

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

State of Minnesota
In Supreme Court

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

and

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/Cross-Appellant (A10-1246, A10-1247),

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

and

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

**BRIEF AND ADDENDUM OF APPELLANT/CROSS-RESPONDENT
RICK GLORVIGEN, AS TRUSTEE FOR THE NEXT-OF-KIN OF
DECEDENT JAMES KOSAK**

Philip Sieff, #169845
Vincent J. Moccio, #184640
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500
*Counsel for Appellant/Cross-Respondent Rick Glorvigen,
Trustee for the Next-of-Kin of Decedent James Kosak*

(Additional counsel continue on following page)

Sam Hanson, #0041051
Diane Bratvolt, #018696X
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

-and-

Edward J. Matonich, #68603
Darrold E. Persson, #85364
David Arndt, #149330
MATONICH & PERSSON, CHARTERED
2031 Second Avenue East
P.O. Box 127
Hibbing, MN 55746
(218) 263-8881

*Counsel for Appellant/Cross-Respondent
Thomas Gartland, Trustee for the Next-of-
Kin of Gary R. Prokop*

Timothy R. Schupp, #130837
Robert W. Vacarro, #0313750
GASKINS, BENNETT, BIRRELL,
SCHUPP L.L.P.
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
(612) 333-9500

*Counsel for Appellant/Cross-Respondent
the Estate of Gary Prokop
through Katherine Prokop, as Personal
Representative*

*(Additional counsel continue on following
page)*

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

-and-

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

*Counsel for Respondent/Cross-Appellant
Cirrus Design Corporation*

Charles E. Lundberg, #6502X
Steven P. Aggergaard, #336270
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612) 333-3000

-and-

William J. Katt, #390715
LEIB & KATT, LLC
740 N. Plankinton Avenue, Suite 600
Milwaukee, WI 53203
(414) 276-8816

*Counsel for Respondent/Cross-Appellant
University of North Dakota Aerospace
Foundation*

Wilbur W. Fluegel, #30429
FLUEGEL LAW OFFICE
150 South Fifth Street, Suite 3475
Minneapolis, MN 55402
(612) 238-3540

Counsel for Amicus Curiae
Minnesota Association for Justice

Alan I. Gilbert, #0034678
John S. Garry, #0208899
OFFICE OF THE ATTORNEY
GENERAL
State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

Counsel for Amicus Curiae
State of Minnesota

Mark B. Rotenberg
William P. Donohue, #23589
UNIVERSITY OF MINNESOTA
OFFICE OF THE GENERAL COUNSEL
360 McNamara Alumni Center
200 Oak Street S.E.
Minneapolis, MN 55455-2006
(612) 624-4100

Counsel for Amicus Curiae
Regents of the University of Minnesota

Robert J. Hajek, #39512
HAJEK & BEAUCLAIRE, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305
(612) 801-5067

-and-

Kenneth M. Mead, Esq.
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue N.W.
Washington, DC 20004-2400
(202) 639-7744

-and-

Raymond D. Golden
Raymond D. Speciale
YODICE ASSOCIATES
411 Aviation Way
Frederick, MD 21701
(301) 695-2300

Counsel for Amicus Curiae
Aircraft Owners and Pilots Association

William M. Hart, #150526
Damon L. Highly, #0300044
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Counsel for Amici Curiae
Minnesota Defense Lawyers Association,
Minnesota Private College Council, and
Minnesota Career College Association

*(Additional counsel continue on following
page)*

Mark S. Olson, #82120
OPPENHEIMER, WOLFF &
DONNELLY, L.L.P.
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7000

-and-

Hugh F. Young, Jr.
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, VA 20191
(Of Counsel)

*Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.*

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>
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	6
I. The Plane, The Training, And The Crash	6
II. Cirrus’s Transition Training Was Supposed To Include Flight Lesson 4a, Which Was Necessary For The Safe Operation Of The Aircraft	7
SUMMARY OF ARGUMENT	12
I. Cirrus And UNDAF Owed A Duty To Prokop And Kosak To Give Flight Lesson 4a.....	12
II. Plaintiffs’ Claims Are Not Barred By The “Educational Malpractice” Doctrine.....	14
ARGUMENT	17
I. Standard Of Review	17
II. Cirrus And UNDAF Owed A Duty To Provide Flight Lesson 4a.....	17
A. Longstanding Minnesota Law Required Cirrus, As A Product Supplier, To Provide Flight Lesson 4a, An Instruction Needed For The Safe Use Of Its Product, Where It Was Foreseeable That Failure To Do So Would Lead To A Fatal Crash	19
B. Cirrus Itself Decided That Flight Lesson 4a Was Necessary For The Safe Use Of Its SR22 Aircraft, And Assumed A Duty To Provide It	22
C. The Evidence—Accepted As True By The Jury—Was That Flight Lesson 4a Was Never Given, And That That Failure Was A Cause Of The Fatal Crash.....	25
D. Cirrus And UNDAF’s Duty Extends To James Kosak.....	26
E. It Was Error For The Court Of Appeals To Find That Defendants Owed No Duty To Prokop And Kosak	27

1.	The Court rejected a duty to train to proficiency, but no such duty is at issue in this case	27
2.	There is no basis for confining the duty to instruct to written instructions	28
III.	This Is Not An Educational Malpractice Case	29
A.	Introduction	29
B.	The Educational Malpractice Bar Has Never Been Applied To Give Immunity To Entities That Are Not Acting As Educational Institutions.....	32
C.	Because UNDAF Is The Agent And Joint Venturer Of Cirrus, It Stands In The Shoes Of Cirrus For The Purposes Of Giving Cirrus’s Product Instruction And A Claim Against It Cannot Be Barred By The Doctrine Of “Educational Malpractice.”	36
D.	This Case Has Always, From The Beginning, Invoked The Duty Of Cirrus As Product Manufacturer And Supplier	38
E.	This Case Does Not Implicate The Same Public Policy Rationales That Would Preclude Finding The Existence Of A Duty	39
1.	The first policy consideration—lack of a standard of care “by which to evaluate an educator”—is not an issue here	41
2.	No evidence was presented regarding the second policy consideration—“intervening factors such as the student’s attitude, motivation, temperament, past experience, and home environment.”	42
F.	Plaintiffs’ Claim That Defendants Did Not Provide The Specific Product Instruction That They Promised Is Not Barred By <i>Alsides</i>	43
G.	The Fact That Cirrus Attempted to Discharge Its Duty As A Product Manufacturer In The Form Of Flight Instruction Does Not Transform Its Failure To Instruct Into An Educational Malpractice Case	46
	CONCLUSION	48

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>80 South Eighth Street Ltd. P’ship v. Carey-Canada, Inc.</i> , 486 N.W.2d 393 (Minn. 1992).....	24
<i>Alsides v. Brown Inst., Ltd.</i> , 592 N.W.2d 468 (Minn. Ct. App. 1999)	passim
<i>Anderson v. Anoka Hennepin Indep. Sch. Dist. 11</i> , 678 N.W.2d 651 (Minn. 2004).....	22, 36
<i>Andre v. Pace Univ.</i> , 655 N.Y.S.2d 777 (N.Y. App. Term 1996).....	43
<i>Bilotta v. Kelley Co., Inc.</i> , 346 N.W.2d 616 (Minn. 1984).....	18
<i>Bjerke v. Johnson</i> , 742 N.W.2d 660 (Minn. 2007).....	17
<i>Canada By & Through Landy v. McCarthy</i> , 567 N.W.2d 496 (Minn. 1997).....	22
<i>Clark v. Oshkosh Truck Corp.</i> , 1:07-cv-0131, 2008 U.S. Dist. LEXIS 52829 (S.D. Ind. July 10, 2008)	29
<i>Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.</i> , 277 S.W.3d 696 (Mo. Ct. App. 2008).....	32
<i>Doe v. Yale Univ.</i> , 748 A.2d 834 (Conn. 2000).....	2, 16, 34, 35
<i>Dosdall v. Smith</i> , 415 N.W.2d 332 (Minn.App. 1987).....	23
<i>Driver v. Burlington Aviation, Inc.</i> , 430 S.E.2d 476 (N.C. Ct. App. 1993)	26
<i>Frey v. Montgomery Ward & Co.</i> , 258 N.W.2d 782 (Minn. 1977).....	passim

<i>George v. Estate of Baker</i> , 724 N.W.2d 1 (Minn. 2006).....	17
<i>Germann v. F. L. Smithe Machine Co.</i> , 395 N.W.2d 922 (Minn. 1986).....	passim
<i>Glorvigen (Ct.App.Dissent)</i> , 796 N.W.2d 560 (Add.38).....	passim
<i>Glorvigen v. Cirrus Design Corp.</i> , 2008 U.S. Dist. LEXIS 10899, (D. Minn. 2008)	4, 41
<i>Glorvigen v. Cirrus Design Corp.</i> , 581 F.3d 737 (8th Cir. 2009).....	4
<i>Glorvigen v. Cirrus Design Corp.</i> , 796 N.W.2d 541 (Minn. Ct. App. 2011)	passim
<i>Gray v. Badger Mining Co.</i> , 676 N.W.2d 268 (Minn. 2004).....	1, 19, 39
<i>Gupta v. New Britain Gen. Hosp.</i> , 687 A.2d 111 (Conn. 1996).....	32, 33, 34
<i>Hartmon v. National Heater Co.</i> , 240 Minn. 264, 60 N.W.2d 804 (1953).....	18
<i>Hauenstein v. The Loctite Corp.</i> , 347 N.W.2d 272 (Minn. 1984).....	14, 26
<i>Hodder v. Goodyear Tire & Rubber Co.</i> , 426 N.W.2d 826 (Minn. 1988).....	23, 29
<i>Holm v. Sponco</i> , 324 N.W.2d 207 (Minn. 1982).....	18
<i>In re Cessna 208 Series Aircraft Prods. Liab. Litig.</i> , 546 F. Supp. 2d 1153 (D. Kan. 2008)	2, 45
<i>In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.</i> , 711 F.Supp.2d 1348 (M.D. Ga. April 22, 2010)	29
<i>In Re: Air Crash Near Clarence Center, New York, on February 12, 2009</i> , 2010 U.S. Dist. LEXIS 130846 (W.D.N.Y. December 12, 2010)	43

<i>Isler v. Burman</i> , 305 Minn. 288, 232 N.W.2d 818 (Minn. 1975)	1, 13, 22, 23
<i>Johnson v. West Fargo Mfg. Co.</i> , 255 Minn. 19, 95 N.W.2d 497 (1959).....	23
<i>Kirchner v. Yale Univ.</i> , 192 A.2d 641 (Conn. 1963).....	35
<i>Larson v. Indep. Sch. Dist. No. 314</i> , 289 N.W.2d 112 (Minn. 1979).....	22, 35
<i>Lovejoy v. Minneapolis-Moline Power Implement Company</i> , 248 Minn. 319, 79 N.W.2d 688 (1956).....	14, 23, 26
<i>Mervin v. Magney Const. Co.</i> , 416 N.W.2d 121 (Minn. 1987).....	22, 41
<i>Olson v. Penkert</i> , 252 Minn. 334, 90 N.W.2d 193 (1958).....	6, 17
<i>Paul v. Faricy</i> , 228 Minn. 264, 37 N.W.2d 427 (Minn. 1949).....	24
<i>Peter W. v. San Francisco Unified School District</i> , 131 Cal. Rptr. 854, 60 Cal. App. 3d. 814 (1976).....	15, 30
<i>Pouliot v. Fitzsimmons</i> , 582 N.W.2d 221 (Minn. 1998).....	28
<i>Ross v. Creighton Univ.</i> , 957 F.2d 410 (7th Cir. 1992).....	44
<i>Sheesley v. The Cessna Aircraft Co.</i> , 2006 U.S. Dist. LEXIS 27133 (D.S.D., April 20, 2006)	32
<i>Walsh v. Pagra Air Taxi, Inc.</i> , 282 N.W.2d 567 (Minn. 1979).....	24

STATEMENT OF ISSUES

- 1. The manufacturer of a product has a duty to provide adequate instructions for the safe use of its product. Here, the manufacturer of a sophisticated aircraft, as part of its sale, promised and undertook to instruct the purchaser of the plane how to perform a specific flight maneuver which was necessary to safely operate the plane. The jury found that the manufacturer failed to do so, and that the omission of this instruction was a cause of the crash in which the pilot/purchaser and passenger died. Did the Court of Appeals err in holding that there was no duty to provide the omitted instruction?**

The trial court held on Summary Judgment and JMOL that there was a duty. (Add.139-141, 53). The Court of Appeals held there was no duty. (Add.14-20).

Apposite Authorities:

Gray v. Badger Mining Co., 676 N.W.2d 268 (Minn. 2004)

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

Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977)

Isler v. Burman, 305 Minn. 288, 232 N.W.2d 818 (Minn. 1975)

- 2. Did the Court of Appeals err in holding that the “educational malpractice” doctrine bars Plaintiffs’ wrongful death claims, which are based on the negligent failure of a product manufacturer to provide adequate instructions for the safe use of its product?**

The trial court held on Summary Judgment and JMOL that the “educational malpractice doctrine” did not bar the claims. (Add.139-141, 53). The

Court of Appeals held the “educational malpractice doctrine” barred the claims. (Add.20-32).

Apposite Authorities:

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

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

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

STATEMENT OF THE CASE

In July 2005, Rick Glorvigen, as trustee for the heirs and next-of-kin of James Kosak, and Thomas Gartland, as trustee for the heirs and next-of-kin of Gary Prokop, brought separate actions in the Itasca County District Court against Cirrus Design Corporation, seeking to recover damages for the wrongful deaths of pilot Prokop and his passenger, Kosak. Both Prokop and Kosak were killed when a Cirrus SR22 airplane, owned and piloted by Prokop, crashed near Hill City, Minnesota in the early morning hours of January 18, 2003. Glorvigen's action also alleged negligence on the part of Prokop. (A.1-9)¹.

In September 2005, Cirrus removed both cases to the United States District Court for the District of Minnesota, arguing that the claims asserted against it implicated "significant federal issues." (A.12-15; A.32). Alternatively, Cirrus contended that the Federal Aviation Act ("FAA") completely preempted state law claims based on an alleged failure to provide adequate pilot training. (A.14; A.32). In February 2006, Judge Paul Magnuson rejected Cirrus's preemption claims and remanded both cases to state court. (A.31-43).

In May 2006, Cirrus brought third-party actions against employees of the United States Federal Aviation Administration, asserting that they were negligent in the weather briefing they provided to Prokop prior to the crash. The case was again removed to federal court, this time by the new third-party defendant, the United States. (A.44-47).

¹ "A." refers to the joint appellants' appendix; "Add." refers to the addendum to this brief. "T." refers to the transcript.

While the action was again pending before Judge Magnuson, Cirrus sought summary judgment on federal preemption grounds and also on the grounds that the “educational malpractice” doctrine barred Plaintiffs’ claims. Judge Magnuson again denied Cirrus’s claim of federal preemption, and also rejected Cirrus’s claim that Plaintiffs’ causes of action were barred under the “educational malpractice” doctrine. *Glorvigen v. Cirrus Design Corp.*, 2008 U.S. Dist. LEXIS 10899, (D. Minn. 2008) (hereafter “*Glorvigen (Fed.SJ)*”). (Add.136-143). Judge Magnuson again remanded the case to the state district court. (A.65-69).

In September 2008, The University of North Dakota Aerospace Foundation (“UNDAF”)—an entity separate from the University, which was hired by Cirrus to give Cirrus’s instructions (and was found by the jury to be Cirrus’s joint venturer)—intervened in the case “to control the strategy of and to present its own defense for any claims for which UNDAF may have indemnity liability under the indemnity agreement between UNDAF and Cirrus.” (A.70-74).

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

In May 2009, this case was tried to a jury in the District Court for the Ninth Judicial District—Itasca County, the Honorable David J. Ten Eyck presiding by designation. On June 4, 2009, the jury returned a verdict for Plaintiffs finding the Estate of Prokop 25% negligent and Cirrus and UNDAF each 37.5% negligent. Add.49-51.

The jury also found that UNDAF was Cirrus's agent and that Defendants were engaged in a joint enterprise—a finding not challenged by Defendants in the Court of Appeals or in this appeal. Add.50. Thereafter, Defendants moved for Judgment as a Matter of Law, which was denied by the trial court by order and memorandum dated May 19, 2010. (Add.52-135).

On April 12, 2011, a divided panel of the Court of Appeals reversed the trial court's denial of Defendants' motions for JMOL, finding that Defendants owed no duty to the Plaintiffs to provide the omitted flight instruction. *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 552 (Minn. Ct. App. 2011) (hereafter "*Glorvigen (Ct.App.)*"). Add.1-39. The majority concluded 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." *Id.* at 552, Add.20. The majority also found that Plaintiffs' claims were barred by the doctrine of "educational malpractice." *Id.* at 552-558, Add.20-32. Judge Klaphake dissented, finding that:

Ultimately, the majority's view of this case depends on weighing the facts found by the jury in a light unfavorable to its verdict, sidestepping settled principles of negligence law while expanding the educational-malpractice doctrine. I would affirm the jury's verdict, as did the district court in denying appellants' motions for judgment as a matter of law.

Id. at 561. (Add.38).

This Court granted the petitions of Gartland, Glorvigen and the Estate of Prokop for further review, and also granted UNDAF's conditional petitions for further review.

STATEMENT OF FACTS

Appellant Glorvigen joins in the extensive factual statement of Appellant Gartland, and provides the following brief summary of certain facts. In doing so it must be noted that the parties prevailing at trial—appellants herein—are entitled to have the evidence viewed in the most favorable light and to have the benefit of all reasonable inferences to be drawn from the evidence. *Olson v. Penkert*, 252 Minn. 334, 340, 90 N.W.2d 193, 199 (1958).

I. The Plane, The Training, And The Crash.

Gary Prokop and James Kosak died when a Cirrus SR22 airplane, owned and piloted by Prokop, crashed near Hill City, Minnesota, at approximately 6:38 a.m. on January 18, 2003. Prokop had purchased the SR22 just weeks before, in December 2002. His prior plane was a 1968 Cessna 172 Sky Hawk, a much slower, lower performance airplane than the Cirrus SR22. (T.229-231, 234).

The FAA requires a pilot flying the fast and sophisticated SR22 to obtain a “high performance” endorsement to his or her license. (T.635, 687, 859). As part of its marketing of the SR22, Cirrus included in the sales price the cost of the necessary instruction for the purchaser pilot to receive the endorsement. (T.244-245, 466, 489, 1475-1476, 1496-1497, 1528). Cirrus admitted at trial that Prokop needed the proffered training despite his prior flight experience, and that he could not fly the SR22 without it. (T.1494-1495, 1528; *see also* A.151). Cirrus would not allow Prokop to take delivery of the SR22 until he went through the training and received the high performance endorsement. (T.1494-1495, 1528).

The undisputed evidence at trial was that shortly after Prokop took off, he encountered the equivalent of instrument meteorological conditions (IMC) which deprived him of visual ground references. This condition is commonly known as “VFR into IMC.” It means that you fly from conditions where you can see the ground (VFR, or Visual Flight Rules) into IMC where you cannot see the ground and have to fly by your instruments. “VFR into IMC” is a well-known danger, and is a leading cause of small plane crashes because the pilot is suddenly unable to maintain his or her spatial orientation without visual cues. (T.697-698).

VFR into IMC conditions require immediate and specific action in order to continue safe flight. Specifically, the proper response in the SR22 was to engage the auto-pilot, change the course setting, and set the auto-pilot to maintain attitude and altitude. The Cessna 172 that Prokop had previously piloted did not have an auto-pilot, and the pilot made these maneuvers manually. However, because of the speed at which the SR22 flew, trying to recover by flying the plane manually was much more dangerous than in the Cessna 172. This is why Cirrus was supposed to instruct Prokop—in the air—on how to use the auto-pilot to assist in the recovery from VFR into IMC. (T.694-698).

II. Cirrus’s Transition Training Was Supposed To Include Flight Lesson 4a, Which Was Necessary For The Safe Operation Of The Aircraft.

The transition training promised by Cirrus is designed to ensure that a licensed pilot with some degree of flight experience is trained in the differences between the planes he has flown and the one he will be flying. Moving from one plane to another

requires the pilot to become familiar with differences in controls, handling, and flight characteristics. As expert witness Captain James Walters explained,

Transition training is a specialized type of training that is done when a pilot is qualified, typically in one type of airplane, and is moving for whatever reason into another type of airplane. He's a pilot, and he knows how to fly, but he doesn't know all of the intricacies of the new airplane he's going to be flying. So obviously we take that pilot and give him extensive training and teach them the differences."

(T.156-57). A Cirrus official agreed that Cirrus was responsible for seeing that there was a transition training program. (T.1509). Like Cirrus, UNDAF also recognized the need for transition training when a pilot moved from one aircraft to another. (T.498). Transition training is standard in the industry. (T.181).

It was undisputed at trial that the transition training provided by Cirrus to Prokop was supposed to include Flight Lesson 4a, entitled "Recovery from VFR into IMC (auto-pilot assisted)." Cirrus included Flight Lesson 4a as part of its transition training, and designated the auto-pilot assisted maneuver as the proper way to escape IMC conditions. (A.156, 163; T.694-698). The overwhelming evidence—accepted by the jury as true—was that neither Flight Lesson 4a nor anything resembling it was ever given to Prokop. (Add.85-88).² In addition, there was overwhelming evidence—also accepted by the jury in rendering its verdict—that Flight Lesson 4a was necessary for

² Defendants relied below on the testimony of Prokop's instructor, YuWeng Shipek that the training supposed to be covered by Flight Lesson 4a was given "under the hood," meaning that Prokop was made to fly the plane and execute the auto-pilot assisted recovery from IMC while under a hood so that he could not see outside the airplane. UNDAF Brief to Court of Appeals, at 13. No hood training, however, was documented in Prokop's log book. (T. 792-796, 798-799, 892; A.361-389). The jury apparently disregarded Shipek's testimony, as it was contradicted by the documentary evidence.

Mr. Prokop's **safe use** of the aircraft. That evidence included, but was not limited to, the following:

- Captain Walters, a pilot with over 24,000 hours experience and a master's degree of aviation science specializing in aviation safety, testified that transition training is the industry standard, that Flight Lesson 4a was a "required part of the transition training" for Mr. Prokop, and that skipping it did not meet industry standards. (T.153, 157, 181, 258-259).

- John Wahlberg, UNDAF's director of transition training at Cirrus's facility, admitted that Flight Lesson 4a was "required" for Mr. Prokop and that he "should have been given this training." (T.511).

- Mr. Wahlberg admitted that a maneuver taught in Flight Lesson 4a, "Recovery from VFR into IMC (auto-pilot assisted)," addressed recovery from conditions that are a "**leading cause**" of crashes for VFR pilots such as Mr. Prokop, and that "This is why this procedure exists." (T.698) (emphasis added). Mr. Wahlberg admitted that the auto-pilot assisted recovery is "**the safest maneuver**" for a VFR pilot such as Mr. Prokop to use to escape those conditions. (T.695) (emphasis added).

- Mr. Wahlberg admitted that "in order for this training to take, in order for training to be effective, **you can't just do it on the ground... It has to be done up in the sky with the pilot.**" (T.696) (emphasis added).

- Mr. Wahlberg admitted that if a pilot is flying at 180 knots (a speed at which the SR22 can travel, just over 200 miles an hour) and encounters IMC-like conditions, the encounter is going to occur quickly. Mr. Wahlberg agreed that is "a

dangerous situation,” and a pilot who cannot execute the auto-pilot assisted recovery maneuver “may die.” (T.697-698) (emphasis added); (*see also* T.234).

In their briefs to the Court of Appeals, Defendants claimed Prokop knew how to turn on the auto-pilot—a fact that was in dispute. The Court of Appeals found it important that there were written materials provided to Prokop that showed—according to the Court—how to “activate and operate the auto-pilot.” *Glorvigen (Ct.App.)*, 796 N.W.2d at 552. (Add.20). The evidence showed, however, that merely knowing how to turn on the auto-pilot is completely different from being able to activate and utilize the auto-pilot while safely executing an auto-pilot assisted recovery from VFR into IMC maneuver. (T.257-258, 517-518, 524-25).

As the district court explained in its detailed ninety-page order upholding the jury’s verdict, the speed of the Cirrus SR22 made flight training on the auto-pilot assisted recovery maneuver critical:

Recovery from VFR into IMC or IMC-like conditions requires a pilot to think and act quickly. . . . At cruising speed, Prokop would have been moving much faster than he was used to. . . . The practical effect of this was that Prokop would have had less time than usual to recognize what was going on and less time than usual to extricate himself from the situation. . . . The relationship between reaction times and the speed of the plane is likely one of the reasons why the maneuver that would have been taught in lesson 4-A is auto-pilot assisted. The auto-pilot gives an additional resource in conducting the recovery maneuver. This is because without the auto-pilot the pilot has to make the same adjustments as the auto-pilot would. Therefore, the auto-pilot makes the maneuver easier. . . . One of the leading causes of VFR crashes is VFR into IMC conditions and that is why the auto-pilot assisted maneuver exists. The reason that a pilot uses the auto-pilot in the SR22 during an emergency recovery from VFR to IMC is to make the procedure safer. . . . It is also important because in addition to being faster, the SR22 also handles differently than the Cessna 172 that Prokop had before. . . . These differences in handling and equipment is

another reason that it is important to train the specific procedure which was omitted in flight 4-A.

(Add.95-97) (citations omitted).

The trial court also made it clear that the jury's findings of causation were well supported:

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

(Add.97-98) (emphasis added).

SUMMARY OF ARGUMENT

I. Cirrus And UNDAF Owed A Duty To Prokop And Kosak To Give Flight Lesson 4a.

Cirrus is in the business of manufacturing and selling a product. As such, it has a long recognized duty to instruct the purchasers of its product in the safe use thereof where the failure to do so will result in “the type of occurrence that was or should have been reasonably foreseeable” from the omission of the required instruction. *Germann v. F. L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787-88 (Minn. 1977). The evidence at trial established that the omitted Flight Lesson 4a was meant to instruct Prokop in how to fly the plane when he encountered IMC—the very conditions he was in when he crashed the plan. Witnesses agreed that Flight Lesson 4a was “required,” and that “in order for this training . . . to be effective, **you can’t just do it on the ground . . . It has to be done up in the sky with the pilot.**” (T.511, 696). Further, the testimony established that encountering IMC-like conditions is “**a dangerous situation,**” a **leading cause** of crashes for VFR pilots such as Mr. Prokop, and **a pilot who cannot execute the auto-pilot assisted recovery maneuver “may die.”** (T.697-698) (emphasis added).

Thus, it was foreseeable to Cirrus and UNDAF that Prokop and Kosak would die if they encountered IMC and Prokop had not been not instructed in how to escape them. The Court of Appeals addressed this issue by concluding that there is no duty to “train the end user to proficiency.” *Glorvigen (Ct.App.)*, 796 N.W.2d at 552. (Add.20). No such duty, however, is at issue. The duty at issue here is the longstanding duty of every

product manufacturer to “give adequate instructions for safe use.” *See Frey*, 258 N.W.2d at 787 (emphasis added).

Cirrus itself decided what particular instruction was necessary for the safe use of its SR22 aircraft, and promised and undertook to provide that instruction to Prokop. Cirrus included the instruction in the plane’s purchase price and demanded that Prokop take the instruction before it would let him have the plane. Knowing that IMC presented “a dangerous situation” that could kill a pilot and his passenger, and knowing that Flight Lesson 4a was “required” to instruct a pilot—in the air—on how to escape such conditions, Cirrus prescribed Flight Lesson 4a as a necessary portion of its training. The inclusion of Flight Lesson 4a in the required instruction is more evidence of the foreseeability of a crash occurring when IMC are encountered if the pilot cannot escape from them. Additionally, by promising and undertaking to provide Flight Lesson 4a, Cirrus and UNDAF undertook and assumed the responsibility of giving it in a non-negligent manner. It is well-established that “one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.” *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 822 (Minn. 1975).

It is undisputed that the transition training was supposed to include Flight Lesson 4a, and the overwhelming evidence—accepted by the jury as true—was that it was never given to Prokop. The crash occurred when Prokop entered IMC and could not successfully escape them in the SR22. The jury found that Defendants’ failure to give Flight Lesson 4a was a direct cause of the crash and that Defendants were negligent in not giving it. The trial court’s extensive memo also made it clear that the jury’s findings

of causation were well supported, concluding, “Had Prokop been trained in the VFR into IMC auto-pilot assisted emergency procedure there would not have been any crash.” (Add. 97-98).³

II. Plaintiffs’ Claims Are Not Barred By The “Educational Malpractice” Doctrine.

Educational malpractice cases usually involve suits against educational institutions for failure to “properly educate.” Other than the Minnesota Court of Appeals, no court in the nation has extended the educational malpractice bar to apply to product instructions given by a product manufacturer. This Court has never considered the doctrine or its proper application. If the Court of Appeals ruling is allowed to stand, Cirrus will have succeeded in using the “educational malpractice” doctrine to do an end-run around its long recognized duty to provide instruction in the safe use of its sophisticated and dangerous SR22 aircraft. Minnesota would stand alone as the only jurisdiction that has carved out such an exception to a product manufacturer’s duty to instruct in the safe use of its product. As Judge Klaphake cautioned in his dissent, under such an “expansive definition of ‘educational malpractice’ every coffee pot manufacturer who issues instructions for its product’s use would constitute an educational institution to which the

³ The duty of a manufacturer to provide adequate safety instructions for the use of its product extends to all foreseeable users, including airplane passengers. *See., e.g., Hauenstein v. The Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984); *Lovejoy v. Minneapolis-Moline Power Implement Company*, 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956). Thus, the duty was owed to passenger Kosak as well as purchaser/pilot Prokop.

educational-malpractice bar would apply.” *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 560-561. (Add.38).

The crux of the bar on educational malpractice claims is that courts are not equipped to delve into the amorphous question of whether a student generally received a quality education, and that allowing a court to do so carries with it a risk of embroiling the courts in the educational system and educational policy. Because of this a workable rule of care cannot be formulated and a tort duty will not be imposed. *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854, 60 Cal. App. 3d. 814 (1976). Following this line of reasoning our Court of Appeals allowed breach of contract and fraud claims based on failure to deliver on specific promises and representations, but rejected claims based on the “general quality” of education. *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999). In doing so the Court noted several policy considerations that made claims based on general quality of education unworkable. *Id.*

In this case, these policies reasons simply do not apply. For instance, there is no issue with establishing a workable rule of care. It is long established Minnesota law that a manufacturer has a duty to give adequate instruction for the safe use of this product. Additionally, there is no threat here of embroiling the courts in the “day-to-day operations of schools.” *Id.*

Even assuming this case fits within the educational malpractice context—which it does not—Plaintiffs’ claims survive an *Alsides* analysis because they are based on the failure to provide “specifically promised” instruction; claims explicitly recognized by *Alsides*. *See id.* (“But courts have recognized claims by students for breach of contract,

fraud, or other intentional wrongdoing that allege a private or public educational institution has failed to provide *specifically promised educational services.*”) (emphasis in original). Plaintiffs’ claims also survive because there is a distinction between a claim for failure to provide a “quality education” (which is amorphous and bound up in questions of policy) and a cognizable negligence case for personal injuries arising in the educational context—to which the educational malpractice doctrine does not apply. *See Doe v. Yale University*, 748 A.2d 834 (Conn. 2000).

ARGUMENT

I. Standard Of Review.

The Court of Appeals found that Defendants owed no duty to Plaintiffs, and that even if a duty was owed it would be eradicated by the doctrine of “educational malpractice.” The existence of a duty is a question of law which is reviewed *de novo* by the Supreme Court. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

The Court of Appeals vacated the judgment entered in the district court and directed entry of judgment in favor of the defendants notwithstanding the jury verdict. When judgment as a matter of law is reviewed on appeal, the party prevailing at trial is entitled to have the evidence viewed in the most favorable light and to have the benefit of all reasonable inferences to be drawn from the evidence. *Olson v. Penkert*, 252 Minn. 334, 340, 90 N.W.2d 193, 199 (1958). This Court must determine whether the jury’s verdict is manifestly against the evidence viewed in a light most favorable to the nonmoving party. *George v. Estate of Baker*, 724 N.W.2d 1, 6 (Minn. 2006). Appellate courts “will not disturb a jury’s answer to special verdict questions if it can be reconciled on any theory.” *Id.*

II. Cirrus And UNDAF Owed A Duty To Provide Flight Lesson 4a.

This wrongful death case revolves around a basic set of operative facts. First, because Cirrus is a product manufacturer it has a long recognized duty to instruct the purchasers of its product in the safe use of that product. Second, Cirrus itself decided what particular instruction was necessary for the safe use of its SR22 aircraft, included the instruction in the purchase price of the product, promised and undertook to provide

the instruction to Prokop, and demanded that Prokop take the instruction before it would let him have the plane. Third, the jury found that Cirrus and its joint venturer UNDAF failed to provide Flight Lesson 4a, a critical portion of the promised and required instruction which would have taught Prokop how to conduct a specific maneuver in the SR22 in order to safely escape IMC. Fourth, the crash occurred when Prokop entered IMC and could not successfully escape them.

The Cirrus SR22 is a high performance aircraft, whose speed and “innovative aspects” make it inherently unforgiving of gaps in a user’s knowledge. The nature of the product made it critical that Cirrus provide proper and effective instructions on its use. *See Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 621 (Minn. 1984), *quoting Holm v. Sponco*; 324 N.W.2d207, 212 (Minn. 1982) (“What constitutes ‘reasonable care’ will, of course, vary with the surrounding circumstances and will involve ‘a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm’”); *Hartmon v. National Heater Co.*, 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953) (“Reasonable care is that degree of care that a reasonably prudent person would exercise under the same or similar circumstances. It must be commensurate with the risks of the situation as they were, or should have been, reasonably anticipated by the actor”).

The critical nature of Flight Lesson 4a was discussed at length at trial, and the director of transition training at Cirrus’s facility admitted its importance. The Court of Appeals agreed that “Prokop may have needed transition training to safely pilot the SR22.” *Glorvigen (Ct.App.)*, 796 N.W.2d at 552, Add.20. Thus, a finding of a duty in

this case in no way expands tort liability. On the contrary, in finding that Defendants had no duty to Prokop and Kosak the Court of Appeals abrogated basic Minnesota negligence law and greatly expanded the claims bar of “educational malpractice.” As Judge Klaphake summarized in his dissent:

Ultimately, the majority’s view of this case depends on weighing the facts found by the jury in a light unfavorable to its verdict, sidestepping settled principles of negligence law while expanding the educational-malpractice doctrine.

Id. (Dissent) at 561, Add.38.

A. Longstanding Minnesota Law Required Cirrus, As A Product Supplier, To Provide Flight Lesson 4a, An Instruction Needed For The Safe Use Of Its Product, Where It Was Foreseeable That Failure To Do So Would Lead To A Fatal Crash.

It is a matter of basic tort law in Minnesota that a product supplier has a duty to warn and instruct where the failure to do so will result in “the type of occurrence that was or should have been reasonably foreseeable.” *See Germann*, 395 N.W.2d at 924; *see also Gray v. Badger Mining Co.*, 676 N.W.2d 268, 274 (Minn. 2004) (“In general, a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use”). A manufacturer’s duty to warn includes a duty to give adequate instructions for safe use of the product. *Frey*, 258 N.W.2d at 787; *see also Gray*, 676 N.W.2d at 274 (“To be legally adequate, the warning should . . . (3) provide instructions on ways to safely use the product to avoid injury”).

“[F]oreseeability of injury is the linchpin for determination of whether a duty to warn exists.” *Germann*, 395 N.W.2d at 924. The test for foreseeability was explained in *Germann*:

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.

Id.

In *Germann*, a punch press operator sustained serious injuries while using a press that had had its safety bar removed for maintenance. He argued that the manufacturer, Smithe, had breached its duty by not warning of the dangers of using the machine in the absence of the safety bar. The manufacturer argued that it had no duty to warn of such dangers because it had equipped the machine with the safety bar. The court found a duty to warn because:

[T]he safety bar was detachable as the result of the machine's design. In fact, it had to be detached in order that the press might be serviced. Knowing that, Smithe could have reasonably foreseen that on a machine designed for extended and heavy use, it was almost inevitable that for maintenance purposes the safety bar would be removed, and that there was a risk it might not be properly reattached. If the safety bar was not properly reattached, there would be exposure to a user-operator of increased danger of injury of the type the safety bar had been designed to prevent. This misuse was foreseeable; it was not remote; and the danger of injury to a user because of the misuse was likewise foreseeable. Therefore, we hold Smithe had a legal duty to warn operators of the peril of running the press without a properly attached and operating safety bar.

Id. at 925.

Here, the evidence at trial—accepted as true by the jury in rendering its verdict—was that the crash was caused by Mr. Prokop's failure to properly perform the maneuver known as "Recovery from VFR into IMC (auto-pilot assisted)." The omitted flight

lesson was specifically meant to instruct Prokop in how to perform that very maneuver—a maneuver used to escape a “leading cause” of crashes for pilots such as Mr. Prokop. (T.695-698). Defendants knew that the omitted flight lesson was needed in order for Prokop to be properly instructed in how to escape IMC conditions in the SR22. *See* testimony of UNDAF’s manager, Mr. Wahlberg, agreeing that Flight Lesson 4a was “required,” and that “in order for this training . . . to be effective, **you can’t just do it on the ground . . . It has to be done up in the sky with the pilot.**” (T.511, 696). Defendants also knew, as Mr. Wahlberg agreed, that encountering IMC-like conditions is “**a dangerous situation,**” and a **pilot who cannot execute this maneuver “may die.”** (T.697-698) (emphasis added).

Thus, it was foreseeable to Cirrus and UNDAF that Prokop and Kosak would die if they encountered IMC and Prokop was not instructed in how to escape them in the SR22. Defendants therefore had a duty to provide that instruction. This was clear to Judge Klaphake, who conducted a traditional, foreseeability-based duty analysis, and concluded that “[o]n these facts, the crash here is a direct and foreseeable consequence of appellants’ failure . . .” *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 559. (Add.35).⁴ This must have been also apparent to the majority, which conceded that “Prokop may have needed transition training to safely pilot the SR22.” *Id.* at 552. (Add.20).

⁴ Three judges found that a duty of care existed in this case: federal district court judge Paul Magnuson, who ruled on summary judgment motions (*Glorvigen (Fed.SJ)*, 2008 U.S. Dist. LEXIS 10899, *9-12 (D.Minn. 2008), (Add.139-141); the state trial court judge who oversaw the trial and ruled on the motions for judgment as a matter of law (*Glorvigen (JMOL)*, (Add.64-68, 71, 116); and the dissenting Court of Appeals judge (*Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 559-560, (Add.33-39).

B. Cirrus Itself Decided That Flight Lesson 4a Was Necessary For The Safe Use Of Its SR22 Aircraft, And Assumed A Duty To Provide It.

Knowing that IMC conditions presented “a dangerous situation” that could kill a pilot and his passenger, and that proper instruction was “required” to instruct a pilot on how to escape such conditions, Cirrus prescribed Flight Lesson 4a as a necessary portion of its training. Cirrus included Flight Lesson 4a in the transition training and said it would not let Prokop take delivery of the plane if he didn’t go through the training.⁵ The inclusion of Flight Lesson 4a in the required instruction is more evidence of the foreseeability of a crash occurring when IMC are encountered.⁶

Additionally, by promising and undertaking to provide Flight Lesson 4a, Cirrus and UNDAF undertook and assumed the responsibility of giving it in a non-negligent manner. “[O]ne who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.” *Islor*, 305 Minn. at 295,

⁵ Cirrus, of course, did let Prokop take delivery of the SR22 even though he didn’t go through Flight Lesson 4a.

⁶ Cirrus, as part of the plane’s purchase price, entered into a “Pilot Training Agreement” with Prokop for the transition training that included Flight Lesson 4a. (T.1475-1476, 1496-1497, A.161, 152, 156). While the standard of care is not fixed by the terms of this agreement, the terms of the agreement may be considered by the jury in determining if the party charged with negligence acted with reasonable care. *Mervin v. Magney Construction Co.*, 416 N.W.2d 121, 124-25 (Minn. 1987); *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 504-05 (Minn. 1997); see also *Larson v. Indep. Sch. Dist. No. 314, Braham*, 289 N.W.2d 112, 117 n.8 (Minn. 1979), overruled in part on other grounds, *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 657 (Minn. 2004) (evidence of a curriculum manual’s provisions “was relevant for the jury’s determination whether defendants breached the duty of care owed”). Here, the agreement provided that Flight Lesson 4a—instruction on transitioning from IMC to VFR flight conditions—would be given. The jury properly considered the terms of the agreement as evidence of the reasonableness of Defendants’ conduct.

232 N.W.2d at 822. In *Isler*, a church undertook to inspect land that it did not own but on which it was sponsoring a snowmobile party. This Court ruled that the church assumed the duty of making an adequate inspection. *Id.*, 305 Minn. at 294, 232 N.W.2d at 821. The church contended it was being penalized for undertaking an inspection which it had no duty to make in the first place. *Id.*, 305 Minn. at 295, 232 N.W.2d at 821-822. The Court dismissed that argument, holding:

It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so. ..."* * * 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 * * *."

Isler, 305 Minn. at 295, 232 N.W.2d at 822 (citations omitted); *see also Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 832 n.5, 833 (Minn. 1988) (tire manufacturer and marketing subsidiary "assumed" or "undertook" a shared post-sale duty to warn which they breached by inadequately distributing the materials that had been prepared to instruct and warn about the danger); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956) ("If the manufacturer undertakes by printed instructions to advise of the proper use to be made of a chattel, he assumes the responsibility of giving accurate and adequate instructions with respect to the dangers inherent in its use in some other manner."); *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 24, 95 N.W.2d 497, 501 (1959) (same); *Dosdall v. Smith*, 415 N.W.2d 332, 335 (Minn.App. 1987) ("a manufacturer who gives a warning on a product assumes the duty of providing an *adequate* warning") (italics in original), *citing Johnson, supra*.

While Defendants argued below that they owed no tort duty to Plaintiffs because their relationship was contractual, it is well established that a party may assume a tort duty through a contract. *See, e.g. Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570-71 (Minn. 1979) (by agreement with the city, defendant undertook to provide firefighting services at airport and duty to do so); *Paul v. Faricy*, 228 Minn. 264, 279, 37 N.W.2d 427, 436 (Minn. 1949) (city could become liable for injuries resulting from negligence in maintenance when it entered into a maintenance contract with the state); *see also 80 South Eighth Street Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 395-96 (Minn. 1992) (tort claims allowed to proceed based in part on “understanding of the nature of the responsibility a manufacturer must undertake in distributing his products”) (citation omitted); *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 561. (Add.38) (“Although generally, a party’s damages for breach of contract are limited to economic losses arising out of the contract itself . . .there is an exception when personal injury . . . is involved”), *citing 80 South Eight Street*, 486 N.W.2d at 396.⁷ In sum, even if Defendants did not have a duty to provide Flight Lesson 4a as necessary product instruction—which they

⁷ The Court of Appeals disposed of Cirrus’ assumption of duty in two sentences, stating: “Although one may assume a duty or care . . . the duty must be one that is legally recognized. And Minnesota does not recognize the duty to effectively educate.” *Glorvigen (Ct.App.)*, 796 N.W.2d at 556. (Add.28-29). There is, however, no Minnesota precedent for making the assumption of a duty dependant on whether a duty already existed at law. In fact, under such an analysis a duty could never be assumed—it would either exist in the first place, or be held not to have been assumed because it did not exist in the first place. Moreover, to the extent the majority’s ruling of no assumed duty rests on its holding that Plaintiffs’ claims are barred by “educational malpractice,” because that bar does not apply here (as explained below), there is no basis for the majority’s ruling.

did—they would still have a duty to provide Flight Lesson 4a because they undertook to do so.

C. The Evidence—Accepted As True By The Jury—Was That Flight Lesson 4a Was Never Given, And That That Failure Was A Cause Of The Fatal Crash.

It is undisputed that the transition training was supposed to include Flight Lesson 4a. The overwhelming evidence—accepted by the jury as true—was that Flight Lesson 4a was never given to Prokop, and that no flight training whatsoever was given to Prokop for the subject matter of Flight Lesson 4a. Defendants relied, below, on the testimony of Prokop’s instructor, YuWeng Shipek to try to create a factual dispute as to this matter. In addition to such fact finding being improper at this stage of the case, Mr. Shipek’s testimony was not supported by the documentary evidence and was apparently disregarded by the jury. (*See* T.792-796, 798-799, 892; A.361-389).

Having found that Defendants never gave Flight Lesson 4a, the jury also found that this failure was a direct cause of the fatal crash. (*See* Add.49-51). The trial court made it clear that the jury’s findings of causation were well supported:

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

(Add.97-98) (emphasis added).

D. Cirrus And UNDAF's Duty Extends To James Kosak.

The duty of a manufacturer to provide adequate safety instructions for the use of its product extends to all foreseeable users, including airplane passengers such as Kosak. *See, e.g., Hauenstein v. The Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984) (“a manufacturer’s duty to warn . . . extends to all reasonably foreseeable users”). It is “well established” in Minnesota that a manufacturer may be liable to all “those who it should expect will use the chattel” if it fails to exercise reasonable care in the design of the product or if it fails to furnish adequate warnings for the safe use of the product. *Lovejoy*, 79 N.W.2d at 693. This is true even if “there is no privity between the user and the manufacturer.” *Id.*

The SR22 was equipped with a passenger seat. It was eminently foreseeable that a passenger would occupy that passenger seat. It is fundamental that the passengers of an aircraft are owed a duty by the manufacturer in the same way that the purchaser and pilot of an aircraft are. *See, e.g., Driver v. Burlington Aviation, Inc.*, 430 S.E.2d 476, 480-481 (N.C. Ct. App. 1993) (aircraft passenger stated a claim for relief “under general principles of negligence” by alleging that manufacturer’s instructional manual “promulgated dangerously inadequate information” that allegedly caused the crash). Thus, the duty owed by Cirrus and UNDAF to provide the instruction Cirrus decided was necessary for safe use of the plane extends not only to pilot Prokop, but also to his passenger Kosak.

E. It Was Error For The Court Of Appeals To Find That Defendants Owed No Duty To Prokop And Kosak.

As the Court of Appeals majority correctly observed, there is no dispute that “Cirrus, as the supplier of a high-performance aircraft, had a duty to warn Prokop of dangers associated with the aircraft,” and that that duty included the “attendant duty to provide adequate instructions for safe use.” *Glorvigen (Ct. App.)*, 796 N.W.2d at 550-551. (Add.17). The Court did not disagree with the conclusion of the jury and trial court that the plane crash was a foreseeable consequence of failure to provide Flight Lesson 4a, and did not even perform a *Germann* analysis—the basic analysis required under Minnesota law to determine the existence of a duty. Nonetheless, the majority found there was no duty to provide Flight Lesson 4a.

1. The Court rejected a duty to train to proficiency, but no such duty is at issue in this case.

The Court of Appeals rejected a duty to “train the end user to proficiency.” *Glorvigen (Ct.App.)*, 796 N.W.2d at 552, Add.20. No such duty is at issue in this case. The duty at issue here is the longstanding duty of every product manufacturer to “**give** adequate instructions for safe use.” *See Frey*, 258 N.W.2d at 787 (emphasis added). The claim here is that Defendants breached their duty to instruct in the safe use of the product, because the instruction necessary for that safe use—Flight Lesson 4a—was not given *at all*. This is underscored by the fact that, had Flight Lesson 4a been **given** to Mr. Prokop (as promised), Defendants’ duty would have been discharged even if Mr. Prokop had

nonetheless failed to properly perform the maneuver and crashed the airplane.⁸ Thus, Plaintiffs seek the imposition of no greater duty than has always existed under Minnesota law. The Court of Appeals ruling narrows that long-standing law.

2. There is no basis for confining the duty to instruct to written instructions.

As Judge Klaphake summarized in his dissent: “[c]learly, Cirrus did not feel that its training manuals alone provided adequate warning and that the transition training was part of its duty to warn.” *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 559. (Add.35). The evidence showed—and the jury apparently found—that written instructions alone were inadequate and Flight Lesson 4a was therefore necessary for the safe use of the SR22 aircraft. (T.696, 258-259). Adequacy of a warning or instruction is an issue for jury resolution. *Germann*, 395 N.W.2d at 924-925. The jury’s verdict will not be set aside “if it can be sustained on any reasonable theory of the evidence.” *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). Yet, the majority appears to have found that Cirrus’s written instructions on how to “activate and operate” the auto-pilot constituted adequate instructions for safe use, and that Flight Lesson 4a was not a necessary part of such safety instruction. *Glorvigen (Ct.App.)*, 796 N.W.2d at 552. (Add.20). This invasion of the purview of the jury cannot be sustained.

⁸ The trial court made absolutely clear that the duty being upheld was one to “**provide**” the omitted training, and that if the omitted training had been “**provided**,” the duty would have been fulfilled. *Glorvigen (JMOL)*, (Add.73, 116) (bolding in original). While a claim might also lie if Flight Lesson 4a had been given, but given negligently (i.e. wrong instruction was given), those are not the facts of this case.

Moreover, in reaching this improper conclusion, the majority used a flawed test for adequacy. While acknowledging that the duty to warn encompasses both a duty to “warn of dangers inherent in improper use” and a duty “to give adequate instructions for safe use” (*Glorvigen (Ct.App.)*, 796 N.W.2d at 551, Add.17), the majority appears to have reached its conclusion based solely on a duty to “put Prokop on notice of the dangers associated with piloting the SR22.” *Id.* at 552. (Add.20). The majority ignored Defendants’ additional duty to give the adequate instruction necessary for safe use. *Id.* at 552. (Add.20).⁹

III. This Is Not An Educational Malpractice Case.

A. Introduction.

If the Court of Appeals ruling is allowed to stand, Cirrus will have succeeded in using the “educational malpractice” doctrine to do an end-run around its long recognized duty to provide instruction in the safe use of its sophisticated and dangerous SR22 aircraft. “Educational malpractice” has never been considered by this Court in any

⁹ To the extent the Majority indicates that the traditional duty to warn involves written instructions (*see Glorvigen (Ct.App.)*, 796 N.W.2d at 551-52, Add.19-20), manufacturers have long been held liable for inadequate warnings or instruction given in a non-written form. *See, e.g., Hodder*, 426 N.W.2d at 834 (breach of duty where post-sale “warnings and instructions” delivered “by means of **safety films, posters, manuals, and advertising** were inadequate); *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, 711 F.Supp.2d 1348, 1360, 1363, 1377-1378 (M.D. Ga. April 22, 2010) (denying medical device manufacturer summary judgment on duty to warn claim where manufacturer provided written instructions, **instructional videos**, and **regular contact with sales representatives**); *Clark v. Oshkosh Truck Corp.*, 1:07-cv-0131, 2008 U.S. Dist. LEXIS 52829, at *12-13 (S.D. Ind. July 10, 2008) (plaintiffs presented sufficient evidence on “failure to instruct” theory where neither “**safety video**” nor operations manual adequately instructed). (emphasis added).

context. It was adopted by the Court of Appeals in the context of a suit against an educational institution in *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999). The decision below is an unprecedented extension of that “educational malpractice” immunity to a product manufacturer and the joint venturer that was hired to give the manufacturer’s product instruction. No other court in the nation has extended “educational malpractice” protection to a product manufacturer. Under this ruling, Minnesota stands alone as the only jurisdiction that has carved out such an exception to a product manufacturer’s duty to instruct in the safe use of its product.

Educational malpractice cases—as the Court of Appeals recognized—involve suits against educational institutions charged with the education of students. *Glorvigen (Ct.App.)*, 796 N.W.2d at 552-553. (Add.21-22). Because courts are not equipped to delve into the amorphous question of whether a student generally received a quality education, a “workable rule of care” cannot be formulated and there are risks of the courts becoming embroiled in the educational system and educational decisions. Thus, a tort duty will not be imposed. *Peter W.*, 131 Cal. Rptr. 854, 858. Following this line of reasoning—which began with *Peter W.*—*Alsides* rejected a general duty to properly educate.

In *Alsides*, students asserted claims both attacking the “general quality” of the education they received at Brown Institute and claiming that specific instruction they were promised was not provided. Specifically, they alleged that the education they received was inadequate, that the instructors were incompetent, that the certification and qualification of the instructors was misrepresented, that the instructors lacked a

curriculum, that Brown misrepresented that students would be prepared to take the relevant exam and certification test, that students were not taught in modern, up-to-date facilities, and that students were not provided the 960 hours of course instruction they were promised. *Alsides*, 592 N.W.2d at 471. The court allowed the breach of contract and fraud claims based on Brown's failure to deliver on specific promises and representations, but rejected the "general quality" of the education claims. *Id.* at 472.

The court noted that

[T]hese claims have been rejected by courts on a number of public-policy grounds, including: (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."

Id. (citations omitted).

In this case, these policies reasons simply do not apply. For instance, there is no issue with establishing a workable rule of care. It is long established Minnesota law that such a manufacturer has a duty to give adequate instruction for the safe use of this product. Moreover, factors concerning the "student's" motivation, etc. have never been applied to relieve a product manufacturer of a duty to instruct in safe use, and there is no threat here of embroiling the courts in the "day-to-day operations of schools." There are, therefore, no reasons—policy or otherwise—to rule that there is no duty. On the contrary, affirming the Court of Appeals would reverse decades of Minnesota products

liability law and “expand[e] the educational-malpractice doctrine.” *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 561. (Add.38).

B. The Educational Malpractice Bar Has Never Been Applied To Give Immunity To Entities That Are Not Acting As Educational Institutions.

The Court of Appeals found that educational malpractice immunity could be applied to a product manufacturer in part because Plaintiffs “cite no authority holding that the educational-malpractice bar applies only to entities or individuals that are primarily or solely in the business of education....” *Glorvigen (Ct.App.)*, 796 N.W.2d at 554. (Add.23). In doing so, the Court of Appeals in a sense put the burden on Plaintiffs to prove a negative by finding a case where a court stated that the bar would not be applied to an entity that would not typically be subject to the bar. What is true, however, is that the educational malpractice bar has only been applied to organizations that were providing educational services. Defendants have been unable to cite any case where the doctrine was applied outside the educational context, or any case where it was applied to a product manufacturer.¹⁰

The Court of Appeals discussed only one case involving an entity that is not solely in the business of education. In *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111 (Conn. 1996), a terminated resident sued the hospital claiming it failed to provide a program that

¹⁰ Defendants below cite cases brought against flight schools, but these schools were in the business of providing education to the general public on how to fly airplanes. They were not aircraft manufacturers providing instruction in the safe use of their aircraft. See e.g., *Sheesley v. The Cessna Aircraft Co.*, 2006 U.S. Dist. LEXIS 27133 (D.S.D., April 20, 2006); *Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008).

“would reasonably and adequately train him.” *Id.* At 118-20. The resident claimed that he worked at the hospital, and the decision to dismiss him was therefore an employment rather than an academic decision. The Court disagreed, concluding that it was an academic decision and the suit was subject to the educational malpractice bar because the hospital “assumed educational responsibilities related to, but distinct from, its function as an institution for healing the sick.” *Id.* at 118.

The Court of Appeals majority’s reliance on *Gupta* is misplaced. In *Gupta*, the hospital participated in two separate endeavors. One was healing patients. The other was educating residents. Educating residents was completely separate from its function as a healing hospital. As such, it was acting as an educator for the purpose of training the resident and was subject to the educational malpractice bar in failing to properly educate him. The suit brought by the resident was for failure to give him an adequate education. It was not a suit, like here, for injuries caused by failure to give necessary products instruction. In fact, *Gupta* did not involve a product or a product manufacturer.

An example using the framework of *Gupta* is instructive: assume that a patient sued the hospital for malpractice alleging that she suffered injury because the hospital failed to adequately instruct the resident on how to perform a test upon her. The case would be for medical malpractice and a defense of educational malpractice would clearly be rejected. This would be true because 1) the hospital’s duty to properly instruct the resident to avoid injury was part and parcel of its role as a hospital caring for patients, and 2) the suit would be for personal injuries caused by a breach of the hospital’s duty to practice medicine non-negligently. The hospital would not be acting as a educational

institution—subject to the bar—simply because the injury flowed from a failure to properly train.

A case involving a version of this hypothetical was presented to the Connecticut Supreme Court—the same court that decided *Gupta*—four years after *Gupta* and resulted in a very different outcome. In *Doe v. Yale University*, 748 A.2d 834 (Conn. 2000), the plaintiff, a first year medical resident, contracted HIV following a botched arterial line insertion she performed without the supervision of her third-year resident. *Id.* at 841. Plaintiff sued Yale for negligently causing her personal injuries, claiming they were caused by the university’s failure “to properly and adequately train, supervise, and evaluate the plaintiff.” *Id.* at 841 n. 11.

Following a jury verdict in plaintiff’s favor, the university argued on appeal that the allegations sounded in “educational malpractice” and should not have been submitted to the jury. *Id.* at 845. In upholding the jury verdict, the court examined the distinction between claims of inadequate education—which are barred by the educational malpractice doctrine—and cognizable personal injury, negligence claims alleging a failure to properly train or instruct a student:

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

...

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

Id. at 847 (emphasis added, citations omitted).

The key distinction between an actionable and non-actionable claim is not the timing of the injury, as the Court of Appeals indicated (*Glorvigen (Ct. App.)*, 796 N.W.2d at 556, Add.27-28), but the “**result of the claimed educational inadequacy.**” *Doe*, 748 A.2d at 849 (emphasis added). The *Doe* court explained:

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

Id. (emphasis added) (citations omitted): *see also Kirchner v. Yale Univ.*, 192 A.2d 641, 642-43 (Conn. 1963) (plaintiff had cognizable negligence action against university for injuries he sustained in woodworking class while operating a machine because both the teacher and the university had a duty to the student “to exercise reasonable care . . . to **instruct and warn students in the safe and proper operation of the machines provided for their use**”); *Larson v. Indep. Sch. Dist. No. 314*, 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) (this Court affirmed liability for personal injuries caused in the educational context).

In this case, Cirrus, as a product manufacturer, had a duty to instruct in the safe operation of its product. Its product training was not a second, separate endeavor, but one that flowed from its status as a manufacturer and seller of products. The duty to train Prokop was part and parcel of its role as a product manufacturer. To rule that Cirrus's duty as a product manufacturer is preempted by the educational malpractice bar needlessly and incorrectly expands that bar at the expense of long-standing Minnesota negligence law. As Judge Klaphake cautioned in his dissent, under the majority's "expansive definition of 'educational malpractice' 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." *Glorvigen (Ct.App.Dissent)*, 796 N.W.2d at 560-561. (Add.38).

C. Because UNDAF Is The Agent And Joint Venturer Of Cirrus, It Stands In The Shoes Of Cirrus For The Purposes Of Giving Cirrus's Product Instruction And A Claim Against It Cannot Be Barred By The Doctrine Of "Educational Malpractice."

Plaintiffs did not sue UNDAF. UNDAF—which is a separate entity from the University of North Dakota—intervened as a defendant. It is Defendants that attempt to turn this products failure-to-instruct case into an educational malpractice case. While UNDAF is associated with an educational institution, here it stands in the shoes of Cirrus as its appointed instructor. The jury found that UNDAF was Cirrus's agent and joint

venturer for the purposes of providing Cirrus's product instruction—a finding that Defendants did not challenge on appeal. As such, UNDAF was not acting as an educational institution. It was simply the conduit for Cirrus's product instruction.

The fact that UNDAF was not acting as an autonomous educational institution is most clearly illustrated by the history of the transition training program. The materials used were developed by Wings Aloft—which gave the instruction on Cirrus's behalf—long before UNDAF was involved. (T.708-711). After firing Wings Aloft, **Cirrus gave the training itself from October 2001 until July 2002.** (T.709, 711-713). Cirrus later made the Wings Aloft training course materials available to UNDAF. (A.391-392; T.723-724). In its contract with UNDAF, **Cirrus retained tight control of the transition training and ownership over all of the training materials.** (A.391-394; T.488). **Cirrus retained the right to approve whatever training materials were used by UNDAF for Cirrus transition training.** (T.491, 715-720). The product instruction was conducted at Cirrus's Duluth factory Duluth. (*See* T.488). UNDAF was simply Cirrus's agent for delivering Cirrus's instruction for the safe operation of Cirrus's product.

Surely, Cirrus's decision to contract with UNDAF to provide the promised instruction cannot transform this case into one for "educational malpractice." If it could, then all product manufacturers could contract out their training programs—or even the writing of their instruction manuals—to an educational institution in order to claim "educational malpractice" and avoid liability.

D. This Case Has Always, From The Beginning, Invoked The Duty Of Cirrus As Product Manufacturer And Supplier.

Cirrus has argued that this case fails to present the issue of whether the educational malpractice doctrine bars “claims that a product manufacturer failed to properly instruct in the safe use of its product” because—according to Cirrus—this matter is not a products liability claim. (Cirrus’s Response to Glorvigen Petition for Review, p. 1.) Cirrus’s premise is untrue. Beginning with the Complaint, Glorvigen has always invoked the duty of Cirrus as a manufacturer and seller.¹¹ Moreover, contrary to Cirrus’s argument, Glorvigen’s negligence claim based on Cirrus’s duty as a manufacturer was not dismissed on summary judgment.

Glorvigen’s Complaint alleged that Cirrus “designed, manufactured, marketed and sold” the product (¶8); undertook to provide training as part of the sale of the product (¶10); knew, or should have known, that such flight training was essential for Gary Prokop to safely pilot his Cirrus SR22 and to protect others, such as passengers in the aircraft like James Kosak” (¶10); “assumed and undertook duties as part of the sale,” including providing Prokop with all flight training Cirrus had promised (¶17); and “recognized the training was necessary for the safe operation of the aircraft” (¶17). (A.3-5). It was plain from the Complaint that the duties invoked were those of a manufacturer and seller arising from its sale of a product.

¹¹ The Court of Appeals did not address this issue. *Glorvigen (Ct.App.)*, 796 N.W.2d at 541, Add.15.

In ruling on Cirrus's summary judgment motion, Judge Paul Magnuson dismissed the strict liability and warranty claims but denied summary judgment as to the Plaintiffs' negligence claims. In doing so he specifically recognized that the negligence claims invoked the duties of a product manufacturer. Judge Magnuson based his decision on the *Gray, Frey and Germann* products liability cases, upholding the duty to give adequate instructions for the safe use of the product. *Glorvigen (SJ)*, 2008 U.S. Dist. LEXIS 10899, *10-14. (Add.139-141). He distinguished educational malpractice cases because none involved "an aircraft **manufacturer** that allegedly undertook a duty to train a pilot by including transition training as part of the aircraft's purchase price." *Id* at *11, (Add.140) (emphasis added). He then articulated the pertinent standard: "[I]n cases decided on negligence theories, there is general agreement that the duty of care owing by a **manufacturer** of aircraft or aircraft equipment is a duty of ordinary, reasonable care." *Id* at *13, (Add.140) (citation omitted) (emphasis added). Thus Cirrus's duties as a product manufacturer and seller were central to the Court's preservation of Plaintiffs' negligence claims. Nothing in Judge Magnuson's decision dismissing the Plaintiffs' strict liability and warranty claims undercuts his denial of summary judgment on Plaintiffs' negligence claims. Those negligence claims were premised on Cirrus's duty to instruct as a manufacturer and seller, and were allowed to proceed on that very basis.

E. This Case Does Not Implicate The Same Public Policy Rationales That Would Preclude Finding The Existence Of A Duty.

The imposition of the "educational malpractice" bar is based on a judicial decision to avoid involvement in the educational process. This Court has never considered any

educational malpractice case, has never adopted the bar, and has never examined the policy considerations behind it. Because this case involves the negligent failure to instruct in the safe use of a product, and is therefore not an educational malpractice case, the policy considerations are not implicated and do not militate against finding a duty.

The relevant policy considerations were identified by the Court of Appeals in *Alsides*, where the court noted that,

[T]hese claims have been rejected by courts on a number of public-policy grounds, including: (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."

Alsides, 592 N.W.2d at 472.

In this case, the Court of Appeals did not examine these policy considerations in detail, but found, without explanation, that the first two policy considerations "potentially are implicated any time there is a challenge to the effectiveness of education or instruction provided by an institution—even if the institution is not primarily in the business of education." *Glorvigen (Ct.App.)*, 796 N.W.2d at 555. (Add.25).¹² When examined, however, it becomes apparent that neither of these considerations is implicated outside of the educational environment, and certainly not where the claim is failure of a

¹² It appears that the Court of Appeals agreed with Plaintiffs that the remaining policy considerations discussed in *Alsides* are inapplicable to this case. See *Glorvigen (Ct.App.)*, 796 N.W.2d at 555. (Add.25).

product manufacturer to instruct in the safe use of its product. These considerations simply have no relevance here.

1. The first policy consideration—lack of a standard of care “by which to evaluate an educator”—is not an issue here.

The Court need not be concerned with determining a standard of care “by which to evaluate an educator.” Cirrus is not an educator. It is a product manufacturer. As Judge Magnuson explained, “the question of whether a manufacturer of airplanes has departed from a standard of ordinary care is to be resolved by **measuring his conduct against the standard of what an ordinary prudent designer and manufacturer of airplanes would have done.**” *Glorvigen (Fed.SJ)*, 2008 U.S. Dist. LEXIS, at *13, (Add.140) (emphasis added, citation omitted).

Moreover, Cirrus set the standard of conduct by which its duty of reasonable care must be measured when it decided that Prokop must be given Flight Lesson 4a. *See, e.g., Mervin v. Magney Const. Co.*, 416 N.W.2d 121, 124-25 (Minn. 1987) (a contract does not define the standard of care, which is imposed by operation of law, but it does provide evidence of the standard of conduct, which the jury may decide is reasonable, and if not met, may be found to be a lack of reasonable care).

Defendants argued to the Court of Appeals that there is a “lack of a satisfactory standard” in educational malpractice cases because they “necessarily entail[] an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen,” (Cirrus’s Brief to Court of Appeals, p. 10) (quoting *Alsides*, 592 N.W.2d at 472). Here, Plaintiffs do not complain that the training materials—the

Initial Training Syllabus (A.152-160), the Cirrus SR22 Training Manual (A.164-351), and the PowerPoint slides used during the training (A.399-512)—were deficient. On the contrary, Plaintiffs allege that specific instruction that Cirrus’s own materials indicate should have been given was not given. Likewise, no complaint is made about the “pedagogical method” used to give instruction to Prokop. It was the **failure** to give the critical flight instruction—Flight Lesson 4a—that constituted the negligence.

Thus, this case need not be barred for want of a proper standard by which to measure the conduct of Cirrus and its agent, UNDAF.

2. No evidence was presented regarding the second policy consideration—“intervening factors such as the student’s attitude, motivation, temperament, past experience, and home environment.”

In this case there are no “inherent uncertainties about causation and the nature of damages in light of such intervening factors as the student’s attitude, motivation, temperament, past experience, and home environment.” *Alsides*, 592 N.W.2d at 472. There was no evidence presented that Prokop’s ability to receive product instruction was affected by any of these factors. To the extent that Defendants challenged the evidence of causation in this case, that challenge centers on the cause of the crash and is not tied to Prokop’s “attitude, motivation, temperament, past experience, and home environment.” In fact, this consideration underscores the inapplicability of the educational malpractice

bar to product instruction cases, since these considerations are never available to a product manufacturer to excuse its failure to adequately warn and instruct.¹³

F. Plaintiffs' Claim That Defendants Did Not Provide The Specific Product Instruction That They Promised Is Not Barred By *Alsides*.

Even if the safe-use products instruction owed by Cirrus and UNDAF to Prokop is construed as some form of “education,” the educational malpractice bar is inapplicable because Plaintiffs do not “challenge the general quality of the instructors and the education . . . received” by Prokop. *See Alsides*, 592 N.W.2d at 473. The claim here is that Cirrus failed to deliver on the specific promise it undertook: a promise to give specific flight instruction to Prokop on how to escape from IMC with the use of the SR22’s auto-pilot. The claim is nothing more than a negligence claim based on Defendants’ failure to provide the specific instruction promised. As such, it does not require the court to conduct a disfavored “comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies” *Id.* at 472 (quoting *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996)). The

¹³ The policy considerations behind the educational malpractice bar were recently examined in *In Re: Air Crash Near Clarence Center, New York, on February 12, 2009*, 2010 U.S. Dist. LEXIS 130846 (W.D.N.Y. December 12, 2010) where plaintiffs sued a flight school for negligent flight simulator training of the pilot of a crashed airliner and defendant claimed educational malpractice immunity. Although the private corporation was in the business of providing flight instruction—and was not an aircraft manufacturer—the court, on motion to remand, nonetheless found that educational malpractice may not bar claims because the policy considerations may be found not to apply to a private corporation. *Id.* at *18-21. Here, the policy considerations are even less relevant because the Defendants, a product manufacturer and its joint venturer, had a duty to provide product instruction that the flight school in *In Re Air Crash* did not have.

court in *Alsides* made clear that claims such as the one presented by Plaintiffs will not be rejected as an “educational malpractice” claim:

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

Alsides, 592 N.W.2d at 472-73 (emphasis added) (quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992)). Even if this Court analyzes this case as an educational malpractice case—which it should not do—and accepts the reasoning of *Alsides*, that reasoning compels the conclusion that Plaintiffs’ claims are nonetheless not barred.

Faced with the *Alsides* court’s exception to the educational malpractice bar, the Court of Appeals majority states that claims based on a failure to provide specific, promised instruction cannot sound in tort. *Glorvigen (Ct.App.)*, 796 N.W.2d at 555. (Add.25-26). The fact that Plaintiffs’ claims sound in negligence, however, is not a relevant distinction. It is the potential entanglement in the schools’ educational and pedagogical methods and administrative policies that is to be avoided. Whether the claim will present such potential entanglements does not depend on whether it sounds in negligence or contract or otherwise. It depends on whether it challenges the defendant’s

general educational standards—and therefore runs the risk of such entanglement—or simply claims—as in this case—that specific, promised instruction was not given.¹⁴

Plaintiffs proved that specific, promised instruction was not given. Because such claims do not implicate the prohibited entanglements, they are not “educational malpractice.” *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1153, 1159 (D. Kan. 2008) (court rejected educational malpractice bar and **allowed negligence claim for failure to provide specific, promised instruction to go forward** against a flight school, noting that *Alsides* recognized cognizable claim to the extent the allegation was that the institution failed to perform on specific promises). This was clear to Judge Klaphake, who pointed out:

[Plaintiffs] have not alleged that the training received for “Recovery from VFR into IMC (auto-pilot assisted)” was ineffective or that the instruction was of poor quality; rather, the record evidence is that this promised aspect of training was not provided. This is precisely the type of claim that the *Alsides* court concluded was permissible and not barred by the doctrine of educational malpractice.

Glorvigen (Ct.App.Dissent), 796 N.W.2d at 560. (Add.37).

¹⁴ The court in *Alsides* found that “where the essence of the complaint is that the school failed to provide an ‘effective education,’ it is irrelevant whether the claim is labeled as a tort action or breach of contract, ‘since in either situation the court would be forced to enter into an inappropriate review of educational policy and procedures.’” *Alsides*, 592, N.W.2d at 473.

G. The Fact That Cirrus Attempted to Discharge Its Duty As A Product Manufacturer In The Form Of Flight Instruction Does Not Transform Its Failure To Instruct Into An Educational Malpractice Case.

The only way Prokop could be properly trained in the use of the auto-pilot assisted maneuver to escape from IMC to VFR conditions while flying the SR22 was to be given flight instruction while flying the aircraft. *See, e.g.* testimony of UNDAF's director of transition training at Cirrus, Mr. Walberg, agreeing that "in order for training to be effective, **you can't just do it on the ground... It has to be done up in the sky with the pilot.**" (T.696) (emphasis added). Because Cirrus knew this was the only adequate way to give the necessary product instruction, Cirrus included Flight Lesson 4a in its transition training course, sold that course as part of the purchase price, and required that it be taken before delivery of the aircraft would be made.

The Court of Appeals' decision that this case is governed by educational malpractice was made on the basis of the **nature—or form**—of the product instruction that Cirrus chose to deliver. The mere fact that the product instruction was supposed to be given in the form of a flight lesson became a focus of the Court of Appeals decision. The majority decided that this was an educational malpractice case because

The gravamen of respondents' [Glorvigen's and Gartland's] claims is that appellants [Cirrus and UNDAF] breached their duty to provide adequate flight training by omitting Lesson 4a, which included instruction regarding how to use the auto-pilot to escape IMC conditions. Essentially, **respondents' theory is that appellants did not teach Prokop what he needed to know to use the auto-pilot to escape the "IMC-like" conditions that he encountered before the crash.** Despite respondents' reliance on one allegedly promised but undelivered flight lesson, respondents ultimately challenge the quality of the transition training. This challenge requires review of the instructor's failure to provide flight training, in addition to ground training, regarding use of the auto-pilot to

escape unexpected IMC conditions. **But a determination of whether the transition training was ineffective because the instructor failed to provide a flight lesson on this topic would involve an inquiry into the nuances of the educational process, which is exactly the type of determination that the educational-malpractice bar is meant to avoid.**¹⁵

Glorvigen (Ct.App.), 796 N.W.2d at 553. (Add.22-23). (footnote and citations omitted) (emphasis added).

The Court of Appeals did not analyze the case on the basis of the relationship of the parties as product manufacturer and purchaser, nor did it analyze the case based on the fact that the transition training was being given to properly instruct on the safe use of the product. Instead, the Court of Appeals focused on the fact that the required product instruction was given in the form of flight training—leading to its improper reformulation of the Plaintiffs’ claim as one of failure to properly “teach.” The Court thus equated the required product instruction with the “educational process,” artificially transforming the instruction being given for the safe use of the product into an “educational process.” Having done so, it found that it would be required to involve itself in “the nuances” of this “education process” and that *Alsides* prohibited such involvement.¹⁶

Rather than focus on the form of the training, this Court must properly focus on the **relationship** of the parties and the long standing duty that Cirrus had to provide

¹⁵ The Court’s use of the word “allegedly” to describe whether Flight Lesson 4a was promised and not given is another indication that the Court was impermissibly “weighing the facts found by the jury in a light unfavorable to its verdict.” *Glorvigen (Ct.App.Dissent)* at 561. (Add.38).

¹⁶ Of course, even this formulation requires the giving of a flight lesson to be the “educational process,” yet another leap the Court of Appeals had to take to fit this case into the educational malpractice rubric.

instruction in the safe use of its product. Once the inquiry is refocused in this way, it becomes clear that this is not at all an educational malpractice case, but one involving a manufacturer's duty to instruct. If it is the form of the instruction that is allowed to implicate the educational malpractice bar, any established duty—such as the one involved in this case—can be avoided by simply manipulating the form in which the instruction is given. By focusing on the form of the instruction, the Court of Appeals has established a precedent that will allow a products manufacturer to avoid its long standing responsibilities by incorporating required product instruction in a course of study. It can then argue that a claim that its instruction was insufficient involves an inquiry into the “nuances of the educational process.”

Such a result would be particularly advantageous to manufacturers of highly sophisticated machinery—such as the SR22—which traditionally require a higher level of specific training. Ironically, manufacturers of those products that require more hands on and specific training would be the very ones that would gain immunity for failure to sufficiently instruct under the Court of Appeals ruling.

CONCLUSION

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

Dated: July 28, 2011

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

By: *Philip Sieff*
Philip Sieff (#169845)
Vincent J. Moccio (#184640)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

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

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant Rick Glorvigen, as trustee for the Next-of-kin of decedent James Kosak, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface using Microsoft Word 2003 and contains 13,550 words, according to the Microsoft Word 2003 "Word Count" function, which was set to specifically include headings, footnotes, and quotations.

Dated: July 28, 2011

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

By: 
Philip Sieff (#169845)
Vincent J. Moccio (#184640)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

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