Minn. 564, 237 N.W.2d 385 (1975).....	45
<i>Sheesley v. Cessna Aircraft Co.</i> , Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006).....	27-28
<i>State ex rel. Bergin v. Fitzsimmons</i> , 226 Minn. 557, 33 N.W.2d 854 (1948) .....	2, 42

**Statutes, Rules & Regulations**

Minn. R. Civ. App. P. 128.02, subd. 1(c).....	5
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## STATEMENT OF ISSUES

- 1. This is a negligence case based on the failure of a manufacturer to provide adequate instructions for the safe anticipated use of its product. Does the so called “educational malpractice” doctrine bar the wrongful death claims of the respondents?**

The district court rejected the defense contention that respondents’ negligence based product liability claims were barred by the inapplicable rule.

### **Apposite Authorities:**

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

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

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

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

- 2. Where the appellants undertook to supply instruction and training necessary for the safe operation of the Cirrus SR22 airplane, and respondents presented evidence that required training was 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 a 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 ample evidence to support the jury’s findings of fault and causation.

### **Apposite Authorities:**

*Robinson v. Butler*,  
234 Minn. 252, 48 N.W.2d 169 (1951)

*Osborne v. Twin Town Bowl, Inc.*,  
749 N.W.2d 367 (Minn. 2008)

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

3. **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' agent and joint venturer, findings which are not challenged on appeal?**

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

**Apposite Authorities:**

*Blaeser & Johnson, P.A. v. Kjellberg*,  
483 N.W.2d 98 (Minn. Ct. App. 1992)

*Faricy v. St. Paul Inv. & Sav. Soc'y*,  
110 Minn. 311, 125 N.W. 676 (1910)

*State ex rel. Bergin v. Fitzsimmons*,  
226 Minn. 557, 33 N.W.2d 854 (1948)

4. **Did the district court abuse its discretion in concluding that no new trial was required because of alleged misconduct during final argument?**

The district court examined the claimed misconduct, evaluated it in the context of the instructions and the case as a whole, and determined that a new trial was not warranted.

**Apposite Authorities:**

*Pomani by Pomani v. Underwood*,  
365 N.W.2d 286 (Minn. Ct. App. 1985)

*Eklund v. Lund*,  
301 Minn. 359, 222 N.W.2d 348 (1974)

*Sather v. Snedigar*,  
372 N.W.2d 836 (Minn. Ct. App. 1985)

*Connolly v. Nicollet Hotel*,  
258 Minn. 405, 104 N.W.2d 721 (1960)

## STATEMENT OF CASE

Appellants gloss over the significant proceedings that occurred in the federal district court prior to the trial of this case in state court. Thomas Gartland, as trustee for the heirs and next-of-kin of Gary Prokop, and Rick Glorvigen, as trustee for the heirs and next-of-kin of James Kosak, brought separate actions in the Itasca County District Court against Cirrus Design Corporation, seeking to recover damages for the alleged wrongful deaths of Prokop and Kosak. On September 14, 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.” Alternatively, Cirrus contended that the Federal Aviation Act (“FAA”) completely preempted state law claims based on an alleged failure to provide adequate pilot training.

Judge Paul Magnuson rejected Cirrus’ claims, and in an order filed February 16, 2006, 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. R.A. 5-17.<sup>1</sup>

Undeterred, Cirrus brought third-party actions in May 2006 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 United States removed the case to federal court, where it was again heard by Judge Magnuson. While the action was pending before Judge Magnuson for the second time, Cirrus sought

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<sup>1</sup> “R.A.” refers to respondents’ appendix.

summary judgment on federal preemption grounds, and on the claim that it had provided inadequate training. Judge Magnuson again denied Cirrus' claim of federal preemption, and also rejected the "educational malpractice" defense. Cirrus A. 162-76.<sup>2</sup> He then remanded the case to state court, where it was ultimately tried to a jury verdict.

These rulings, which will be discussed in more detail below, are significant in a number of respects. First, Judge Magnuson reached the same decision on the merits of the educational malpractice defense as did the state court judge in the decision that is the subject of this appeal, and his analysis is instructive. Second, his decision rejecting preemption was apparently accepted by the appellants, who did not raise the issue in the subsequent state court proceedings after remand,<sup>3</sup> and do not raise the issue on appeal to this court.

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<sup>2</sup> "Cirrus A." refers to Cirrus' appendix.

<sup>3</sup> Judge Magnuson remanded the case to state court because once he granted summary judgment to the FAA, there was no longer a basis for federal jurisdiction. Cirrus could and did appeal the remand order to the Eighth Circuit. *Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737 (8th Cir. 2009). Cirrus did not attempt to raise the preemption issue in the Eighth Circuit, nor did it pursue the issue in state district court after the second remand. The Airplane Owners and Pilots Association raises the issue of preemption in their amicus brief. 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); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 863 (Minn. Ct. App. 2003), *aff'd*, 675 N.W.2d 57 (2004), *vacated*, 544 U.S. 1012 (2005).

## STATEMENT OF FACTS

### *Overview*

Many of the facts in this case are not disputed. Others were very much in dispute at trial. Because the factual disputes have been resolved by the jury, under the controlling standard of review the record is now examined in a light most favorable to the verdict. Appellants have recited the facts without complete fidelity to Minn. R. Civ. App. P. 128.02, subd. 1(c), failing to summarize the facts that support the verdict, and instead continuing to advance their own selective view of the evidence. Respondent Gartland submits the following statement of facts for the court's consideration in light of the appropriate standard of review.

Gary Prokop and James Kosak died when Prokop's Cirrus SR22 airplane crashed near Hill City, Minnesota, in the early morning hours of January 18, 2003. Prokop had purchased the SR22 in December 2002 and had limited flight experience in the new plane. Prokop's prior experience was piloting a 1968 Cessna 172 Sky Hawk, a much smaller, lower performance airplane than the Cirrus SR22.

As part of the purchase price for the SR22, Prokop received training from Cirrus on how to safely fly the new plane. The training was given by UNDAF, who provided the training under a contract with Cirrus.

The Cirrus SR22 crashed while Prokop was trying to fly out of adverse conditions that made it difficult or impossible for him to fly by visual flight rules (VFR). The undisputed evidence at trial was that shortly after he took off, Prokop encountered the equivalent of instrument meteorological conditions (IMC) which deprived him of visual

ground references; these conditions required immediate and specific action in order to continue to fly safely. VFR into IMC is a leading cause of small plane crashes because the pilot is suddenly unable to maintain his or her spatial orientation without visual cues.

The loss of orientation is even more dangerous in a fast, high performance plane like the SR22, because the pilot can lose control more quickly than in a slower plane like Prokop's 35-year-old Cessna. While Prokop had been trained in his Cessna on how to respond in VFR to IMC conditions, the procedures prescribed by Cirrus for recovery in its plane were significantly different than for the Cessna. Specifically, the proper response in the SR22 was to engage the autopilot, change the course setting, and set the autopilot to maintain altitude and attitude. The Cessna did not have an autopilot, and the pilot made these maneuvers by hand. However, because of the speed at which the SR22 flew, trying to recover by flying the plane manually was much more dangerous than in Prokop's Cessna, and for this reason the Cirrus pilot was supposed to use the autopilot to assist in the recovery. Moreover, as explained in detail below, the steps required by Cirrus to recover from this dangerous condition involved more than merely turning on the autopilot, and all steps had to be taken quickly and surely. The failure to take the actions prescribed by Cirrus could, as it did in this case, prove fatal.

One of the primary issues at trial was whether Prokop did, in fact, get the training he had been promised by Cirrus and UNDAF in order to prepare him to fly his new plane. Respondents asserted that Prokop's instructor skipped the lesson specifically intended to teach Prokop how to recover from VFR into IMC in the SR22. His Cirrus/UNDAF instructor claimed he gave Prokop all of the training that Prokop was supposed to receive

according to the curriculum developed by Cirrus and UNDAF. The written records concerning Prokop's training contradicted that testimony. In addition, Prokop's comments to others indicated that he had not received the crucial training on recovery in emergency situations by using the SR22's autopilot. The jury resolved these factual disputes in favor of the respondents.

Another hotly contested fact issue at trial was whether Prokop's lack of training made a difference in the accident. The appellants' position was that it did not. However, respondents presented expert testimony which established that Prokop did not use the emergency procedure in which he had received no instruction, and that if he had, the accident could have been avoided. Once again, the jury resolved this factual dispute in favor of the respondents.

Finally, the appellants argued at length that there were other causes for the accident, including errors on Prokop's part in deciding to fly on the morning in question, and in the way he piloted the plane. Respondents countered these claims by asserting that Prokop was unprepared to successfully confront the emergency situation in which he found himself, and that his lack of preparation was the result of inadequate instruction by Cirrus and UNDAF. The jury resolved these disputes as well, apportioning 25% of the fault for the accident to Prokop, and a total of 75% of the fault to Cirrus and UNDAF.

On post-trial motions, the trial judge carefully considered the arguments of the parties concerning the factual record, and found that there was no basis to set aside the jury's verdict.

**A. Cirrus And UNDAF Undertook To Provide Necessary Transition Training To Prokop So That He Could Safely Fly His New High Performance Plane, And Failed To Do So**

Gary Prokop died while piloting his recently purchased Cirrus SR22, a sophisticated high performance private plane. Cirrus marketed the SR22 as fast yet easy to fly and “accessible to pilots with a wide range of experience.” T.240.<sup>4</sup> Because Cirrus was marketing its plane to people who were casual aviators, Cirrus had an obligation to ensure that purchasers of the plane were adequately trained in how to fly it. T.242-43. Although not required by FAA regulations to offer training, Cirrus undertook to do so as part of the purchase price of the plane. T.182, 466, 489, 711-12, 1476. Cirrus provided transition training to buyers with every plane. T.245, 489.

**1. Transition Training In General**

Transition training is well recognized in the aviation industry. It is training designed to ensure that a pilot, already licensed and with some degree of flight experience, is trained in the differences between planes he or she is 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. Neither Cirrus nor UNDAF disputed at trial that transition training was standard practice in the industry, and that it was crucial to the safe operation of the SR22. Cirrus officials agreed that Cirrus was responsible for seeing that there was a transition

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<sup>4</sup> “T.” refers to the trial transcript.

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

Capt. James Walters, an expert witness called by counsel for the Kosak family, explained to the jury the importance of training pilots who are moving from one plane to another – what he called “differences” or “transition” training.<sup>5</sup> T.156-57. As 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.” T.156-57.

Walters discussed transition training in general, and the standards in the aviation industry for such training. “[T]he training is there because the airplanes are different. . . . You take the knowledge . . . that the pilot has, and you pretty much tailor a program not specifically to him, but specifically to the airplane that he’s coming from and going to so that you can maximize his learning experience essentially.” T.181. Walters testified that the goal was to train the students to proficiency in the new craft, which is an industry standard for both commercial and general aviation training.<sup>6</sup> T.181.

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<sup>5</sup> Throughout their briefs, appellants challenge Capt. Walters’ testimony on a number of grounds. However, they did not raise the issue of the trial court’s admission of Walters’ testimony in either their motion for a new trial or their opening briefs to this court. *See* discussion, *infra* at 41-42.

<sup>6</sup> Walters was cross-examined on the fact that he had never piloted an SR22, and had never given general aviation transition training. T.322. Walters testified that although he was not himself qualified to fly an SR22, based upon all of the information that he had,

## 2. Cirrus' Transition Training Program

Although not required by FAA regulations, transition training is standard practice in the aviation industry, and the inclusion of transition training in the price of the SR22 was part of Cirrus' marketing for the plane.<sup>7</sup> T.466, 1476. The Cirrus training included "emphasis on the innovative aspects of the SR22 . . . [including] the autopilot/trim system" and "[f]light training to proficiency, in accordance with trainer's standards." Cirrus A. 188.

From October 2001 to July 2002, Cirrus provided transition instruction directly to new purchasers of its planes. T.715. In 2002, Cirrus contracted with UNDAF to provide the transition training and to design training materials. T.488. UNDAF was to provide training tailored to the individual purchaser. T.503, 1476. Cirrus had the right to approve all UNDAF training materials, and acknowledged that it was ultimately responsible for the materials. T.491, 726, 740.

John Glenn Wahlberg, UNDAF course manager, provided oversight to all flight training facilities throughout the country, and testified about the training program and the contractual relationship between UNDAF and Cirrus. T.487-88, 497. Wahlberg also identified the specific training materials that UNDAF used to train Prokop. T.509-10.

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the general principles to which he testified regarding transition training were applicable to all planes, including the SR22 all the way up to a 747. T.450.

<sup>7</sup> The FAA does not require a manufacturer to provide transition training. T.600. But the FAA does require a High Advanced Technical Aircraft Certification for a pilot to fly the SR22, and therefore Prokop would not have been allowed to leave the Cirrus facility with the SR22 without his certification. T.1494-95, 1528. Part of Cirrus' sale of its planes included providing the training needed for the certification. T.1496-97.

Wahlberg testified that pilots who purchased new Cirrus planes were to be trained to proficiency in the areas covered by the syllabus, and were expected to earn satisfactory grades. T.505.

UNDAF instructors provided the transition training at the Cirrus facility in Duluth. T.488. The transition training documents indicated that the training was 8 hours per day, including both classroom and in-flight lessons, for 2 days. T.545, 613-14. Prokop also paid for an additional 2 days of training. T.618. But Prokop's training was only about 4-5 hours per day. T.613-18, 931-32. Thus, Prokop actually received 3 1/2 days of training, instead of the 4 for which he paid. T.619, 931. The training course materials included the Initial Training Syllabus and the Cirrus SR22 Training Manual. T.510-11; UNDAF A. 86-94.<sup>8</sup> Instructors were required to fill out checklists indicating that the lessons were complete. T.602-03, 638. Moreover, the Training Syllabus states, "skipped items should be left unchecked." T.512, 924.

### **3. Claimed Lack of Adequate Transition Training For Prokop**

A key dispute at trial concerned whether Prokop had received the full course of training called for in the Cirrus syllabus. Specifically, it was the claim of the respondents that Gary Prokop did not receive the training called for in the syllabus on recovery from VFR into IMC, Lesson 4a. VFR into IMC training was particularly important for Prokop. First, he indicated on his registration forms that he had limited experience as a pilot. T.247, 618-19. Prokop was not certified to fly by Instrument Flight Rules (IFR),

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<sup>8</sup> "UNDAF A." refers to UNDAF's appendix.

although he was pursuing that certification separately from the Cirrus training. Second, appellants were aware that VFR into IMC problems were a leading cause of crashes for inexperienced pilots. T.698. Indeed, appellants acknowledged that the VFR into IMC training was developed for that very reason; as UNDAF's Wahlberg said, "[t]his is why this procedure exists." T.698.

Lesson 4a was intended to cover specific flight maneuvers for the SR22. The instructor and student were supposed to practice "[r]ecover from unusual attitudes" and "[r]ecover from VFR into IMC (auto-pilot assisted)." UNDAF A. 90. This lesson was included in the transition training because a pilot who had not flown the SR22 would not be aware of the steps that Cirrus and UNDAF considered necessary to safely recover from the emergency situation of VFR into IMC.

The training prescribed by the syllabus was crucial to the safe operation of the plane. Because the SR22 was a much faster plane than the Cessna that Prokop had flown before, there was a greater potential for emergencies to arise more quickly. As one witness said succinctly, with a faster plane, "you can get into problems quicker." T.1190.

UNDAF's course manager, John Wahlberg, admitted that the switch to autopilot in the SR22 would be an emergency procedure in VFR to IMC recovery, and would need to be done very quickly. T.517, 524. However, more was required than simply turning on the autopilot. Cirrus prescribed a four step process: the pilot had to make several decisions, including adjusting the attitude of the plane, activating the autopilot, and setting the autopilot to hold altitude. T.257-58, 524-25. Wahlberg conceded that the training was important for a fast response to a quickly developing emergency. T.697.

Wahlberg also admitted that, despite Prokop's prior training, the VFR to IMC training "needed to be done." T.626. Wahlberg acknowledged that there is no portion of the syllabus that lists "VFR into IMC autopilot assisted" other than lesson 4a. T.514.

Finally, it was undisputed at trial that lesson 4a in Prokop's syllabus was not checked off, indicating, according to the terms of the syllabus itself, that the lesson had not been completed. The reasons for this omission, and its significance, were central issues at trial.

YuWeng Shipek was the trainer for Prokop. T.753-54. Shipek was a recent UNDAF graduate, who had been providing transition training on the Cirrus planes for about 4 months when he trained Prokop. T.746, 748. Shipek testified that there was no standardized training for Cirrus instructors at the time he was trained. T.753, 882.

Prokop trained with Shipek from December 9 to December 12, 2002. UNDAF A. 86-94. Shipek initially claimed that the lessons contained in the syllabus were not mandatory but instead were "more of a guidelines." T.768. Shipek also denied initially that he was required to provide and document the specific training contained in the syllabus, despite the specific language of the syllabus that said "a grade of S[atisfactory] or E[xcellent] is required before a maneuver is to be considered complete." T.771. Shipek's position was completely refuted by other UNDAF witnesses, including his supervisor, Wahlberg. T.514-16.

After initially disputing whether he was required to sign off on the syllabus, Shipek later admitted that the purpose of the syllabus was to document that all training specified was given, and that the normal procedure was to check off each lesson

immediately after completion. T.891, 923-24. Shipek then claimed he actually did the disputed lessons but “forgot” to sign off on the syllabus. T.792, 864-65. Shipek asserted that he was “sloppy” in his documentation, and that there were a number of “clerical errors” in his documentation of Prokop’s training. T.773, 798-99, 876, 891. Yet Shipek was aware that satisfactory completion of each maneuver in the syllabus was required for final certification.<sup>9</sup> T.859.

VFR into IMC training requires the pilot’s vision to be obscured. T.526. This is accomplished through either actual IMC conditions or “under the hood” training.<sup>10</sup> T.526-27. Shipek claimed that he did not specifically recall putting Prokop “under the hood,” but thought he might have done so at least twice for the VFR into IMC training. T.794. But when Shipek was shown Prokop’s log book for the training, he agreed that no “hood time” was listed. T.797-98. Prokop, however, would have been motivated to record any “hood time” in his log book because “hood time” was necessary for the IFR certification that he was working towards. T.919-20.

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<sup>9</sup> UNDAF’s position was that the syllabus outlined the course, and that by signing off on the final evaluation, Prokop was himself certifying that he had been instructed in all areas of the syllabus, that he actually got VFR to IMC training, and that it simply was not documented. T.585-86. Wahlberg also opined that Prokop was proficient in use of the autopilot, based on the final evaluation, despite the fact that the lesson was not checked off. T.542. Wahlberg based his opinion that Prokop was properly trained on what he described as “tribal knowledge” that instructors and students talked about the training, so that the final certification signified that the training was done completely. T.596. While the jury clearly could have believed UNDAF’s arguments, they chose not to; it was clear that immediately prior to the crash Prokop did not do what the training indicated he should do, and the jury was free to decide why he failed to do so.

<sup>10</sup> “Under the hood” training simulates IMC conditions by obstructing the pilot’s view outside the aircraft, typically with a visor.

Shipek admitted that he did not do some of the other listed training because it was not checked on the syllabus. T.777-88. Shipek admitted that absence of a check-off indicated that part of the lessons were not done. T.780-81.

Notwithstanding these admissions, and despite the fact that the VFR to IMC recovery lesson was not signed off on as completed, Shipek testified that he did teach that particular lesson. T.792, 800-01. Shipek claimed that he did the VFR to IMC training, although it was not documented, based on other portions of the syllabus. T.865-71. He also claimed that during training, the autopilot was used extensively, so the student can concentrate on other details. T.847-48. However, when pressed, he admitted he had no specific recollection of Prokop using the autopilot, only that it was “standard procedure.”<sup>11</sup> T.784.

Shipek agreed that inadvertent flight into IMC was a potentially fatal situation. T.902. Moreover, he conceded that using the autopilot in an emergency is not as simple as just pushing a button – the pilot has to do some planning and thinking about the maneuver and programming the autopilot. T.853.

In addition to his uncertain memory, Shipek argued with questions and changed answers repeatedly. Shipek was also confused in his deposition about what materials were used in training Prokop, and changed his story after his deposition. T.756-59. The jury understandably could have found Shipek’s inconsistent and vague testimony to be

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<sup>11</sup> Under cross-examination, Shipek admitted that while he claimed to recall doing certain things with Prokop despite the absence of any written record, he was completely unable to recall details of training he did with other students; instead, he kept saying that he would have to look at his records. T.907-08.

not credible; the trial judge certainly did. *See* discussion, *infra* at 23. Moreover, the jury could readily infer from Shipek's admission that his record keeping was "sloppy" that he was sloppy in his training as well. Based on these facts alone, the jury had an ample basis to determine that the training specifically called for in the Cirrus syllabus regarding the emergency procedure for recovery from VFR into IMC was never completed.

However, respondents' case did not rest entirely on Shipek's admissions, his generally unbelievable testimony, the training documents, or the expert opinions of Capt. Walters. The jury also heard from Steven Day, Prokop's regular flight instructor, who was preparing Prokop for his IFR test. According to Day, Prokop was a dedicated, good student, who did not rush his training. T.1172. Day testified regarding the IFR training that he gave to Prokop in the Cessna, including unusual attitude recovery training. T.1176-77. Day was confident that Prokop would have passed the test in the Cessna. T.1180.

Day also testified that although he had trained Prokop in VFR to IMC response in the Cessna, that training would not be adequate for the Cirrus. T.1244. "So the training I gave him on the 172 would not have been sufficient for a Cirrus, no." T.1244. This was consistent with the testimony of UNDAF's Wahlberg, who agreed that despite Prokop's prior training, the Cirrus VFR to IMC training "needed to be done." T.626.

Day testified that despite having completed the Cirrus training, Prokop chose the Cessna in which to take his IFR test, because he was not familiar with the Cirrus avionics in an instrument flying context. T.1195. Prokop told Day that he "wasn't completely comfortable with the avionics in the airplane." T.1183. "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." T.1184. Day testified that the comment surprised him. "He just finished his training. . . . And it just surprised me that he wasn't more familiar with the avionics at that point." T.1184-85.

The jury heard similar testimony from Patrick Bujold, a friend of Prokop's who also owned a Cirrus SR22. Bujold flew in his own SR22 with Prokop to familiarize him with the GPS and autopilot before Prokop began his Cirrus training. T.987-88. After Prokop's Cirrus training was over, Bujold flew again with Prokop, and Prokop told him he was "not comfortable" with the autopilot in the SR22. T.991. "Gary did tell me that he was not comfortable with the avionics suite on an occasion and in a phone call." T.991.

This evidence, added to all the other evidence indicating that the crucial lesson on VFR to IMC had not been completed, provided a basis from which the jury could conclude that the required training that Cirrus undertook to provide had not been provided.

**B. Respondents Claimed That The Lack Of Adequate Transition Training Was A Cause Of The Crash**

**1. Evidence That The Crash Occurred When Prokop Tried To Manually Escape An Emergency Situation**

Respondent Glorvigen called Capt. James Walters as an expert witness. Walters was extremely well qualified in pilot training and safety, as well as accident

reconstruction. In addition to being an experienced pilot, Walters holds a masters in aviation science with specialization in aviation safety. T.153, 157. He also has specific training in aviation accident investigation, and is the former chair of the Airline Pilots Association National Accident Investigation Board, which investigates accidents alongside the National Transportation Safety Board. T.161-64. Walters has investigated numerous airplane accidents, some involving high profile crashes. For example, he investigated the EgyptAir Flight 990 crash in 1999 and the 1996 crash of TWA Flight 800 as it left New York City. T.164, 166. He has also written extensively on a number of aviation crashes, including the fatal crash of the light plane piloted by John F. Kennedy, Jr. T.173. Walters has twice testified before Congress on issues of airplane safety. T.159-60.

Walters gave his opinions on what happened in the crash, and why. After reviewing all the factual evidence, including the training records and the statements of Day and Bujold, Walters concluded it was legal for Prokop to take off from Grand Rapids in the conditions then existing. T.184, 194. In Walters' opinion, when Prokop took off, he had a reasonable expectation of VFR conditions on the entire flight route. T.200.

However, after take-off, Prokop encountered bumpy air and hard-to-see conditions right away, and apparently decided to return to the airport T.212. According to Walters, Prokop tried manually to turn the plane sharply, unexpectedly descended, tried to pull up

at high speed, stalled and crashed; all of this happened at a speed and attitude that were far different than Prokop had experienced in his Cessna 172.<sup>12</sup> T.215, 218.

## **2. Evidence That Cirrus/UNDAF's Failure To Provide Adequate Transition Training Was A Cause Of The Crash**

Walters identified three causes of the accident: Prokop's decision to fly that day (which he described as a "poor" choice even though it was legal for Prokop to take off in the existing and anticipated weather conditions), the fact that Prokop was unequipped to make a better decision because of inadequate training, and the fact that Prokop was inadequately trained to recover from the situation in which he found himself. T.227. According to Walters, Prokop encountered IMC-like conditions, and lost ability to fly visually. As noted above, VFR into IMC was one of the leading causes of crashes prior to the date of this crash. T.698. Prokop found himself suddenly and unexpectedly in an emergency situation, but did not use the autopilot to try to extricate himself. T.222-23. According to Walters, this was one of the root causes of the crash. "[P]ut it this way:

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<sup>12</sup> Dr. Robert Winn, Cirrus' accident reconstruction expert, largely agreed with Walters' opinion on the events of the crash. Winn testified that based on recorded radar tracks, it was clear that Prokop was flying by hand all the way, and that in an effort to extricate himself from the conditions in which he found himself, he performed a turn and climb, which ended up stalling the plane. T.1552-53, 1563-64. Winn reconstructed the flight path from available radar data and inspection of the wreckage. T.1541. Winn concluded that Prokop was hand flying the plane the entire flight, because there was no continuously straight path as would be the case if the autopilot were engaged. T.1552-53. The plane then turned sharply to the left, descending. T.1562. Prokop then pulled the plane up. T.1563. By turning sharply and pulling up, the plane actually lost lift and crashed. T.1564. Prokop lost control during the turn. T.1566.

Had he been able to recover during those IMC-like conditions certainly the accident would not have happened.” T.222-23.

Walters explained that Cirrus was marketing a fast, sophisticated plane to people who were casual aviators; because the SR22 “is not designed for that kind of aviator,” Cirrus had an obligation to ensure that the purchasers were adequately trained. T.242. “You are putting this kind of airplane, which is a very high performance airplane, into a market that doesn’t have the experience level or the training level to be able to fly the airplane appropriately.” T.243. Because of that fact, it was imperative that the purchasers have a transitional training program “that would meet the exact need that you are talking about here.” T.243.

Walters testified that the training that Prokop received did not meet industry standards<sup>13</sup> because some of the required training had not happened, including training on recovery from power stalls. T.254. In addition, Prokop was not trained to proficiency in the use of the autopilot, according to Cirrus’ own records, as well as comments Prokop made to Bujold and Day. T.259-60.

Walters explained that Prokop’s inadequate training in use of the autopilot was causally related to the crash because use of the autopilot was precisely what was called for in the circumstances. T. 274. If Prokop had been trained, he could have recovered from the critical situation in which he found himself. T.274.

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<sup>13</sup> UNDAF objected to the foundation for the Walters’ opinion on transitional training programs in a general aviation context, asserting that he was a commercial aviation expert. The trial court overruled the objection. T.270-71. In post-trial motions, UNDAF did not assert that this ruling was error, nor does it make that claim on appeal.

Walters also opined that the training program was not reasonably supervised, and did not meet industry standards for that reason as well, because the omissions documented in the materials were never corrected. T.276. No one at Cirrus ever reviewed Prokop's syllabus. T. 732, 1498. Cirrus had no monitoring program in place to verify how UNDAF was handling the training T.333, 1498. This failure of oversight was another basis for the jury to find UNDAF negligent in providing the instructions that Cirrus and UNDAF had determined were necessary for the safe operation of the SR22.

Had proper management oversight done that and had they called Mr. Shipek in and said, what happened to 4-A? If in fact 4-A was not completed as I believe it was not completed, it's an opportunity then to call Mr. Prokop and say, some of your lesson that you need to do, why don't you come on back and we'll complete it.

T.277. Upon reviewing other syllabuses after the accident, Shipek's supervisor, John Wahlberg, discovered that Prokop's was the only checklist which was not completely filled out. T.611, 644.

Walters acknowledged that neither transition training nor a training syllabus are required by the FAA. T.404. However, Walters testified that even though not required by FAA regulations, transition training, when given, must be adequate and comprehensive. T.450. And, as noted above, appellants did not deny that transition training was needed here.

Walters agreed that the final evaluation records indicated that autopilot operations were "examined" but disagreed that there is any evidence that flying from VFR to IMC was ever taught, because that part of the syllabus was not marked. T.468. Walters testified that because the specific part of syllabus concerning "recovery from VFR into

IMC autopilot assisted” was not marked as taught, and in light of the comments that were made by Prokop to others, his opinion was that the crucial lesson was not taught. T.468.

Walters did not defend Prokop entirely, conceding that Prokop signed off on the final evaluation which indicated autopilot proficiency and that Prokop made a poor choice in deciding to fly in the less-than-ideal known conditions. T.409, 446. Steven Day similarly testified that Prokop chose to fly in conditions that Day thought were below Prokop’s “personal minimums.” T. 1252. However, as noted above, the jury also heard testimony that it was legal for Prokop to fly on the day of the accident. Further, these facts were only a few of many for the jury to consider.

**C. The Trial Court’s Review Of The Record On Negligence And Causation**

Judge TenEyck spent a great deal of time and effort analyzing the arguments of the parties on post-trial motions, authoring an 84-page memorandum which exhaustively discussed the issues raised. In the end, he rejected all of appellants’ claims.

In his post-trial memorandum, Judge TenEyck discussed in detail the importance of “transition training.” *See* UNDAF Add. 31.<sup>14</sup> He observed that Cirrus undertook to develop and provide a transition training program, noting that the curriculum was designed by Cirrus and UNDAF to ensure that the purchaser/pilot was able to safely fly the new plane. UNDAF Add. 32-33.

He also discussed “recovery from VFR into IMC.” UNDAF Add. 34. He recognized that training on this maneuver was crucial. UNDAF Add. 47. And he

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<sup>14</sup> “UNDAF Add.” refers to UNDAF’s addendum.

rejected the argument that the jury erred in concluding that the training had been provided. He noted that despite Shipek's assertion that he had provided the training, the documents "belied" that claim. UNDAF Add. 36. Moreover, he specifically observed that it was highly unlikely that the omission in the records was inadvertent. UNDAF Add. 37. The judge felt that it was "wholly unreasonable" that the omission was merely a clerical error, and described that claim as not credible. UNDAF Add. 37. The judge, himself "highly skeptical" of the claim, concluded that the jury properly rejected it. UNDAF Add. 37. As he said, one error might be understandable, but several omissions could not be attributed to clerical error, particularly in light of the fact that no similar errors were discovered in any other records. UNDAF Add. 37.

The trial judge also rejected appellants' arguments that there was inadequate proof of causation. He began by noting that for legal liability to result from certain conduct, the conduct need only be *a* cause, not *the* cause of an accident. UNDAF Add. 38. Moreover, direct and circumstantial evidence may prove causation. UNDAF Add. 39. The omitted training was intended to address exactly the situation which Prokop encountered. UNDAF Add. 41. As the judge noted, it was the very characteristic of the Cirrus SR22 that was emphasized as a selling point (its high performance and speed), that gave the pilot less time to react to danger. UNDAF Add. 44. A pilot who was surprised by unexpected conditions easily could make the wrong move because he was not trained to make the right move, and the plane suddenly and catastrophically went out of control. UNDAF Add. 44.

Judge TenEyck concluded that there was ample basis for the jury's findings on both negligence and causation.

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.

UNDAF Add. 47.

## ARGUMENT

### *Summary of Argument*

Two competing factual theories were presented to the jury, both clearly articulated from the very beginning of the case. Respondents asserted that Prokop was not adequately instructed in the precise maneuver he needed to avoid the crash which ultimately claimed his life and the life of James Kosak. The appellants claimed that Prokop caused the accident by deciding to fly in marginal conditions, and by errors he committed in the course of flying the plane. The appellants also asserted that the training which respondents claimed Prokop did not receive was actually given, or alternatively, that the skipped training was insignificant in the greater context of Prokop's flight experience and the other training he received.

The jury could have accepted either of these versions of how the accident occurred and why. In the end, the jury found some merit to the claims of both sides. It apportioned 25% of the causal fault to Prokop, despite evidence that he was a good and careful pilot. The jury apportioned 75% of the causal fault to Cirrus/UNDAF, for failing to provide adequate instruction as required by operation of law, industry standard practices, and Cirrus' assumption of the training obligation as defined by the curriculum which Cirrus developed. The trial court reviewed the record and the verdict, and concluded that there was sufficient evidence of negligence and causation to support the jury's determination. On appeal, the jury's verdict must be affirmed.

## I. STANDARD OF REVIEW

Appellants claim there was insufficient evidence to support the jury's verdict. Factual conflicts, such as those that were presented in this case, "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*, 234 Minn. 252, 254-55, 48 N.W.2d 169, 170 (1951) (upholding jury's verdict although it was based on the testimony of a single witness). This court considers the evidence in a light most favorable to the jury's verdict. *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. Ct. App. 2005). And "[v]erdicts are upset only in extreme circumstances." *Id.*

An appellate court considers causation "a question of fact for the jury to decide." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008). "A jury determination of causation . . . 'will not be upset unless the court finds it to be manifestly contrary to the weight of the evidence.'" *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980) (quoting *Lamke v. Loudon*, 269 N.W.2d 53, 56 (Minn. 1978)).

The appellate court is not bound by, and need not give deference to, the district court's decision on questions of law. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. Ct. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)). However, the court of appeals must follow the law as declared by the state supreme court. *See Lake George Park, L.L.C. v. IBM Mid Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998) (court of appeals is an error-correcting court and not a law-making court).

## **II. RESPONDENTS' THEORY OF LIABILITY IS WELL FOUNDED IN ESTABLISHED MINNESOTA LAW**

Respondents sued Cirrus, the manufacturer and seller of the SR22, asserting product liability claims based on negligence, strict liability, and warranty. The case went to the jury only on the negligence claim.

Plaintiff did not sue UNDAF. Instead, UNDAF intervened in the case as a defendant, ostensibly to protect itself from the consequences of a verdict against its principal and joint venturer, Cirrus, based on UNDAF's failure to provide the training called for in the transition training syllabus. It was the appellants who sought to turn a product liability case based on failure to provide adequate instructions for the safe use of a product into an educational malpractice claim. The trial court properly rejected those efforts, as should this court.

### **A. Minnesota Law Imposes On A Manufacturer And Seller A Duty To Provide Adequate Instructions For The Safe Use Of A Product**

From the outset of this litigation, Cirrus, joined later by UNDAF, tried to force this case into the pigeonhole of educational malpractice. On appeal to this court, they rely heavily on a decision of the United States District Court for the District of South Dakota, *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006), but give only a passing nod to the later and more relevant opinions of Judge Paul A. Magnuson of the District Court for the District of Minnesota in this very case. Indeed, while they include some of the opinions of Judge

Magnuson in their appendices, neither appellant cites the decisions as legal authority in their brief.

Judge Magnuson succinctly summarized the applicable Minnesota law with regard to respondents' negligence claim.

The principal dispute at this stage is whether Cirrus owed a duty regarding Prokop's "transition training." Duty is a question of law. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). In Minnesota, a duty arises when there is 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) (quotation omitted). The duty to warn can arise in the negligence context and "includes the duty to give adequate instructions for the safe use of the product." *Gray v. Badger Mining Co.*, 676 N.W.2d 268, 274 (Minn. 2004) (citing *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (1977)). In addition, "one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so." *Islar v. Burman*, 305 Minn. 288, 232 N.W.2d 818, 822 (Minn. 1975).

*Glorvigen v. Cirrus Design Corp.*, Civ. No. 06-2661, 2008 WL 398814, at \*3 (D. Minn. Feb. 11, 2008).

He also considered and rejected Cirrus' attempt to invoke the educational malpractice doctrine as a defense, and in the course of his analysis, specifically considered and rejected *Sheesley* and the other cases upon which appellants continue to rely.

Plaintiffs assert that Cirrus breached its duty to offer Prokop training – a duty that Plaintiffs contend Cirrus voluntarily assumed by including training as a part of the SR-22 purchase price. In moving for summary judgment, Cirrus characterizes the allegations as "educational malpractice" claims that are barred by the decision in *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999). However, *Alsides* is distinguishable because the plaintiffs did not sue for negligence but rather for breach of contract, fraud, and misrepresentation. *Id.* at 471. Further, the court held that although claims challenging the "general quality of the

instructions” are not actionable in Minnesota, 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.” *Id.* at 472-73. To 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.

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*, 2008 WL 398814, at \*3-4. Judge Magnuson then proceeded to examine the Minnesota law that he found was controlling in this case.

The Court finds the analysis in *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922 (Minn. 1986) instructive:

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.

*Id.* at 924-25. . . .

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.

...

Under the unique facts of this case, the Court concludes that the law should “give recognition and effect” to the duty as Plaintiffs allege in their negligence causes of action. *See L&H Airco., Inc.* 446 N.W.2d at 378. Accordingly, the Court denies Cirrus’ motion for Summary Judgment as it relates to negligence-based claims. In denying summary judgment, the Court expresses no opinion on whether Cirrus breached the duty or whether any breach caused the crash. *See Germann*, 395 N.W.2d at 924-25 (“[o]ther issues such as ... breach of duty and causation remain for jury resolution”).

*Glorvigen*, 2008 WL 398814, at \*4.

It is difficult to improve on this succinct and thoughtful analysis of the controlling Minnesota law. The manufacturer of a product, like Cirrus, has a duty imposed by law to provide instructions adequate for the safe use of its product. The claim here was that the instructions that Cirrus itself considered necessary and appropriate were not given. Under established Minnesota law, it was for the jury to decide if that breach was a cause of the fatal crash.

#### **B. Educational Malpractice Is Not The Claim Here**

Appellants’ efforts to characterize this as a case involving educational malpractice significantly overreach. Educational malpractice is not the claim here; instead, respondents maintain that Cirrus, as the seller of a potentially dangerous piece of equipment, had an obligation imposed by law to provide adequate instructions in the safe use of the product. Cirrus addressed that obligation by undertaking to provide a specific course of training and instruction for the safe use of the SR22. The detailed curriculum was written by Cirrus and UNDAF to provide the requisite instructions.

Respondents claimed that Cirrus failed to provide the training it promised, and which it had determined was appropriate and adequate under the circumstances.<sup>15</sup> While the law imposed a duty on Cirrus to provide adequate instructions, and required that Cirrus and its agent, UNDAF, exercise reasonable care in the discharge of that duty, appellants' own curriculum established the standard of conduct by which their actions could be judged.

Educational malpractice generally describes claims asserting liability based on the broad failure of schools to adequately educate students. Courts have, in many instances, rejected such claims, doing so on equally broad policy grounds. But those cases are clearly distinguishable from this case. *See* discussion, Glorvigen Br. at 40-43; Prokop Br. at 27-29.<sup>16</sup> For example, in *Alsides*, the court pointed to the lack of a clear standard of care, uncertainties in proving causation because measuring educational "success" was at times uncertain, the difficulty in establishing limits on the scope of the claim, and the difficulty of courts in overseeing school operations. *Alsides v. Brown Inst., Ltd.*, 592

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<sup>15</sup> 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, and the failure to provide that training. While Capt. Walters did opine that the training did not comport with industry standards because it did not include scenario-based training, 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 training was provided. T.254, 259, 276, 290, 296, 467.

<sup>16</sup> "Glorvigen Br." refers to Glorvigen's brief, and "Prokop Br." refers to Prokop's brief.

N.W.2d 468, 472 (Minn. Ct. App. 1999). Those concerns are not present here. *See* Glorvigen Br. at 33-37; Prokop Br. at 27-29.

While the failure to adequately instruct Prokop was the claim, that claim was asserted in a radically different context than the traditional educational malpractice claim. This case involved training and instruction in connection with the sale of a specific product. As noted above, Minnesota law has long recognized that a manufacturer/seller of a product, particularly one with the potential to cause bodily injury and death, has an obligation to provide instructions adequate to allow the safe operation of the product. And if a manufacturer could avoid its duty to provide adequate instructions by simply hiring an educational institution to provide instructions, this significant principle of Minnesota products liability law would be eviscerated. *See* Glorvigen Br. at 30.

Rather than a general claim that the training was not adequate, here the claim was that the precise training which Cirrus specified was necessary to allow the safe operation of the SR22, and which Cirrus contractually promised to provide, was not, in fact, provided. Cirrus and UNDAF undertook to instruct Prokop pursuant to a specific and detailed curriculum. That training was to include instruction on emergency procedures to employ if the pilot encountered conditions in which he was not qualified to fly. There were hotly disputed fact issues regarding whether the training was actually provided, but an ample basis for the jury to decide that it was not. And, despite the appellants' arguments to the contrary, there was ample evidence to support the jury's conclusion that the failure of Cirrus and UNDAF to provide the agreed upon training was a cause of the fatal crash.

Respondent Glorvigen cites to a number of foreign cases which specifically addressed, and approved, claims similar to those presented here. *See* discussion, Glorvigen Br. at 24-26. *See also* Prokop Br. at 30-31. While the Minnesota Supreme Court has not previously addressed claims based on an alleged failure to adequately instruct in the aviation context, it has affirmed liability for personal injuries in the educational context based on a nearly identical theory – failure to follow a prescribed curriculum intended to provide adequate instruction for the safety of the student. In *Larson v. Independent School District No. 314, Braham*, 289 N.W.2d 112 (Minn. 1979), *overruled in part on other grounds, Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 657 (Minn. 2004),<sup>17</sup> a student was injured in a junior high school gym class while trying to perform an exercise known as a running headspring over a rolled mat. The exercise was one of several exercises contained in a physical education curriculum guide promulgated by the Minnesota Department of Education. The curriculum guide called for teaching the exercise through a series of increasingly difficult exercises known as “progressions.” Plaintiffs’ claim was that having the student attempt the running headspring without first teaching the predicate progressions was negligence on the part of the teacher. 289 N.W.2d at 116. In addition, they claimed that the school

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<sup>17</sup> The court’s analysis in *Larson* of ministerial versus discretionary duties as they impact governmental immunity (an issue not present here) was distinguished and refined in *Anderson*. While the holding in *Larson* on that point may be diminished, no subsequent case has challenged *Larson*’s analysis of the negligence determinations regarding the teacher for failing to follow the prescribed curriculum guide, or the principal for failing to administer the curriculum.

principal was personally and directly negligent in failing to adequately administer the physical education curriculum to ensure that progressions were being taught.

The supreme court affirmed not only the liability of the teacher for skipping steps contained in the curriculum, but also liability of the junior high school principal for failing to ensure that the curriculum was being followed. The court recognized that the appellants owed students a duty of reasonable care, and correctly observed that the curriculum guide was powerful evidence concerning whether they had met that duty of care.

[W]e believe the activities and courses of study prescribed in Curriculum Bulletin No. 11 were intended to be used as guidelines and did not establish mandatory affirmative duties for teachers, principals, or superintendents. However, because evidence at trial indicated that the bulletin was used by many Minnesota school districts as a standard for planning and teaching physical education, *evidence of the manual's provisions was relevant for the jury's determination whether appellants breached the duty of care owed to [the student].*

*Id.* at 117 n.8 (emphasis added).

As in *Larson*, here the claimed negligence was based on the failure of Cirrus, through its agent and joint venturer UNDAF, to provide the training called for in the curriculum they designed. Additionally, neither Cirrus nor UNDAF supervisors took any steps to review the training that Prokop actually received, and did nothing to verify that the training called for in the curriculum was completed. Just as in *Larson*, these facts fully support the imposition of liability.

This case simply does not implicate the “educational and pedagogical factors” which were the court’s concern in *Alsides*. 592 N.W.2d at 472. As the district court

noted, to consider Cirrus' liability in this case did not require inquiry into the "nuances" of the curriculum. UNDAF Add. 17-19. Judge Magnuson reached the same conclusion when he rejected the very arguments that appellants advance here. And cases in other jurisdictions reach the same results. *See* Glorvigen Br. at 38-39.

### **C. Negligent Breach Of Contract Is Not The Claim Either**

Appellants repeatedly assert that the trial court reached out to create a new cause of action for "negligent breach of contract." That was not what respondents argued to the district court, nor was it the basis for the district court's denial of appellants' post-trial motions.

From the very beginning of the case, respondents claimed that Cirrus failed to provide adequate instructions for the safe use of its product. That position is found in the complaints of the respondents, the extensive briefing before the federal district court, the opening statements at the trial of this case, and in the post-trial briefing.

The district court's post-trial memorandum merely reiterates the long established legal principle that in cases of personal injury, the terms of a contract may be relevant to the question of whether one of the parties has acted reasonably. That is a far cry from creating a "negligent breach of contract" cause of action.

Respondent Glorvigen discusses and forcefully refutes the authorities relied upon by appellants to support their assertion that contract principles bar respondents' claims. *See* Glorvigen Br. at 20-23. *See also* Prokop Br. at 20. That discussion will not be repeated here. However, while contract law does not apply to the claims at issue in this appeal, the contract between Cirrus and Prokop does play an appropriate role in this case.

If a manufacturer undertakes to advise on the proper use of its product, it assumes the responsibility of giving reasonable, accurate and adequate instructions. *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977). The duty to warn includes the duty to give adequate instructions for the safe use of the product. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) (citing *Frey*, 258 N.W.2d at 787). And in this case, Cirrus and UNDAF themselves prescribed what instructions were necessary for the safe use of the SR22 by writing a training curriculum that was sold as part of the purchase price of the plane.

In a negligence action, the duty of care does not arise from the contract but rather from the obligation imposed by law to use due care for the protection of others. *Rausch v. Julius B. Nelson & Sons, Inc.*, 276 Minn. 12, 19, 149 N.W.2d 1, 6 (1967). While the terms of a contract do not fix the duties of the parties to exercise reasonable care, the terms of the agreement can be considered by the jury in deciding the reasonableness of the conduct of those parties. *See Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 504-05 (Minn. 1997); *Dornack v. Barton Constr. Co.*, 272 Minn. 307, 317-18, 137 N.W.2d 536, 544 (1965). In *Mervin v. Magney Construction Co.*, 416 N.W.2d 121 (Minn. 1987), the court succinctly stated the rule that a contract does not define the standard of care – that is imposed by operation of law. The contract does, however, 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.

In *Mervin*, the plaintiff claimed that a Corp of Engineers General Safety Requirements Manual, incorporated into a construction contract, established a standard of

care, the breach of which was negligence *per se*. The court rejected that argument, and in doing so, explained the evidentiary role of contracts in negligence cases. After first rejecting the claim that the violation of a contract constitutes negligence *per se*, the court explained that contractual terms are relevant to the determination of whether a party had acted reasonably, and failure to comply with contractual requirements may be evidence of negligence.

For example, contracts for the repair or construction of highways customarily require the contractor to perform certain acts intended to protect the traveling public. In *Foster v. Herbison Constr. Co.*, 263 Minn. 63, 64, 69, 115 N.W.2d 915, 916, 919 (1962), we held that a contractual requirement that the contractor “continually maintain a smooth and drained roadway over which vehicular traffic can move safely \* \* \* “ was admissible as evidence of the contractor’s negligence. See also *Dornack v. Barton Constr. Co.*, 272 Minn. 307, 317-18, 137 N.W.2d 536, 544 (1965) (standard of care owed by contractor to traveling public not fixed by terms of its contract with the state, which required erection of barricades and warning signs, but terms of contract are relevant in evaluating the reasonableness of the contractor’s conduct).

416 N.W.2d at 124 -125. See also *Larson*, 289 N.W.2d at 117 n.8 (evidence of the curriculum manual’s provisions “was relevant for the jury’s determination whether appellants breached the duty of care owed”).

Both the jury and the trial court could reasonably consider the fact that appellants expressly recognized in their syllabus a pilot such as Prokop who is transitioning to the technically advanced Cirrus would encounter significant danger in the event he inadvertently ran into IMC conditions. They also recognized the need for instructions on how to safely recover from that situation. The jury and the trial court could also take into consideration the fact that appellants failed to provide what they sold as a necessary

instruction, when considering whether the appellants breached their duty of reasonable care. Thus, all the district court was saying when it referred to the contract is that a party may assert a negligence claim where the parties have a contractual relationship, and the terms of the contract are evidence which can be used in determining whether the conduct of the parties was reasonable.

This is not a breach of contract case, a fact that the trial court recognized. UNDAF Add. 29-30. Respondents were not suing for the benefit of the bargain, but rather, sought damages because of the negligent conduct of appellants. Under well established Minnesota law, the duty owed by appellants was the duty of reasonable care. That duty was imposed by law, and arose out of the sale of the product by Cirrus. The traditional test for liability in product liability cases based on negligence was whether the appellants' actions were reasonable, and the contract between Prokop and Cirrus was evidence of the standard of conduct to which Cirrus might be held.

### **III. THERE WAS MORE THAN SUFFICIENT EVIDENCE OF CAUSATION**

The questions for the jury were whether appellants breached their duty of reasonable care, and if so, was that breach a cause of the accident. The duty to exercise reasonable care in providing instructions on the safe use of the product was imposed by law. The standard of conduct was established in part by the curriculum. There was ample basis for the jury to decide that the standard of conduct was not met, and that crucial aspects of the curriculum were skipped. There was also ample basis for the jury to find that this breach was a cause of the accident.

Because neither Prokop nor Kosak survived the crash, there is no direct evidence of what happened immediately before the plane stalled and crashed. However, numerous pieces of evidence all point to the cause of the fatal crash – the fact that VFR into IMC is a well recognized cause of crashes in private aircraft; the fact that Cirrus recognized this danger, and included specific training on it for the safe operation of the SR22; the fact that the SR22 was a much faster plane than other private passenger planes, making recovery from VFR into IMC more difficult without the aid of the autopilot; the fact that the training records and Prokop’s comments to others prior to the accident showed that he had not been trained on the very emergency procedure that he should have used to avoid the fatal crash; the undisputed fact that Prokop tried to hand-fly the plane to recover from the dangerous conditions in which he found himself; and the fact that the crash resulted from the very hazard that the training was intended to avoid, a power stall occurring when the pilot was trying to climb out of the dangerous conditions. Taken together, it is clear that “the cumulative circumstantial evidence is 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).

Moreover, a jury’s consideration of circumstantial evidence necessarily involves drawing inferences from direct evidence and does not make those inferences speculative. “Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.” *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

The opinion of Capt. Walters was fully laid out before the jury. As noted previously, although appellants attack Capt. Walters' testimony on foundation and other grounds, both Cirrus and UNDAF failed to raise the issue of the trial court's admission of Walters' testimony or any other evidentiary rulings in either their motions for a new trial or directly as an issue in their briefs. Evidentiary rulings not assigned as error in a motion for a new trial are not reviewable on appeal from a judgment. *Larson v. Indep. Sch. Dist. No. 314, Braham*, 289 N.W.2d 112, 126 n. 12 (Minn. 1979); *Fritz v. Arnold Mfg.*, 305 Minn. 190, 194, 232 N.W.2d 782, 785 (Minn. 1975); *Pierce v. Nat'l Farmers Union Prop. & Cas. Co.*, 351 N.W.2d 366, 368-69 (Minn. Ct. App. 1984).

In *Larson*, the Minnesota Supreme Court specifically rejected this kind of backdoor effort to argue evidentiary issues not properly preserved:

Peterson also contends that it was error for the trial court to qualify one of plaintiffs' witnesses as an expert and to admit testimony by him concerning the duties owed by a principal to a student. Peterson claims the witness had neither education in nor work experience as a school principal or superintendent. Peterson did not include this objection in the grounds he cited as a basis for requesting an order granting a new trial on all issues. Objections to evidentiary rulings which are not assigned as error in a motion for a new trial are not reviewable by this court on appeal from judgment.

289 N.W.2d at 126 n.12. Where the issue of admission of evidence is not preserved in a motion for new trial, the appellate court's review is limited to an examination of whether the evidence that is in the record, viewed in a light most favorable to the verdict, is sufficient. See *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). In the context of this case, that rule means that appellants cannot attack or disregard Capt. Walters' opinions.

Walters explained that, in his opinion, Prokop's failure to use the autopilot occurred because he was not trained in its use in the circumstances in which he found himself. This was, in Walters' expert opinion, a "root cause" of the crash. The jury heard all of the evidence upon which Walters based his opinion, and apparently agreed with his opinion. The evidence was undisputed that the autopilot was not being used at the time of the crash. The autopilot, if used, would have made the entire maneuver easier, with less chance for error. It would have reduced the impact of pilot disorientation, and would have provided the pilot with more time to react. As the district court judge noted, the importance of training in the autopilot was the whole reason that it was included in the curriculum. UNDAF Add. 46-48.

It is hardly a leap into speculation for the jury to conclude that Prokop, who was not trained in the use of the autopilot to recover from VFR into IMC, who told others that he did not know how to use the autopilot and that he was not comfortable with it, chose to escape the hazard in which he found himself in the only way that he had been trained, by flying the plane by hand. The jury could also have concluded, without speculation, that a maneuver that might be safely executed in an aged, slow-moving Cessna was exactly the wrong thing to do in a new, high performance plane flying at significantly faster speeds. The trial court correctly concluded that there was ample evidence to support the verdict.

**IV. JUDGMENT WAS PROPERLY ENTERED JOINTLY AND SEVERALLY AGAINST CIRRUS AND UNDAF, ITS AGENT AND JOINT VENTURER WHO VOLUNTARILY INTERVENED IN THE LITIGATION AS A DEFENDANT AND PARTICIPATED FULLY IN ALL ASPECTS OF THE TRIAL**

The district judge was understandably bemused by UNDAF's argument that judgment could not be entered against it. He observed that UNDAF sought the status of a defendant, and got it. UNDAF Add. 49. Moreover, UNDAF fully participated in the entire case, well aware of the potential for its own liability. *See* UNDAF Add. 50. The trial court remarked that it was clear that UNDAF was not in the case solely with respect to the contribution or indemnity claims, pointing out that neither Cirrus nor UNDAF ever submitted to the jury or to the district court a request that the court adjudicate any of those claims. UNDAF Add. 51. Moreover, the court noted that the joint venture and agency theories were tried to a conclusion, with no challenge by UNDAF to the procedure or the jury's findings on joint venture or agency, but only on the merits of the jury's liability determination.

In *Faricy v. St. Paul Investment & Savings Society*, 110 Minn. 311, 313, 125 N.W. 676, 677 (1910), the supreme court said, "Intervention, in modern practice, as well as in the civil law, is an act or proceeding by which a third party becomes a party in a suit pending between others." It repeated that holding in *State ex rel. Bergin v. Fitzsimmons*, 226 Minn. 557, 564, 33 N.W.2d 854, 858 (1948) (noting that an intervenor who prevails may tax costs like a party, and an intervenor who does not prevail is subject to liability for costs.) *Accord Erickson v. Bennett*, 409 N.W.2d 884, 888 (Minn. Ct. App. 1987). By

intervening in these cases, and seeking the status of a defendant, UNDAF unquestionably became a party to the litigation.

The gravamen of UNDAF's claim appears to be that they were not served with a summons, and therefore were never technically made a party-defendant against whom judgment could be entered. But based on UNDAF's actions, *i.e.*, making a motion to intervene as a defendant and fully litigating the case, UNDAF has waived any potential complaints regarding service. *See Blaeser & Johnson, P.A. v. Kjellberg*, 483 N.W.2d 98, 101-02 (Minn. Ct. App. 1992) (concluding that although service was insufficient, defendant's conduct constituted a waiver of any defect in service).

Further, the cases cited by UNDAF in an attempt to support their claim are inapposite. First, there is nothing in *Avery v. Campbell* that remotely suggests that for a defendant-intervenor to be held liable, plaintiff must have served them with a summons and complaint. 279 Minn. 383, 387-88, 157 N.W.2d 42, 45-46 (1968) (recognizing that intervention is allowed "to grant to one who is left out of a suit a right to become a party despite objection by the parties to the action," but not requiring either a summons or complaint to be served upon them). Second, *Sister Elizabeth Kenny Foundation, Inc. v. National Foundation* stands for the proposition that mere hope of being a beneficiary is not a sufficient interest to allow intervention as a matter of right. 267 Minn. 352, 360, 126 N.W.2d 640, 645 (1964). Third, *Kansas Public Employees Retirement System v. Reimer & Koger Assocs., Inc.*, simply concluded that the intervenor, due to joint liability in a related negligence action, had a right to intervene. 60 F.3d 1304, 1308-09 (8th Cir.

1995). And the Oregon cases relied upon by UNDAF are neither controlling nor persuasive. *See* Glorvigen Br. at 44-45.

UNDAF intervened in these cases so it could be treated as a defendant; it fully litigated its causal fault, and all other issues in this case. The trial court properly entered judgment against UNDAF.

#### **V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A NEW TRIAL**

Cirrus alone seeks a new trial based on the alleged misconduct of Gartland's counsel in final argument. The district court carefully considered all of the alleged instances of misconduct, and concluded that there was no significant prejudice to the appellants. UNDAF Add. 73-74. The court also concluded that any prejudice was removed by the jury instructions, including specifically the admonition that damages were not to include any amount intended to punish the appellants. UNDAF Add. 75. The trial court's determination on such issues is entitled to considerable deference by this court. Here, there is no basis to reverse the district court's exercise of discretion in denying the new trial motion.

A new trial may be granted based on improper final argument only to prevent a miscarriage of justice. *Pomani by Pomani v. Underwood*, 365 N.W.2d 286, 290 (Minn. Ct. App. 1985). A miscarriage of justice requires misconduct by trial counsel that was severe, had an impact on the jury, and clearly resulted in prejudice. *Eklund v. Lund*, 301 Minn. 359, 362, 222 N.W.2d 348, 350 (1974); *Bradley v. Hubbard Broad., Inc.*, 471 N.W.2d 670, 676 (Minn. Ct. App. 1991).

Moreover, appellate review of alleged misconduct by counsel requires (1) an objection at the time of the alleged misconduct; (2) a request for appropriate corrective action; and (3) a failure of the trial court to act. *Jurgensen v. Schirmer Transp. Co.*, 242 Minn. 157, 166, 64 N.W.2d 530, 536 (1954). A party who fails to request corrective action waives any later claim that counsel's misconduct was improper enough to justify a new trial. *Schwartz v. Consol. Freightways Corp. of Del.*, 306 Minn. 564, 565, 237 N.W.2d 385, 386 (1975); *Larson v. Anderson, Taunton & Walsh, Inc.*, 379 N.W.2d 615, 622-23 (Minn. Ct. App. 1985). But when an objection is made and the trial court gives a curative instruction, as was the case here, a new trial should not be granted unless the misconduct was extremely prejudicial. *Peterson v. Burlington N. R.R. Co.*, 399 N.W.2d 175, 177 (Minn. Ct. App. 1987).

As stated by both the Minnesota Supreme Court and this court,

[I]t is elementary that counsel when arguing to the jury is entitled to present his client's case forcefully and fairly, and that his efforts are not to be crippled by compelling him to run a course of technical hazards either when he draws factual inferences from conflicting evidence or when he applies the law to the facts as he, as an advocate, sees them. Although he may not strike foul blows, he may strike hard blows which are not always technically correct. No precise rule can therefore be laid down defining the scope of legitimate argument in summing up a case before a jury.

*Sather v. Snedigar*, 372 N.W.2d 836, 838 (Minn. Ct. App. 1985) (quoting *Connolly v. Nicollet Hotel*, 258 Minn. 405, 419-20, 104 N.W.2d 721, 732 (1960)).

The trial court examined each of the alleged instances of misconduct, and concluded that the claims were without merit. The judge noted that the argument that the jury should "send a message" to corporate America was inappropriate, however, did not

“create prejudice of such a nature as to require a new trial.” UNDAF Add. 73. With regard to the comparison between Ian Bently and Sergeant Schultz of Hogan’s Heroes, the court cogently observed that Sergeant Schultz was “more Falstaff than Eichman,” a comment which adequately sums up the impact of that particular argument. UNDAF Add. 76. Using comic lines that reflect feigned ignorance to highlight the absurdity of the claim of Cirrus’ top training official, Bently, that Cirrus was unaware of any problems in the training program and therefore not responsible was a fair comment on the evidence.

The trial court did criticize the reference by Gartland’s counsel in the final argument to terrorists, and characterized it as “egregious.” UNDAF Add. 77. But the court ultimately concluded there was no prejudice, pointing out that the damages award was less than Gartland’s counsel had requested. UNDAF Add. 77-78. Finally, the trial court rejected the notion that Gartland’s counsel’s argument that the jury should be guided by its “spirit” was an indirect plea based on the prohibited golden rule argument. UNDAF Add. 78-79.

This was a long and hard fought case. The parties were all represented by experienced and capable trial counsel. The trial court concluded that the comments of Gartland’s counsel, viewed in the context of the entire case, did not rise to the level of prejudicial error, and any potential prejudice was corrected by the trial court’s re-reading of the jury instruction concerning arguments of counsel. The trial court also found that there was no merit to the claim that the result in this case would have been different absent the portions of the final argument of Gartland’s counsel about which Cirrus now

complains. The damages awarded were clearly in line with the evidence, and appellants do not contest the jury's findings on damages. Cirrus has failed to make the compelling showing required to overturn the discretionary ruling of the trial court. The trial court's determination that counsel's closing arguments did not serve as a basis for a new trial was not clearly erroneous and was well within its discretion.

## CONCLUSION

Cirrus marketed and sold a sophisticated high performance airplane. It recognized that the private pilots who bought that plane would need significant instruction in how to fly it safely. Cirrus undertook to provide the necessary transition training, and made the availability of that training part of its sales program by including the cost of the training in the price of the plane. Cirrus hired UNDAF to provide the actual instruction, and the jury finding that Cirrus and UNDAF were principal and agent and joint venturers in providing that instruction is not challenged on appeal.

The jury heard conflicting evidence concerning the Cirrus/UNDAF training provided to Prokop, including evidence establishing that a critical element of the training prescribed by Cirrus, recovery from VFR into IMC, was skipped by Prokop's instructor. The jury also heard evidence that this training was critical to safe recovery from a sudden emergency. Finally, the jury heard evidence that Prokop, who was not trained in the specific procedure to be followed in the emergency conditions in which he found himself, tried manually to fly the SR22 out of the emergency conditions, resulting in a power stall and the fatal crash of the plane.

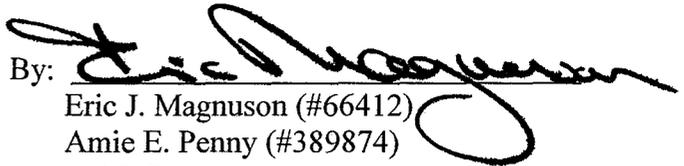
The jury's verdict does not rest on speculation or conjecture. Nor does the negligence claim against Cirrus implicate the educational malpractice doctrine. The law imposed on Cirrus as a product manufacturer an obligation to provide adequate instructions for the safe use of its product. Cirrus decided that a particular course of instruction would discharge that obligation, and undertook to provide that instruction.

Unfortunately for the families of Gary Prokop and James Kosak, Cirrus and UNDAF failed to meet the standard of conduct they set for themselves.

The trial judge carefully reviewed the record in this case on both the issues of liability raised by appellants and the claim that a new trial was required based on the final argument of Prokop's counsel. It found none of those arguments to be persuasive. Respondent Gartland respectfully submits that the decision of the trial court was correct, and that the judgment against the appellants should be affirmed in all respects.

Dated: October 27, 2010

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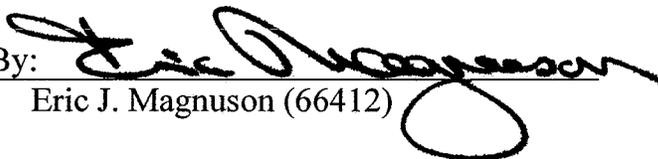
**ATTORNEYS FOR RESPONDENT  
THOMAS M. GARTLAND, AS TRUSTEE  
FOR THE NEXT-OF-KIN OF DECEDENT  
GARY R. PROKOP**

## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Gartland, 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 utilizing Microsoft Word Word 2003 and contains 13,576 Word Count words, including headings, footnotes and quotations.

Dated: October 27, 2010

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