

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

State of Minnesota
In Supreme Court

18

Rick Glorvigen, as Trustee for the Next-of-Kin of
decedent James Kosak,
Appellant/ Cross-Respondent (A10-1242, A10-1246),
Thomas M. Gartland, as Trustee for the Next-of-Kin of
decedent Gary R. Prokop,
Appellant/ Cross-Respondent (A10-1243, A10-1247),
vs.

Cirrus Design Corporation,
Respondent (A10-1246, A10-1247),
Estate of Gary Prokop, by and through Katherine Prokop
as Personal Representative,
Appellant/ Cross-Respondent (A10-1242, A10-1246),
University of North Dakota Aerospace Foundation,
Respondent/ Cross-Appellant (A10-1242, A10-1243).

**BRIEF AND ADDENDUM OF APPELLANT ESTATE OF GARY PROKOP,
BY AND THROUGH KATHERINE PROKOP
AS PERSONAL REPRESENTATIVE**

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

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Statement of Legal Issues.....	1
Statement of the Case and the Facts.....	3
Argument.....	11
I. Standard of Review	11
II. Cirrus and UNDAF Owed Prokop and Kosak a Duty of Care Because Specialized Transition Training Was Provided as Part of the Purchase Price of the SR22, and the Failure to Adequately Provide it Could and Did Foreseeably Lead to Injury	12
A. Cirrus and UNDAF Had a Duty of Care Imposed by Minnesota Law Because it was Foreseeable that Negligent Provision of Instruction Concerning the SR22 Could Lead to an Accident	13
B. Cirrus Assumed a Duty of Care by Providing Transition Training as Part of the Sale of the SR22, Which the Jury Determined it Negligently Discharged Leading to Injury	16
III. The Educational Malpractice Doctrine Does Not Bar the Jury’s Negligence Findings Against Cirrus and UNDAF Involving the Specialized Training They Offered, But Failed to Provide, to Safely Operate the SR22	19
A. Educational Malpractice is Not the Claim in this Case	19
B. Cirrus’s Duties Should Not be Altered by the Educational Malpractice Doctrine Because Cirrus Acted as a Product Seller and Had a Duty to Provide Reasonable Instruction in the Safe Use of the SR22	20

	<u>Page</u>
C. Even if the Educational Malpractice Doctrine Is Implicated Here, it Does Not Apply Because the Liability Findings at Trial Do Not Impinge Upon Educational Processes or Theories, But Merely Correct for Negligent Conduct	21
1. “Lack of a satisfactory standard of care”	25
2. “Inherent uncertainties about causation and the nature of damage”	25
3. “Potential for a flood of litigation against schools”	26
4. “Embroider the courts into overseeing the day-to-day operations of schools”	27
D. Authorities Dealing With Educational Malpractice Do Not Preclude Negligence Claims Against Cirrus and UNDAF	30
Conclusion.....	33

TABLE OF AUTHORITIES

	<u>Page</u>
<u>State Cases</u>	
<i>Alsides v. Brown Institute, Ltd.</i> , 592 N.W.2d 468 (Minn. Ct. App. 1999)	Passim
<i>Balder v. Haley</i> , 399 N.W.2d 77 (Minn. 1987).....	15, 16
<i>Bilotta v. Kelley Co., Inc.</i> , 346 N.W.2d 616 (Minn.1984).....	21
<i>Bjerke v. Johnson</i> , 742 N.W.2d 660 (Minn. 2007).....	1, 13
<i>Bolander v. Bolander</i> , 703 N.W.2d 529 (Minn. Ct. App. 2005).....	11
<i>Canada by Landy v. McCarthy</i> , 567 N.W.2d 496, 504 (Minn. 1997)	18
<i>D & A Dev. Co. v. Butler</i> , 357 N.W.2d 156 (Minn. Ct. App. 1984).....	17
<i>Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.</i> , 277 S.W.3d (Mo. Ct. App. 2008).....	30
<i>Doe v. Yale Univ.</i> , 748 A.2d 834 (Conn. 2000)	23, 29
<i>George v. Estate of Baker</i> , 724 N.W.2d 1 (Minn. 2006).....	11
<i>Germann v. F.L. Smithe Mach. Co.</i> , 395 N.W.2d 922 (Minn. 1986).....	Passim
<i>Glorvigen v. Cirrus Design Corp.</i> , 796 N.W.2d 541 (Minn. Ct. App. 2011).....	3
<i>Gray v. Badger Mining Corp.</i> , 676 N.W.2d 268 (Minn. 2004).....	1, 13

	<u>Page</u>
<i>Hauenstein v. Loctite Corp.</i> , 347 N.W.2d 272 (Minn. 1984).....	13
<i>Isler v. Burman</i> , 232 N.W.2d 818 (Minn. 1975).....	17, 18
<i>Larson v. Indep. Sch. Dist. No. 314, Brahm</i> , 289 N.W.2d 112 (Minn. 1979).....	18
<i>Lesmeister v. Dilly</i> , 330 N.W.2d 95 (Minn. 1983).....	17
<i>Lovejoy v. Minneapolis-Moline Power Implement Co.</i> , 79 N.W.2d 688 (Minn. 1956).....	14, 21
<i>Moore v. Vanderloo</i> , 386 N.W.2d 108 (Iowa 1986)	32
<i>Moss Rehab v. White</i> , 692 A.2d 902 (Del. 1997)	32, 33
<i>Page v. Klein Tools, Inc.</i> , 610 N.W.2d 900 (Mich. 2000).....	31
<i>Pouliot v. Fitzsimmons</i> , 582 N.W.2d 221 (Minn. 1998).....	11
<i>Reads Landing Campers Assoc. v. Township of Pepin</i> , 546 N.W.2d 10 (Minn. 1996).....	11
<i>Thielen v. Spilman</i> , 86 N.W.2d 700 (Minn. 1957).....	17
<i>Walsh v. Pagra Air Taxi, Inc.</i> , 282 N.W.2d 567 (Minn. 1979).....	17

Federal Cases

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

In re Air Crash Near Clarence Center, New York,
2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010).....2, 28, 29

In re Cessna 208 Series Aircraft Prod. Liab. Litig.,
546 F. Supp. 2d 1153 (D. Kan. 2008).....2, 29, 30

Sheesley v. Cessna Aircraft Co.,
2006 WL 1084103 (D.S.D. Apr. 20, 2006)31

United States v. Johnson,
853 F.2d 619 (8th Cir. 1988)17, 18

Statutes, Rules & Regulations

Minn. Stat. § 604.101 (2000)17

STATEMENT OF LEGAL ISSUES

1. Did Cirrus, an aircraft manufacturer, and UNDAF, Cirrus's agent and joint venturer, have or assume a duty to act with reasonable care in the sale of, and provision of instruction concerning, the SR22?

The trial court correctly held that Cirrus and UNDAF owed Prokop and Kosak a duty of care as a matter of law, which the jury determined Cirrus and UNDAF breached causing injury. Add. 68, 116.¹ A split court of appeals panel, however, held that “an airplane manufacturer’s duty to warn of dangers associated with the use of its aircraft does not include a duty to provide pilot training,” and therefore the negligence claims against Cirrus and UNDAF failed. Add. 31.

Apposite Authorities:

Bjerke v. Johnson,

742 N.W.2d 660 (Minn. 2007)

Germann v. F.L. Smithe Mach. Co.,

395 N.W.2d 922 (Minn. 1986)

Glorvigen v. Cirrus Design Corp.,

2008 WL 398814 (D. Minn. Feb. 11, 2008)

Gray v. Badger Mining Corp.,

676 N.W.2d 268 (Minn. 2004)

¹ “Add.” refers to the addendum to this brief.

2. Does the educational malpractice doctrine shield Cirrus, an aircraft manufacturer, and UNDAF, a factory training representative, from a jury's negligence findings when they conducted a specialized "transition training" program as part of the purchase price of the SR22, but omitted a specific piece of critical training, the purpose of which was to prevent the exact type of accident that occurred in this case?

The trial court correctly held that the educational malpractice doctrine did not preclude Prokop's and Kosak's negligence claims. Add. 58-73, 116. A split court of appeals panel, however, held the negligence claims "sound in" educational malpractice, and are therefore barred as a matter of law. Add. 31.

Apposite Authorities:

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

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

In re Air Crash Near Clarence Center, New York,
2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010)

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

STATEMENT OF THE CASE AND THE FACTS

Gary Prokop and James Kosak were killed when Prokop's Cirrus SR22 airplane crashed near Hill City, Minnesota on January 18, 2003. Kosak was Prokop's friend and sole passenger that day. The trustees for the next-of-kin of Prokop and Kosak each commenced wrongful death actions against Cirrus, the airplane's manufacturer, in Itasca County District Court. The trustee for Kosak's next-of-kin also sued Prokop, claiming negligent piloting. UNDAF, a Cirrus subcontractor that provided Prokop transition training on the SR22, intervened as a defendant in both cases and fully participated in the case through trial. Ultimately the case was tried and submitted to the jury on a negligence theory, the Honorable David J. TenEyck presiding. The jury apportioned a total of 75% negligence to Cirrus and UNDAF, and 25% to Prokop. The court thereafter rejected Cirrus's and UNDAF's various post-trial motions and sustained the jury's findings.

Cirrus and UNDAF appealed the judgment, and a divided court of appeals panel reversed. *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541 (Minn. Ct. App. 2011). The court of appeals held that Cirrus and UNDAF did not have a duty to provide transition training to Prokop, and therefore negligence liability could not attach to them. 796 N.W.2d at 558. It further held that negligence findings against Cirrus and UNDAF were barred by the educational malpractice doctrine. *Id.* This Court granted further review.

Prokop obtained his private pilot's license in July 2001. Tr. 1170-1171.² He was licensed to fly under Visual Flight Rules ("VFR"), which require a pilot to be able to see outside the cockpit in order to control the aircraft's attitude, navigate, and avoid obstacles and other aircraft. VFR flight contrasts with flight under Instrument Flight Rules ("IFR"), which allow a pilot to fly in obstructed conditions—known as Instrument Meteorological Conditions ("IMC")—by using the aircraft instrument panel to navigate.

Most of Prokop's flight experience came in a Cessna 172 Skyhawk, an entry level aircraft that was slower and far less sophisticated than the SR22. The SR22 had numerous characteristics that set it apart from the Cessna 172. A pilot must obtain a high performance aircraft endorsement in order to fly the SR22, given its power and speed. Tr. 232, 237. The SR22 has a side stick controller and an electronic multi-function display, features that are not present in the Cessna 172. Tr. 229. Also unlike Prokop's Cessna 172, the SR22 is equipped with an autopilot system. *Id.*

Prokop purchased the SR22 in December 2002. When Cirrus sold Prokop the airplane, it provided him with a two-day course of transition training as part of the purchase price, conducted through its designated representative, UNDAF. A. 391-394.³ The purpose of transition training was to instruct pilots like Prokop how to safely operate the SR22 and "transition" them from aircraft they previously operated. A Cirrus document entitled "Pilot Training Agreement" described the transition training as

² "Tr." refers to the trial transcript.

³ "A." refers to the joint appellants' appendix.

follows:

Transition training for one (1) SR22 pilot will be furnished to the Initial Purchaser, subject to the following:

- A. All training will be conducted by Cirrus and/or its designated training organization.
- B. Pilot Training will consist of Cirrus' standard two-day transition training program as follows:
 - 1. Aircraft systems training with **emphasis on the innovative aspects of the SR22**. Examples include combined throttle/propeller control, side yoke and **autopilot/trim system**.
 - 2. **Flight training to proficiency**, in accordance with trainer's standards. Normally this aspect of training will result in 4-5 hours of flight time.
 - 3. Avionics systems training with particular emphasis on the use of GPS and the multi-function display.

A. 163 (emphasis added). This document indicated that "extra training" was available at additional cost for those "who wish to contract for additional training services," and that payment to Cirrus would be required "for any training requested beyond that described above." *Id.* In addition to the standard two-day course of transition training described above, Prokop purchased two additional days of training—although he was ultimately provided with only 3½ days total training. Tr. 619, 931.

UNDAF described itself as serving "the business arm between the aerospace industry and the John D. Odegard School of Aerospace Sciences at the University of North Dakota." A. 392. When Prokop communicated with UNDAF's representative

prior to delivery of the SR22, he stated that he had “approximately 200 hours of Cessna 172 time and limited GPS.” A. 361. Prokop indicated to UNDAF that he would “plan for as much training time as you deem necessary.” *Id.*

Yu Weng Shippek was the Cirrus/UNDAF flight training representative who provided the transition training to Prokop. Tr. 753-754. A detailed course syllabus outlined the various aspects of transition training that Cirrus, through UNDAF, was supposed to provide. Among the procedures set forth in the syllabus was an emergency procedure called “Recovery from VFR into IMC (auto-pilot assisted).” A. 152-160. This training was critically important to resolving the difficulties presented to a VFR-rated pilot encountering IMC conditions in the SR22. At trial, John Wahlberg, UNDAF’s training supervisor, acknowledged that a leading cause of VFR crashes was VFR flight into IMC. Tr. 698. Indeed, Wahlberg testified, “[t]his is why this procedure exists.” *Id.* Proper performance of auto-pilot assisted recovery from VFR into IMC in the SR22 required very quick thinking and action. Tr. 517-518.

In addition, Captain James Walters, an expert witness that counsel for the Kosak family called at trial, testified about the importance of the autopilot system in the SR22:

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

Tr. 224. When Captain Walters was asked why pilots practice emergency procedures to proficiency, he testified, “[s]o that when the time comes to do them, you don’t have to

think. You just do exactly what you've been trained and what is in your memory to do.”
Tr. 473.

The procedure “Recovery from VFR into IMC (auto-pilot assisted)” was contained among other procedures in a section of the course syllabus entitled “Flight 4a: IFR Flight (non-rated).” A heading at the top of this and other sections of the syllabus reads, “Skipped items should be left unchecked.” A. 156. Each procedure in this section contains a corresponding dashed line above which the flight instructor can place a check mark to indicate whether the procedure was performed satisfactorily. *Id.* None of the procedures in Flight 4a, including auto-pilot assisted recovery from VFR into IMC, was checked, indicating these lessons were not taught. *Id.*; Tr. 258-260.

One disputed issue at trial was whether Shipek provided the flight lesson to Prokop that covered the specific emergency procedures for recovery from VFR into IMC flight—the very circumstance that befell Prokop the morning of the crash. Shipek testified that he gave the flight lesson, but the documentary evidence showed otherwise. In a pre-trial deposition, Shipek claimed the lesson was given as part of an instrument landing Prokop made at the Duluth airport. Tr. 912-913. But since the procedure for recovery from VFR into IMC requires a 180° turn, it was not possible that this lesson was given during the instrument landing. Tr. 301. At trial, Shipek testified that the VFR into IMC training procedure was performed “several times,” but it simply “was not documented.” Tr. 792-

793. Shipek testified that the training was provided “under the hood,”⁴ although no hood training was documented in Prokop’s log book, which Shipek filled out and signed. Tr. 793, 797-798; A. 386-387. Ultimately the jury considered all of the evidence and assessed Shipek’s credibility on this critical factual issue.

Another issue at trial was whether Prokop’s lack of adequate instruction caused the crash. Captain Walters testified that, on the morning of the fatal flight, Prokop entered IMC-like conditions that prevented him from being able to fly VFR, and that this circumstance was part of the root cause of the crash. Tr. 222-223. Captain Walters opined that, after takeoff, Prokop entered adverse, turbulent conditions and decided to return to Grand Rapids. Tr. 212. Prokop tried to manually turn the airplane and, in the course of that maneuver, the airplane descended. Tr. 215. Prokop pulled back in order to correct the descent, and the aircraft entered into a stall and crashed. Tr. 216-221. Captain Walters testified that Prokop did not use the autopilot during the attempted return, but was hand-flying the aircraft. Tr. 223-224.

Captain Walters’s opinion was consistent with the testimony of Steven Day, Prokop’s flight instructor. Day testified that, after Prokop’s factory training on the SR22, Prokop indicated either that he did not “know how to turn the autopilot on” or did not “know how to use the autopilot,” which surprised Day because he thought Prokop would have been more familiar with the aircraft’s avionics at that time. Tr. 1184-1185. Day

⁴ “Under the hood” refers to the simulation of an IMC environment for a pilot through use of a view limiting device.

also testified that Prokop was a very good, dedicated, and intelligent student who did not want to “rush his training” in any way. Tr. 1172.

Captain Walters testified that Prokop could have reasonably believed that he would be encountering VFR conditions along his flight route on January 18, 2003, and that, based on the weather reports, Prokop was legal to fly. Tr. 304. Captain Walters opined that the failure to train Prokop to proficiency regarding the inadvertent flight into IMC emergency procedure was the proximate cause of the crash. Tr. 305.

Captain Walters’s opinions and other evidence at trial precisely implicated the training that Cirrus and UNDAF failed to provide, despite the representation in the syllabus that it would be provided—a swift, auto-pilot assisted response to and recovery from IMC. Captain Walters testified that, had the autopilot been used at a reasonably early point in the unfolding of the incident, it “would have prevented the accident.” Tr. 274. The jury considered this along with the other evidence, and apportioned 75% of the total negligence to Cirrus and UNDAF.

After the jury returned its verdict, Cirrus and UNDAF each brought motions for judgment as a matter of law and for a new trial. The court carefully considered and resolved these motions, finding no basis to set aside the jury verdict. Add. 55-135. Cirrus and UNDAF thereafter appealed the judgment to the court of appeals, arguing that the district court improperly denied their motions. In a decision filed April 19, 2011, a 2-1 majority of the court of appeals concluded that Cirrus and UNDAF did not have a duty to provide transition training to Prokop, and therefore the negligence claims against

Cirrus and UNDAF could not be sustained. Add. 31. The majority additionally held that negligence claims against Cirrus and UNDAF were barred by the educational malpractice doctrine. *Id.*

This Court subsequently granted the petitions of the trustees for the next-of-kin of Prokop and Kosak, and the estate of Prokop, for further review. It also granted the conditional petition for further review of UNDAF.

ARGUMENT

I. STANDARD OF REVIEW

The trial court entered judgment having refused to grant Cirrus and UNDAF judgment as a matter of law. The court of appeals reversed. On appellate review of a judgment as a matter of law, the trial court's decision must be affirmed if "there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998); accord *George v. Estate of Baker*, 724 N.W.2d 1, 6 (Minn. 2006) (standard applied to review of judgment as a matter of law is that evidence is "so overwhelming on one side that reasonable minds cannot differ as to the proper outcome."). The evidence must be considered "in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Pouliot*, 582 N.W.2d at 224 (citing *Stumne v. Village Sports & Gas*, 243 N.W.2d 329, 330 (Minn. 1976)). "Verdicts are upset only in extreme circumstances." *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. Ct. App. 2005) (citing *Ralph Hegman Co. v. Transamerica Ins. Co.*, 198 N.W.2d 555, 558 (Minn. 1972)). Moreover, this Court need not defer to the court of appeals when making determinations as to questions of law. *Reads Landing Campers Assoc. v. Township of Pepin*, 546 N.W.2d 10, 13 (Minn. 1996).

II. CIRRUS AND UNDAF OWED PROKOP AND KOSAK A DUTY OF CARE BECAUSE SPECIALIZED TRANSITION TRAINING WAS PROVIDED AS PART OF THE PURCHASE PRICE OF THE SR22, AND THE FAILURE TO ADEQUATELY PROVIDE IT COULD AND DID FORESEEABLY LEAD TO INJURY.

The court of appeals addressed the question of whether Cirrus and UNDAF had a duty of care by examining what Cirrus and UNDAF actually undertook to accomplish, rather than by determining whether a duty existed in light of the foreseeability of injury. Interpreting a provision of Cirrus's Pilot Training Agreement, in which Cirrus represented that it would provide flight training "to proficiency," the majority reasoned that Cirrus's duty to warn could not include an "obligation to train Prokop to proficiently pilot the SR22—which is the crux of respondents' claims." Add. 18. But in the context of aircraft flight, training "to proficiency" does not imply the inculcation of any particular skills beyond those required for the safe use of the product, since the performance of one of any number of flight maneuvers "non-proficiently" can easily result in injury or death. Proficiency equates to safe use. The court of appeals incorrectly characterized this term as imposing a seemingly unreasonable burden on Cirrus and UNDAF.

Cirrus provided transition training as part of the purchase price of the SR22 because it could plainly foresee risks associated with allowing SR22 purchasers to leave its factory without a full awareness and understanding of the many advanced features and characteristics of that airplane. Consequently, Cirrus attempted to discharge its duty to reasonably instruct not only through the provision of written materials, but through an experiential training component with a flight instructor guided by a detailed course

syllabus. Prokop relied upon that course of hands-on instruction to prepare him to fly his new plane. Indeed, he was a dedicated and diligent student eager to accept the transition training Cirrus offered through UNDAF.

After the jury considered the evidence, it determined that Cirrus and UNDAF acted negligently in the discharge of their duties, that this negligence was a direct cause of the loss, and that 75% of the resulting liability should be apportioned to Cirrus and UNDAF. Its findings need not and should not be disturbed here.

A. Cirrus and UNDAF Had a Duty of Care Imposed by Minnesota Law Because it was Foreseeable that Negligent Provision of Instruction Concerning the SR22 Could Lead to an Accident.

The determination of whether a duty of care exists is a question of law. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). “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 v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977)). This duty extends to all “reasonably foreseeable users” of a product. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984).

Under Minnesota law, the determination of the existence of a duty is not made in a vacuum, or simply by reference to what might seem appropriate under the circumstances.

Instead, it is inextricably linked to *foreseeability*:

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.

Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922, 924-925 (Minn. 1986) (citing *Christianson v. Chicago St. P., M. & O. Ry. Co.*, 69 N.W. 640 (Minn. 1896)); *see also* *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 79 N.W.2d 688, 693 (Minn. 1956) (if a manufacturer knows, or should know, that a chattel could cause bodily injury if not used in a specific way, it may be liable for failure to furnish adequate notice of dangers and assumes responsibility of giving accurate and adequate instructions).

When Judge Paul A. Magnuson of the United States District Court for the District of Minnesota considered this case before it was remanded to state court, he held that “general negligence principles” applied here and denied Cirrus’s summary judgment motion. Judge Magnuson recognized the vital connection between duty and foreseeability, reasoning:

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.

Glorvigen v. Cirrus Design Corp., 2008 WL 398814, *4 (D. Minn. Feb. 11, 2008) (“*Glorvigen II*”) (Add. 139). Judge Magnuson correctly found that the question of whether Cirrus departed from the ordinary standard of care was answered by examining its conduct “against the standard of what an ordinarily prudent designer and manufacturer

of airplanes would have done.” *Id.* (citation omitted).

Similarly, in ruling on Cirrus’s and UNDAF’s post-trial motions, the trial court recognized that, in the context of aircraft training, “failure to provide a specific type of training may lead to injury and even death,” and that when an entity “that trains pilots has determined that certain training is important enough to include in its curriculum and then fails to provide that training, it is, or should be, reasonably foreseeable that damage may ensue.” Add. 71-72. The trial court appropriately held that Cirrus and UNDAF had a duty as a matter of law, and left issues of breach of that duty and causation to be determined by the jury, consistent with Minnesota law. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987) (if foreseeability exists, a duty exists and the remaining issues of “the adequacy of the warning, breach of duty and causation remain for jury resolution.”).

Although foreseeability is the critical concept for purposes of determining whether a duty exists, the court of appeals majority did not consider it. Instead, it refused to hold that a duty to warn by providing adequate instruction could include “an obligation to train the end user to proficiency,” on the grounds that such a duty would be “unprecedented.” Add. 20. But the issue of precedent is not relevant to the creation of a legal duty—foreseeability is. *Germann*, 395 N.W.2d at 924. Here, Cirrus manufactured and marketed a high performance airplane with many advanced features. It developed a course of transition training that it provided as part of the sale of that airplane that included specific instruction concerning the emergency response to inadvertent flight into IMC. If a VFR pilot encounters IMC—particularly in a fast, sophisticated airplane like the SR22—that

circumstance needs to be resolved immediately. It was foreseeable that if a pilot was not adequately instructed and trained to take the necessary actions in the SR22 to escape from inadvertent entry into IMC, it could, as it did here, prove fatal. A direct connection exists between the omitted training and the accident here, and a conclusion that a duty exists necessarily follows.

Moreover, by restricting the particular scope of the duty that Cirrus owed to Prokop and Kosak, the court of appeals majority resolved, as a matter of law, a fact issue that the jury should (and did) determine here: whether the warning was adequate. *Balder*, 399 N.W.2d at 81. It was the jury's role to determine whether the particular instruction Cirrus and UNDAF gave Prokop—whether conveyed orally, in writing, or in the context of the transition training program—was adequately delivered. The jury did so following a full trial on the merits, and nothing warrants upsetting its determination here.

B. Cirrus Assumed a Duty of Care by Providing Transition Training as Part of the Sale of the SR22, Which the Jury Determined It Negligently Discharged Leading to Injury.

The court of appeals majority held that, “[a]lthough Prokop may have needed transition training to safely pilot the SR22, it does not follow that Cirrus had a duty to provide the training.” Add. 20. Assuming *arguendo* that Cirrus had no duty of care to provide transition training in the first instance, the fact remains it elected to do so. Cirrus therefore obligated itself to conduct transition training in a non-negligent fashion in order to satisfy its assumed duty of care.

In his dissent, Judge Klaphake correctly observed that a party can assume a duty

that may not otherwise exist and, in that circumstance, the party “must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.” Add. 34 (citing *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975)); see also *Thielen v. Spilman*, 86 N.W.2d 700, 706 (Minn. 1957) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275 (1922)) (“It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all[.]”); *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570 (Minn. 1979) (voluntarily undertaken duty by city to provide fire protection services to airport users, which was contractually delegated to a fixed base operator, required discharge of duty with reasonable care and jury properly apportioned negligence). A party does not become immune from the operation of general negligence principles merely because it takes action that is not legally mandated.

Cirrus and UNDAF will argue that, to the extent a duty was assumed, it was based on a contract and therefore negligence principles cannot apply to their conduct. But this is, and always has been, a wrongful death case. The various cases dealing with economic loss do not deal with, and cannot resolve, the issue of whether negligence claims are properly asserted in this context. Cf. *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) (no negligent breach of contract claim relative to economic loss stemming from construction activities); *D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. Ct. App. 1984) (no negligence claim for alleged lost profits owing to failure to timely update architectural plans); *United States v. Johnson*, 853 F.2d 619 (8th Cir. 1988) (no

negligence claim against government relative to administration of farm storage loan contracts); *see also* Minn. Stat. § 604.101 (2000) (codifying economic loss doctrine and providing that it “does not apply to claims for injury to the person”).

Isler makes “reasonable care” the standard governing assumed duties, and does not indicate an exception to that standard exists simply because contractual duties may also be involved. 232 N.W.2d at 822. Here, contractual duties (and any departure from them) were relevant to the jury’s determination of whether Cirrus and UNDAF deviated from the applicable standard of care causing personal injury. *See Larson v. Indep. Sch. Dist. No. 314, Brahm*, 289 N.W.2d 112, 117 n.8 (Minn. 1979), *overruled in part on other grounds, Anderson v. Anoka Hennepin Sch. Dist. 11*, 678 N.W.2d 651, 657 (Minn. 2004) (evidence of curriculum manual provisions “was relevant for the jury’s determination whether defendants breached the duty of care owed to [plaintiff].”); *Canada by Landy v. McCarthy*, 567 N.W.2d 496, 504 (Minn. 1997) (although terms in an agreement do not alone establish a standard of care, the jury can consider them in assessing reasonableness of conduct). Contractual duties do not limit a cause of action for personal injury due to negligent conduct.

As Judge Magnuson, Judge TenEyck, and Judge Klaphake found below, Cirrus had, or at least assumed, a duty of ordinary care in connection with its sale of the SR22. Prokop and Kosak reasonably relied on Cirrus’s undertaking to provide adequate instruction in the operation of the SR22, which involved training to proficiency in various maneuvers including auto-pilot assisted escape from IMC. The evidence at trial

demonstrated that the crash resulted from this exact condition, and that Prokop's use of the autopilot would have prevented the accident. The issue of Cirrus's and UNDAF's negligence was properly submitted to and resolved by the jury here.

III. THE EDUCATIONAL MALPRACTICE DOCTRINE DOES NOT BAR THE JURY'S NEGLIGENCE FINDINGS AGAINST CIRRUS AND UNDAF INVOLVING THE SPECIALIZED TRAINING THEY OFFERED, BUT FAILED TO PROVIDE, TO SAFELY OPERATE THE SR22.

Because Cirrus is a product manufacturer that attempted to provide instruction to discharge its duty of care, not to advance any general educational goals, the educational malpractice doctrine does not fit the facts of this case and should not apply. Moreover, the public policies allegedly supporting application of that doctrine are not implicated by this wrongful death case in negligence.

A. Educational Malpractice is Not the Claim in this Case.

This case does not involve a school or educational institution, but an aircraft manufacturer and its designated training representative that offered, but failed to provide, specialized transition training to Prokop. The trial court's resolution of this negligence-based wrongful death action does not pose a genuine threat of entangling Minnesota courts in the second-guessing of educational decisions or in the day-to-day operation of schools. Judge Magnuson had no difficulty denying Cirrus's summary judgment motion on Cirrus's claimed entitlement to the educational malpractice bar before remand. *Glorvigen II*, 2008 WL 398814 at *4 ("Cirrus' primary business is building and selling airplanes, not training pilots."). And UNDAF, a separate entity from the University of

North Dakota, described itself as serving “the *business arm* between the aerospace industry and the John D. Odegard School of Aerospace Sciences at the University of North Dakota.” (A. 392) (emphasis added.) Educational malpractice is not implicated because the commercial activities that Cirrus and UNDAF undertook do not constitute general education, and do not legitimately implicate the public policies that counsel courts to defer to institutions developing their own educational theories and processes.

Despite these critical distinctions, the court of appeals reversed the trial court and held that negligence claims against Cirrus and UNDAF are barred because they constitute claims for educational malpractice. The court of appeals majority held:

Although Cirrus is not primarily in the business of education, it assumed educational responsibilities related to, but distinct from, its function as a manufacturer by offering transition training and thereby entered into an educational relationship with Prokop, to which the educational malpractice bar applies.

(Add. 24) (footnote omitted).

With respect, this conclusion is incorrect for several reasons.

B. Cirrus’s Duties Should Not be Altered by the Educational Malpractice Doctrine Because Cirrus Acted as a Product Seller and Had a Duty to Provide Reasonable Instruction in the Safe Use of the SR22.

As argued above, Cirrus was a product manufacturer and seller that had or undertook a duty to properly advise Prokop how to safely operate the SR22. Negligence claims are not barred merely because the sale of this product involved transition training. Indeed, by including transition training in the purchase price of the airplane, Cirrus deemed this particular instruction necessary for the use and operation of the product sold,

and therefore held itself to a standard of ordinary care in that instruction. This duty needed to be appropriately discharged whether Cirrus provided the instruction itself or delegated that function to UNDAF. *Lovejoy*, 79 N.W.2d at 693; *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624 (Minn. 1984) (manufacturer cannot delegate its duty to “design a reasonably safe product.”). The jury evaluated the evidence at trial, assessed the credibility of the various witnesses, and found that Cirrus failed to live up to the commitment it assumed causing two deaths. The fact that negligence was established with evidence of a documented failure to train, and testimony concerning that failure, is immaterial because Minnesota tort law provides the appropriate redress for this wrongful death case involving a product manufacturer and its joint venturer.

C. Even if the Educational Malpractice Doctrine is Implicated Here, it Does Not Apply Because the Liability Findings at Trial Do Not Impinge Upon Educational Processes or Theories, But Merely Correct for Negligent Conduct.

In its order following post-trial motions, the trial court conducted a lengthy analysis of the educational malpractice issue and effectively distinguished the cases upon which Cirrus and UNDAF relied. The trial court observed that a key factor in these cases was that the defendants provided some form of training, but it was argued that the training actually undertaken was inadequate or of poor quality. Add. 68. This, in turn, required the court to “conduct an inquiry into the nuances of educational processes and theories” barred by the educational malpractice doctrine. *Id.* By contrast, here a flight lesson that was set forth in the Cirrus/UNDAF curriculum, and that was deemed a

necessary and important part of transition training, simply was not given. This fact distinguishes this matter from those cases in which the educational malpractice bar was imposed.

When this case was in federal court before Judge Magnuson, Cirrus contended that *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999) barred any negligence claim against it. *Glorvigen II*, 2008 WL 398814 at *3-*4 (Add. 139). The court rejected that argument, observing:

Alsides is distinguishable because the plaintiffs did not sue for negligence but rather for breach of contract, fraud, and misrepresentation. Further, the court held that although claims challenging the “general quality of the instructors” 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.” 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.

2008 WL 398814 at *3 (Add. 139). Consequently, the court declined to apply the educational malpractice bar and held, under the facts of this case, that “general negligence principles” applied, the relevant question being whether Cirrus discharged its duty of ordinary care. *Id.* at *4 (citation omitted).

Even if the *Alsides* case applied, it does not bar negligence claims against Cirrus and UNDAF. Appropriately construed, the *Alsides* decision expressly permits claims for breach of contract, fraud, or misrepresentation under a specific set of circumstances. As noted, the court in *Alsides* had no need to deal with the question of negligence because it was never raised in the case. *Alsides* should not, therefore, be construed to prevent a

viable tort claim sounding in negligence, provided the claim involves an alleged failure to perform on specific promises, and does not involve “inquiry into the nuances of educational processes and theories.” *Alsides*, 592 N.W.2d at 473 (citing *Ryan v. Univ. of N.C. Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998) (internal quotations omitted)).

There is a fundamental distinction between the general pursuit of education and the specialized type of training Cirrus offered to instruct new purchasers how to safely operate the SR22 and to manage the differences between that airplane and previous aircraft they operated. The general rationale of *Alsides* supports this view, observing that a majority of courts reject claims that attack “the *general quality of education* provided to students.” 592 N.W.2d at 472 (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (emphasis added)); *see also Doe v. Yale Univ.*, 748 A.2d 834, 847 (Conn. 2000) (distinguishing between claim asserting a failure to educate effectively, which is not cognizable, and the common law duty not to cause physical injury by negligent conduct, which is cognizable). *Alsides* articulated the following public policy grounds for rejecting these types of general claims:

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

Alsides, 592 N.W.2d at 472 (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir.

1992)). *Alsides* further identified the central difficulty with allowing courts to consider such claims:

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

592 N.W.2d at 472 (quoting *Andre v. Pace Univ.*, 170 Misc. 2d 893, 655 N.Y.S.2d 777, 779-780 (N.Y. App. Term 1996)). Even under *Alsides*, however, concerns about “judicial displacement of complex educational determinations” give way when the alleged conduct does not concern the failure of an institution to adequately perform promised educational services, but the failure “to perform that service at all.” *Id.* at 473 (quoting *Ross*, 957 F.2d at 417). Ultimately *Alsides* held that educational institutions are not immune from legal action when the claim involves a failure to “perform on specific promises it made to the student and the claim would not involve an inquiry into the nuances of educational processes and theories.” *Id.* at 476 (internal quotations omitted).

If the Court determines that this case falls within the scope of *Alsides*, none of the public policy grounds at issue in that case supports a bar to negligence claims against Cirrus.

1. “Lack of a satisfactory standard of care”

Cirrus and UNDAF provided a standard by which their conduct could be examined in the form of the course syllabus for the transition training. Moreover, Cirrus and UNDAF acknowledged at trial that the training they failed to provide should have been given and that it was important. UNDAF’s John Wahlberg acknowledged that a leading cause of VFR crashes was VFR flight into IMC and that “[t]his is why this procedure exists.” Moreover, proper performance of auto-pilot assisted recovery from VFR into IMC in the SR22 required very quick thinking and action. Because Cirrus and UNDAF failed to provide instruction they themselves deemed necessary, the trial court was not required to substitute its own judgment for that of an educator.

2. “Inherent uncertainties about causation and the nature of damage”

As the trial court properly held in its decision denying Cirrus’s and UNDAF’s post-trial motions, an analysis of the “student’s attitude, motivation, temperament, past experience, and home environment” was not required here because the evidence demonstrated the relevant training was not conducted in the first instance. Even if it had been, Prokop’s flight instructor, Steven Day, testified that Prokop was a very good, dedicated, and intelligent student who did not want to rush his training. Tr. 1172. There is no reason to conclude that, had the emergency procedure Recovery from VFR into IMC (auto-pilot assisted) been taught to proficiency as promised, Prokop would not have learned it.

Substantial evidence presented and considered at trial indicated that (1) the accident was caused by Prokop's inadvertent transition from VFR flight into IMC-like conditions; (2) Shipek omitted flight training procedures concerning VFR flight into IMC conditions; and (3) had Prokop used the autopilot, the accident would have been avoided. Causation issues routinely arise in wrongful death cases. Here, the connection between the omitted training and the events leading up to and including the incident was logical and direct. The procedures governing a pilot's response to VFR flight into IMC were of critical importance from a life safety perspective. Had they been taught, the evidence was that the accident would not have occurred.

3. "Potential for a flood of litigation against schools"

Because this lawsuit does not involve a university or school, but factory training in connection with the sale of a product, it will not necessarily lead to increased litigation "against schools." The trial court's decision is consistent with decades of Minnesota negligence law. Manufacturers cannot (and do not) expect to be exempted from litigation in connection with the products they sell and the product instructions they prepare and deliver. This is not a case in which the court substituted its own judgment for educators, or signaled a willingness to entertain lawsuits challenging the general adequacy of education, either of which could embolden litigants to press claims traditionally considered to constitute educational malpractice. The trial court sustained a jury verdict finding negligence in the context of a wrongful death case.

4. “Embroid the courts into overseeing the day-to-day operations of schools”

Should the decision of the court of appeals be reversed and the trial court’s decision affirmed, educational institutions will not be held to any different legal standards than they are today. Educational institutions are not similarly situated to commercial enterprises selling highly sophisticated, potentially dangerous products along with training to purchasers about how to use them safely. And the prevention of claims challenging the general adequacy of education is not at odds with submitting negligence claims to a jury in the wrongful death context. Given the particular facts of this case, the trial court’s decision will not open the door to overseeing the day-to-day operation of schools.

* * *

The argument that the educational malpractice doctrine bars negligence claims against Cirrus leads to the unreasonable conclusion that a party is insulated from tort liability in connection with the sale of its product, provided there is some element of “training” or “education” involved in the sale. This is not, and should not be, the law. As Judge Klaphake incisively noted in his dissent, “under [Cirrus’s and UNDAF’s] expansive definition of ‘educational institution,’ every coffee pot manufacturer who issues instructions for its product’s use would constitute an educational institution to which the educational-malpractice bar would apply.” Add. 38.

The United States District Court for the Western District of New York recently treated the issue of educational malpractice in connection with lawsuits arising out of the crash of Continental Connection Flight 3407 outside of Buffalo, New York, in 2009. *In re Air Crash Near Clarence Center, New York*, 2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010) (A. 527). In *Air Crash Near Clarence Center*, plaintiffs brought claims against FlightSafety International, Inc. and others, claiming FlightSafety negligently trained the aircraft's captain, Marvin Renslow, and first officer, Rebecca Lynne Shaw. Plaintiffs claimed that FlightSafety failed to properly train Renslow and Shaw to recognize and respond to "ice-related aerodynamic conditions" that existed at the time of the crash. 2010 WL 5185106 at *1.

Defendants removed the lawsuits, and plaintiffs brought motions to remand for lack of federal diversity jurisdiction, claiming FlightSafety, a citizen of New York, destroyed diversity and had not been fraudulently joined. Defendants claimed that plaintiffs could not state a cause of action against FlightSafety in state court by reason of, among other things, the educational malpractice bar.

Reviewing various New York educational malpractice decisions, the *Air Crash Near Clarence Center* court refused to hold that plaintiffs would be foreclosed from pursuing their claims against FlightSafety because of the educational malpractice bar. The court explained its position as follows:

First, the New York decisions in this area involve traditional educational institutions—public and private schools and universities. This case, however, presents a private corporation engaged in the business of

providing specialized training, thus a New York court may reasonably determine that it is not being tasked with assessing “the validity of broad educational policies,” as discussed in *Donahue*. 47 N.Y. at 445.

Second, a New York court may find that the commercial, specialized training of airmen is not necessarily akin to the general education of children, and is unlikely to result in a glut of suits challenging the day-to-day implementation of educational policies. *Id.* Defendants cite no cases—and this Court has discovered none—in which a New York court has foreclosed a cause of action challenging narrow, specialized training provided to adults by a commercial institution that’s business is limited to such narrow, specialized training, whether the claim is brought directly or by a third party. It therefore cannot be concluded as a matter of law that Plaintiffs’ state claims would fail.

2010 WL 5185106 at *6. The court further held that the specialized flight training at issue “does not implicate the same policy considerations present in the traditional educational setting.” *Id.*

Similarly, in *In re Cessna 208 Series Aircraft Prod. Liab. Litig.*, 546 F. Supp. 2d 1153 (D. Kan. 2008), the pilot of a Cessna 208B airplane (also known as a “Cessna Caravan”) and three other individuals died when the airplane in which they were traveling crashed in Arizona, apparently due to icing. 546 F. Supp. 2d at 1156. The pilot’s family brought suit in Texas state district court (Cosby, J.) against Cessna, FlightSafety, and other parties. *Id.* at 1157. Among the family’s claims was that FlightSafety negligently failed to instruct pilots of the Cessna Caravan about how to avoid ice accumulation, about the unusual dangers of airframe icing on the Cessna Caravan, and about how to control the plane when ice accumulates, and also failed to exercise reasonable care in its performance of flight training services. *Id.* Before the case was removed to federal court

and transferred to the MDL in the United States District Court for the District of Kansas (Vratil, J.), FlightSafety moved for summary judgment on educational malpractice grounds, which Judge Cosby denied. 546 F. Supp. 2d at 1158. In the MDL, FlightSafety again moved for summary judgment. The court denied the motion, holding:

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

546 F. Supp. 2d 1159.

This case presents the same kind of narrow, specialized training at issue in the *Air Crash Near Clarence Center* and *Cessna 208 Series* cases. Cirrus and UNDAF committed themselves to giving flight training to Prokop on the issue of emergency procedures for VFR flight into IMC conditions with auto-pilot assistance. The jury's consideration of whether that training was given to Prokop and its effect does not implicate the policy considerations supporting the educational malpractice doctrine in Minnesota. The educational malpractice doctrine therefore has no proper application here.

D. Authorities Dealing With Educational Malpractice Do Not Preclude Negligence Claims Against Cirrus.

The cases citing *Alsides* to bar negligence claims are distinguishable because they do not treat the central issue here, which is whether a tort action in negligence can be

maintained against an airplane manufacturer and its factory training representative for flight training offered in connection with the sale of the product, but which the evidence established was not provided.

For example, in *Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) (A. 539) and *Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008), the alleged negligence was not predicated on a total omission of training that was included in the syllabus and was supposed to be provided, as here, but on the substantive content of the training that was given. See *Sheesley*, 2006 WL 1084103 at *15 (claims against flight school were that it negligently “created its curriculum by failing to include emergency procedures relating to an exhaust system failure” and used “negligent teaching techniques by employing a simulator that does not accurately replicate the handling of a Cessna 340A.”); *Dallas Airmotive*, 277 S.W.3d at 699 (claim alleged that flight school failed to warn of “known dangers of shutting down an engine in flight without the ability to properly feather the propeller” and knew that its simulator “did not accurately replicate the extreme drag experienced” in an engine shut down situation).

Similarly, in *Page v. Klein Tools, Inc.*, 610 N.W.2d 900 (Mich. 2000), plaintiff contended he was taught particular methods of climbing wooden utility poles that were unsafe, and that the defendant trade school, American Line Builders Apprenticeship Training Program (ALBAT), failed to instruct him regarding the use of independent fall arrest equipment. The *Page* court reasoned that recognizing plaintiff’s claims would

require it to “second-guess ALBAT’s decision to teach pole-climbing using the particular methods it chose.” 610 N.W.2d at 905. As a result, the court believed it “would be practically impossible to determine the precise scope of ALBAT’s undertaking. How much was ALBAT required to teach?” *Id.* at 906.

In *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986), the issue was whether a chiropractic college could be liable to a third party for an alleged failure to teach its student about certain risks created by neck manipulation techniques, an issue the Court noted was of first impression. 386 N.W.2d at 113. Noting that “academic freedom thrives on the autonomous decision-making by the academy itself,” the *Moore* court declined the perceived invitation of plaintiff “to pass judgment on the curriculum” of the chiropractic school. *Id.* at 115.

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

determined that the “terms of those allegations encompass the traditional aspects of education” and consequently, constituted claims of “educational malpractice.” *Id.*

None of these cases sheds light on the core issue here, which is whether an airplane manufacturer who offers transition training as part of the purchase price is shielded from ordinary negligence principles in connection with the sale. Here, Cirrus offered transition training for a complex, sophisticated product as part of the purchase price of that product. In so doing, Cirrus obligated itself to conduct transition training in a non-negligent fashion in order to satisfy a duty of care it had or assumed. The jury considered the evidence at trial that showed Cirrus was negligent in the discharge of its duty, that the negligence was a proximate cause of the loss, and that damage resulted. Minnesota law requires no more.

CONCLUSION

The court of appeals incorrectly decided that Cirrus had no duty to provide transition training. Cirrus had a duty to properly instruct in the safe use of its product, consistent with decades of Minnesota law, and it opted to provide specialized transition training as a way to meet that obligation. Whether Cirrus reasonably discharged its duty was a question for the jury, not the court. This wrongful death case was properly tried and resolved in negligence, the district court and jury correctly applied ordinary tort principles to the issues raised, and the judgment should accordingly be affirmed. The educational malpractice doctrine does not suspend Cirrus’s duty of ordinary care, and should not apply in any event because the specialized training that Cirrus and UNDAF

provided does not implicate the public policies courts seek to enforce through application of that doctrine.

For these reasons, the decision of the court of appeals should be reversed, and the judgment of the district court should be affirmed:

Respectfully submitted,

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Dated: July 28, 2011

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