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),

Thomas M. Gartland, as Trustee for the Next-of-Kin of decedent Gary R. Prokop,
Appellant/ Cross-Respondent (A10-1243, A10-1247),

vs.

Cirrus Design Corporation,
Respondent (A10-1246, A10-1247),

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

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

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

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STATEMENT OF ISSUES

This is a negligence case based on the failure of an airplane manufacturer to reasonably instruct a buyer on the unique procedures that must be followed to safely fly its high performance airplane under certain emergency conditions. Plaintiffs alleged that failure was a cause of the plane crash that occurred when the emergency conditions were encountered. Both the federal district court and, on remand, the state district court rejected the defendants' arguments that the plaintiff's wrongful death negligence claim was barred by either the absence of a legal duty or the education malpractice doctrine.

A divided panel of the court of appeals reversed a jury verdict finding defendants negligent, holding that "although [the buyer] may have needed transition training to safely pilot [the plane], it does not follow that [the manufacturer] had a duty to provide the training" and that the training duties the manufacturer had included in the price of the plane were "distinct from its function as a manufacturer."

1. Consistent with industry custom and practice, the manufacturer of a high performance airplane provided buyers with transition training on the unique operating characteristics of the aircraft. Although the manufacturer prescribed training on specific techniques required to recover from certain emergency conditions, it failed to provide the plaintiff with that specific training. The plane crashed when the plaintiff encountered those precise emergency conditions. The jury found the manufacturer and its agent negligent in causing the death of the buyer and his passenger. Did the court of appeals err in declaring that the manufacturer owed no duty to warn and instruct the buyer in the safe use of its dangerous product?

Gartland's complaint asserted a claim, among others, for negligent failure to warn and instruct. (A.9-11.) The case was submitted to the jury, without objection, on a general negligence instruction and verdict questions. (Add.49-50; A.116.) The district court denied defendants' motions for directed verdict (Add.58) and for judgment as a matter of law following trial. (Add.53-54.) The court of appeals reversed the judgment for plaintiffs based in part on its conclusion that defendants owed no duty to plaintiffs. (Add.1-32.) This Court granted further review of this issue.

Apposite Authorities:

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

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

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

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

2. Does the so called "educational malpractice" doctrine apply to plaintiffs' wrongful death claims based on the negligent failure of an airplane manufacturer to provide specific instructions that it had prescribed as being critical to the safe use of its high performance airplane?

Both the federal district court and the trial court denied defendants motions before and after trial for judgment as a matter of law based on the educational malpractice doctrine. The court of appeals reversed the judgments for the plaintiffs based in part on its application of the doctrine. (Add.1-32.) This Court granted further review of the issue.

Apposite Authorities:

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

Glorvigen v. Cirrus Design Corp.,
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Doe v. Yale Univ.,
748 A.2d 834 (Conn. 2000)

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

STATEMENT OF CASE

Gary Prokop and James Kosak died on January 18, 2003, when the Cirrus SR22 airplane Prokop owned and was flying with Kosak as a passenger crashed near Grand Rapids, Minnesota. Thomas Gartland, as trustee for the heirs and next-of-kin of Gary Prokop, and Rick Glorvigen, as trustee for the heirs and next-of-kin of James Kosak, brought separate actions in the Itasca County District Court against Cirrus Design Corporation, seeking to recover damages for the deaths of Prokop and Kosak. (A.1-8, 9-11.)[1] Gartland alleged, *inter alia*, that Cirrus had negligently failed to provide Prokop with instruction it admitted was necessary and which it had agreed to provide regarding the safe operation of the aircraft.

Prokop had recently purchased the SR22, a high performance private airplane requiring special certification for persons piloting it. Federal law prohibited Cirrus from allowing Prokop to take the SR22 from the Cirrus facility without an endorsement certifying that he was qualified to fly the plane. As part of the sale, Cirrus provided instruction in the safe operation of this particular aircraft, and the required federal endorsement. The availability of this training was a significant aspect of Cirrus' marketing of the SR22. Cirrus contracted with the University of North Dakota Aerospace Foundation (UNDAF) (a separate entity from the University of North Dakota) to provide the instruction.

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[1] "A." refers to the joint appellants' appendix; "Add." refers to the addendum to this brief.

Cirrus removed both cases to the United States District Court for the District of Minnesota, where they were consolidated. (A.12-15, 32.) Cirrus argued that the claims asserted against it implicated "significant federal issues." (A.32, 14.) Alternatively, Cirrus contended that the Federal Aviation Act completely preempted state law claims based on an alleged failure to provide adequate pilot training. (*Id.*) Judge Paul Magnuson rejected Cirrus' claims, and remanded the cases to state court. (A.31-43.)

Cirrus then 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. (A.66.) The United States removed the case to federal court, where it was again heard by Judge Magnuson. (A.44-47.) While the action was pending before Judge Magnuson for the second time, Cirrus sought summary judgment on federal preemption grounds, and on the claim that it had provided inadequate training. (A.53.) Judge Magnuson again denied Cirrus' claim of federal preemption, and also rejected the "educational malpractice" defense. (A.50-62.) He then remanded the cases to state court because once he granted summary judgment to the FAA, there was no longer a basis for federal jurisdiction. (A.65-69.)[2]

The consolidated cases were tried to a jury verdict in Itasca County District Court, the Honorable David J. TenEyck presiding. The jury found that Cirrus and UNDAF were both causally negligent, as was Prokop. (Add.41-42, 49-50.) The jury apportioned

[2] Cirrus appealed the remand order to the Eighth Circuit. *Glorvigen v. Cirrus Design Corp.*, 581 F.3d 737 (8th Cir. 2009), but did not raise preemption in the Eighth Circuit. Cirrus likewise did not pursue the issue in state district court after the second remand.

37.5% of the causal fault to Cirrus and UNDAF respectively, for a total of 75%, and apportioned the remaining 25% of the fault to Prokop. (Add.45, 50.) The jury also found that UNDAF was acting as the agent of Cirrus, and that Cirrus and UNDAF were engaged in a joint venture. (*Id.*) The jury awarded damages of $12,000,000 to Prokop's heirs and next-of-kin ($6,000,000 of which defendants stipulated to for economic loss) which was reduced to $9,000,000 by Prokop's fault. (Add.44-45, 51.)

Judge TenEyck denied defendants' post-trial motions, concluding that there was ample basis for the jury's findings on both negligence and causation.

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

(Add.98.)

On appeal, a divided panel reversed. Despite the facts that (1) transition training was industry custom and practice, (2) Cirrus admitted that the transition training it provided was necessary for Prokop to safely fly the SR22, (3) Cirrus could not release the SR22 to Prokop unless it gave Prokop the high performance endorsement required by federal law, which he could only receive after completing the training, and (4) Cirrus included a fee for the training as part of the purchase price of the plane, the court of appeals' majority held that Cirrus had no duty to instruct Prokop.

First, the majority suggested that Cirrus may not even have had a duty to warn Prokop of the unusual features of the SR22, under the "sophisticated user defense." *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 551 n.4 (Minn. Ct. App. 2011). The majority then 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. The majority discounted the fact that Cirrus actually required the training before releasing the plane to the buyer and included the cost of training in the purchase price, stating that the training responsibilities that Cirrus assumed were "related to, but distinct from, its function as a manufacturer." *Id.* at 554. Finally, the majority also concluded that despite Cirrus' status as a product manufacturer, the "educational malpractice" doctrine precluded liability.

In his dissent, Judge Klaphake noted that the transition training provided by Cirrus "emphasized the 'innovative aspects of the SR22'"; that the transition training was "formatted to train a pilot new to SR22 in particular areas, including [the specific area encountered by Prokop]"; and that, once Cirrus made transition training a part of the purchase agreement, it voluntarily assumed the duty to provide the proposed training. Judge Klaphake further concluded that the "educational malpractice" doctrine did not apply when a "negligence claim for failure to provide promised educational instruction does not depend on an inquiry into the efficacy of the educational instruction." *Id.* at 559-60 (Klaphake, J., dissenting).

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

STATEMENT OF FACTS

Overview

Because the factual disputes have been resolved by the jury, the record is examined in a light most favorable to the verdict.

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

The SR22 is considered a sophisticated, high performance plane. The FAA requires that a person flying the SR22 have a high performance endorsement. As part of its marketing of the SR22, Cirrus included in the sale price the cost of the training for the purchaser/pilot to receive the necessary endorsement. The training was given by UNDAF under a contract with Cirrus.

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. In fact, under federal law, Prokop could not even take the SR22 off Cirrus property without the high performance aircraft endorsement Cirrus supplied.

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

ground references. This condition is commonly known as "VFR into IMC," a well known cause of small plane crashes because the pilot is suddenly unable to maintain spatial orientation without visual cues. VFR into IMC conditions require immediate and specific action in order to continue safe flight.

The loss of orientation is even more dangerous in a fast, high performance plane like the SR22, because the pilot can lose control more quickly than in a slower plane like Prokop's 35-year-old Cessna. While Prokop had been trained in his Cessna on how to respond in VFR into IMC conditions, the procedures prescribed by Cirrus for recovery in the SR22 were significantly different than the procedures in the Cessna. Moreover, as explained in detail below, the steps required by Cirrus to recover from this dangerous condition involved more than merely turning on the autopilot. The failure to take the actions prescribed by Cirrus could prove fatal, as it did in this case.

One of the primary issues at trial was whether Cirrus failed to provide Prokop with the training Cirrus identified as necessary in order to prepare him to fly the SR22. Plaintiffs asserted that the Cirrus instructor skipped the lesson specifically intended to teach Prokop how to recover from VFR into IMC in the SR22. The instructor and defendants claimed he did not. The written records concerning Prokop's training contradicted defendants' claim. In addition, Prokop's comments to others indicated that he had not received the crucial instruction on recovery in emergency situations by using the SR22's autopilot. The jury resolved these factual disputes in favor of the plaintiffs.

Another hotly contested fact issue at trial was whether Cirrus' failure to instruct Prokop made a difference in the accident. The defendants' position was that it did not.

Plaintiffs presented expert testimony which established that Prokop did not use the correct emergency procedure (in which he had received no instruction), and that if he had, the accident could have been avoided. Once again, the jury resolved this factual dispute in favor of the plaintiffs.

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

A. Cirrus And UNDAF Failed To Provide Reasonable Transition Training To Prokop So That He Could Safely Fly His New High Performance Plane

Gary Prokop died while piloting his recently purchased Cirrus SR22, a sophisticated, high performance private plane. The FAA requires pilots flying the SR22 to have a high performance aircraft endorsement. (T.635, 687, 858.) However, Cirrus marketed the SR22 as fast yet easy to fly and "accessible to pilots with a wide range of experience." (T.240.)[3] Because Cirrus was marketing its plane to people who were casual aviators, (T.242-43), Cirrus provided instruction with every plane, as part of its marketing; the cost of the training, including obtaining the high performance

[3] "T." refers to the trial transcript.

endorsement, was included in the purchase price. (T.182, 245, 466, 489, 711-12, 1476; A.171.)

1. Transition Training In General

Cirrus' undertaking to provide instruction in the safe operation of the SR22 as part of the sale of the plane was not unusual. Transition training is well recognized in the aviation industry. It is designed to ensure that a pilot, already licensed and with some degree of flight experience, is instructed in the differences in controls, handling and flight characteristics between the new plane and other planes the pilot may have flown.

Captain James Walters, an expert witness[4] called by counsel for the Kosak family, explained to the jury the importance of training pilots who are moving from one plane to another – what he called "differences" or "transition" training. (T.156-57.) As Walters explained,

> Transition training is a specialized type of training that is done when a pilot is qualified, typically in one type of airplane, and is moving for whatever reason into another type of airplane. He's a pilot, and he knows how to fly,

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

> but he doesn't know all of the intricacies of the new airplane he's going to be flying. So obviously we take that pilot and give him extensive training and teach them the differences.

(T.156-57.)

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

2. Cirrus' Transition Training Program

Both Cirrus and UNDAF agreed at trial that transition training was standard practice in the industry, and that it was crucial to the safe operation of the SR22. Cirrus officials agreed that Cirrus was responsible for seeing that there was a transition program. (T.1509.) UNDAF also recognized the need for transition training when a pilot moved from one aircraft to another. (T.498.)

From October 2001 to July 2002, Cirrus provided transition instruction directly to new purchasers of its planes after terminating an earlier agreement with a training provider, Wings Aloft. (T.715.) Cirrus designed the training materials and course content based on the Wings Aloft materials. (T.490, 713.) In 2002, Cirrus contracted with UNDAF to provide the transition training. (T.488; A.395-403.)

Training was to be tailored to the individual purchaser, depending on his or her prior experience. (T.503, 1476.) The transition instruction was to take eight hours per day, including both classroom and in-flight lessons. (T.545, 613-14; A.163, 171.) Prokop received two days of training as part of the purchase of the plane, and because he was a relatively inexperienced pilot, he also paid for an additional two days of instruction. (T.618.)

UNDAF instructors provided the transition training at the Cirrus facility in Duluth, using written materials, classroom instruction, and in-flight instruction. (T.488). The materials included the Initial Training Syllabus and the Cirrus SR22 Training Manual. (T.510-11; A.152-60, 164-351.)

Instructors were required to fill out checklists contained in the syllabus to document that the lessons had been completed. (T.602-03, 638.) The Training Syllabus states, "skipped items should be left unchecked." (T.512, 924; A.153-59.) John Glenn Wahlberg, UNDAF course manager, testified that pilots who purchased new Cirrus planes were to be trained in the areas covered by the instruction syllabus, and were expected to earn satisfactory grades. (T.505.)

Moreover, as noted above, the FAA requires a High Advanced Technical Aircraft endorsement for a pilot to fly the SR22, and Prokop would not have been allowed to leave the Cirrus facility with the SR22 without this endorsement. (T.1494-95, 1528.) Cirrus could provide the endorsement only after Prokop had completed the prescribed training program.

3. The Cirrus Instructor Skipped Transition Training For Prokop On A Critical Emergency Procedure

A key dispute at trial concerned whether Prokop had received the full course of instruction called for in the Cirrus syllabus. Specifically, plaintiffs claimed that Prokop did not receive the training called for in the syllabus on recovery from VFR (visual flight rules) into IMC (instrument meteorological conditions), Lesson 4a.

VFR into IMC training was particularly important for Prokop. First, he indicated on his registration forms that he had limited experience as a pilot. (T.247, 618-19.) Prokop was not certified to fly by Instrument Flight Rules (IFR), although he was pursuing that certification separately from the Cirrus training, in his old Cessna. Without IFR certification, Prokop could only fly by visual flight rules.

Second, defendants were aware that VFR into IMC problems were a leading cause of crashes for inexperienced pilots. (T.698.) Indeed, defendants acknowledged that the VFR into IMC lesson was developed for that very reason; as UNDAF's Wahlberg said, "[t]his is why this procedure exists." (*Id.*)

Lesson 4a in the syllabus was intended to cover specific flight maneuvers for the SR22. The instructor and student were supposed to practice "[r]ecovery from unusual attitudes" and "[r]ecovery from VFR into IMC (auto-pilot assisted)." (A.156.) Cirrus prescribed a four step process: the pilot had to program the autopilot, then make several decisions, including adjusting the attitude of the plane, activating the autopilot, and setting the autopilot to hold altitude. (T.257-58, 524-25.)

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

UNDAF's course manager, Wahlberg, admitted that more was required than simply turning on the autopilot, and VFR into IMC recovery would be an emergency procedure in the SR22, which would need to be done very quickly. (T.517, 524.) Wahlberg conceded that the training was important for a fast response to a quickly developing emergency. (T.697.) Wahlberg also admitted that, despite Prokop's prior training, the VFR into IMC training "needed to be done." (T.626.) Wahlberg acknowledged that no portion of the syllabus lists "VFR into IMC autopilot assisted" other than Lesson 4a. (T.514.)

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

Yu Weng Shipek was the UNDAF trainer for Prokop. (T.753-54.) Prokop trained with Shipek from December 9 to 12, 2002. (A.152-60.) Shipek was a recent UNDAF graduate, who had been providing transition training on the Cirrus planes for about 4 four months when he trained Prokop. (T.746, 748.)

Shipek testified that satisfactory completion of each maneuver in the syllabus was required for final certification. (T.859.) After initially disputing whether he was required to sign off on the syllabus,[5] Shipek admitted that the purpose of the syllabus was to document that all training specified was given, and that the normal procedure was to check off each lesson immediately after completion. (T.891, 923-24.) When confronted with the fact that the crucial Lesson 4a was not documented, Shipek claimed he actually did the disputed lessons but "forgot" to sign off on the syllabus. (T.792, 864-65.) Shipek asserted that he was "sloppy" in his documentation, and that there were a number of "clerical errors" in his documentation of Prokop's training. (T.773, 798-99, 876, 891.)

Other evidence contradicted Shipek's claim that he had done training that he did not document. For example, VFR into IMC training requires the pilot's vision to be obscured, which is accomplished through either actual IMC conditions or "under the hood" training (training that simulates IMC conditions by obstructing the pilot's view outside the aircraft, typically with a visor). (T.526-27.) Prokop would have been motivated to record any "hood time" in his log book because "hood time" was necessary for the IFR certification that he was working towards in his Cessna. (T.919-20.)

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

Shipek claimed that while he did not specifically recall putting Prokop "under the hood," he thought he might have done so at least twice for the VFR into IMC training. (T.794.) He also claimed that he did the VFR into IMC training, although it was not documented, based on other portions of the syllabus. (T.865-71). But when Shipek was shown Prokop's log book for the training, he admitted that no "hood time" was listed. (T.797-98.)

Shipek agreed that inadvertent flight into IMC was a potentially fatal situation. (T.902.) Moreover, he conceded that using the autopilot in an emergency is not as simple as just pushing a button – the pilot has to do some planning and thinking about the maneuver and programming the autopilot. (T.853.) Shipek claimed that during training, the autopilot was used extensively, so the student can concentrate on other details. (T.847-48.) However, when pressed, he admitted he had no specific recollection of Prokop using the autopilot, only that it was "standard procedure." (T.784.)

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

4. The Evidence Established That Prokop Was Not Reasonably Instructed

UNDAF argued that the syllabus outlined the course, and that by signing off on the final evaluation, Prokop was himself certifying that he had been instructed in all areas of the syllabus, that he actually got VFR into IMC training, and that it simply was not documented. (T.585-86.) Wahlberg also opined that Prokop was proficient in use of the autopilot, based on the final evaluation, despite the fact that the lesson was not checked off. (T.542.) Wahlberg based this opinion not on any specific facts, but rather on what he described as "tribal knowledge," that instructors and students talked about the training, so the final certification signified that the training was done completely. (T.596.) However, Prokop could not give himself the high performance endorsement he needed to take possession of his new plane. Only Cirrus could provide that. As with Shipek's testimony, while the jury could have believed UNDAF's arguments, they chose not to.

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

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

Day testified that despite having completed the Cirrus training, Prokop chose the Cessna in which to take his IFR test because he was not familiar with the Cirrus autopilot. (T.1195.) Prokop told Day that he "wasn't completely comfortable with the avionics in the airplane." (T.1183.) "I just remember we were talking as we were taxiing down [the] runway . . . about the instrument rating and so forth. And he said that, 'Steve, I don't even know how to turn the autopilot on in the plane,' or 'I don't know how to use the autopilot.' One or the other, I don't recall which he said." (T.1184.) Day testified that the comment surprised him. "He just finished his training. . . . And it just surprised me that he wasn't more familiar with the avionics at that point." (T.1184-85.)

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

This evidence, added to all the other evidence indicating that the crucial instruction on VFR into IMC had not been completed, provided a basis from which the jury could conclude that Cirrus had failed to provide Prokop with the instruction required for the safe use of the SR22.

B. Plaintiffs Proved That The Lack Of Reasonable Transition Training Was A Cause Of The Crash

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

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

However, after takeoff, Prokop encountered bumpy air and hard-to-see conditions right away, and decided to return to the airport. (T.212.) According to Walters, based on radar tracking information, Prokop tried manually to turn the plane sharply, unexpectedly descended, pulled up at high speed, stalled, and crashed; all of this happened at a speed and attitude that were far different than Prokop had experienced in his Cessna 172. (T.215, 218.)

Dr. Robert Winn, Cirrus' accident reconstruction expert, largely agreed with Walters' opinion on the events of the crash. Winn testified that based on recorded radar tracks, it was clear that Prokop was flying by hand all the way, and that in an effort to

extricate himself from the conditions in which he found himself, he performed a turn and climb, which ended up stalling the plane. (T.1552-53, 1563-64.) The plane turned sharply to the left, descending. (T.1562.) Prokop then pulled the plane up. (T.1563.) By turning sharply and pulling up, the plane actually lost lift and crashed. (T.1564.) Prokop lost control during the turn. (T.1566.)

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

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

Walters explained that Cirrus was marketing a fast, sophisticated plane to people who were casual aviators; because the SR22 "is not designed for that kind of aviator," Cirrus had an obligation to ensure that the purchasers were adequately trained. (T.242.)

"You are putting this kind of airplane, which is a very high performance airplane, into a market that doesn't have the experience level or the training level to be able to fly the airplane appropriately." (T.243.) Because of that fact, it was imperative that the purchasers have a transitional training program "that would meet the exact need that you are talking about here." (*Id.*)

Walters testified that the training that Prokop received did not meet industry standards because some of the required training had not happened, including training on recovery from power stalls. (T.254.) In addition, Prokop was not trained in the use of the autopilot in an emergency situation, according to Cirrus' own records, as well as comments Prokop made to Bujold and Day. (T.259-60.)

Walters explained that Prokop's incomplete instruction in use of the autopilot was causally related to the crash because use of the autopilot was precisely what was called for in the circumstances. (T.274.) If Prokop had been trained, he could have recovered from the critical situation in which he found himself. (*Id.*)

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

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

(T.277.)

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

Walters agreed that the final evaluation records indicated that autopilot operations were "examined," but he disagreed that there is any evidence that flying from VFR into IMC was ever taught, because that part of the syllabus was not marked. (T.468.) Walters opined that because the specific part of syllabus concerning "recovery from VFR into IMC autopilot assisted" was not marked as taught, and in light of the comments that were made by Prokop to others, the crucial lesson was not taught. (T.468.)

C. The Trial Court Thoroughly Reviewed The Record On Negligence And Causation

In his post-trial memorandum, Judge TenEyck discussed in detail the importance of "transition training." (*See* Add.82-84.) He observed that Cirrus undertook to develop and provide a transition training program, noting that the curriculum was designed by Cirrus and UNDAF to ensure that the purchaser/pilot was able to safely fly the new plane. (Add.83-84.)

He also discussed "recovery from VFR into IMC." (Add.85.) He recognized that training on this maneuver was crucial. (Add.98.) And he rejected the argument that the jury erred in concluding that the training had been provided. He noted that despite Shipek's assertion that he had provided the training, the documents "belied" that claim. (Add.87.) Moreover, he specifically observed that it was highly unlikely that the omission in the records was inadvertent. (Add.88.) The judge felt that it was "wholly unreasonable" that the omission was merely a clerical error, and described that claim as not credible. (*Id.*) The judge, himself "highly skeptical" of the claim, concluded that the jury properly rejected it. (*Id.*) As he said, one error might be understandable, but several omissions could not be attributed to clerical error, particularly in light of the fact that no similar errors were discovered in any other records. (*Id.*)

The trial judge also rejected defendants' arguments that there was inadequate proof of causation. He began by noting that for legal liability to result from certain conduct, the conduct need only be *a* cause, not *the* cause of an accident. (Add.89.) Moreover, direct and circumstantial evidence may prove causation. (Add.90.) The omitted training was intended to address exactly the situation which Prokop encountered. (Add.92.) As the judge noted, it was the very characteristics of the Cirrus SR22 that were emphasized as selling points (its high performance and speed) that gave the pilot less time to react to danger. (Add.95.) A pilot who was surprised by unexpected conditions easily could make the wrong move because he was not trained to make the right move. (*Id.*)

D. The Court Of Appeals' Decision

Despite the uncontroverted evidence that transition training was standard practice in the aviation industry, notwithstanding Cirrus' repeated admissions that transition training was necessary for Prokop to safely operate the new plane they were selling to him, and without regard to the fact that Cirrus included in the sale price of the SR22 the cost of training necessary to provide Prokop with the high performance endorsement required by the FAA, the court of appeals concluded as a matter of law that Cirrus owed no duty to Prokop. It also applied the "educational malpractice doctrine" rejected by the federal court and the trial judge. It ordered judgment for the defendants notwithstanding the jury's verdict.

ARGUMENT

Summary of Argument

For decades, Minnesota product liability jurisprudence has imposed on the manufacturer and seller of a dangerous product an obligation to provide reasonable warnings and instructions for safe use. That duty arises as a matter of law. In addition, Minnesota law recognizes that a party may assume duties to another, and that once a duty is assumed, liability may be imposed for its breach. Finally, this Court has specifically approved tort liability for educators when they fail to follow a curriculum designed to ensure the safety of students, or fail to take steps to make sure that the curriculum is followed.

The majority of the court of appeals' panel looked directly past those well established rules of Minnesota law, and accepted the legal analysis advanced by the defendants – that Cirrus owed no duty to Prokop, and that this was an "educational malpractice" case. Based on those conclusions, the court ruled that Gartland's product liability claims could not be maintained. *Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 543 (Minn. Ct. App. 2011).

That result is not only at odds with established Minnesota product liability and negligence law, but is also contrary to the decision of United States District Court Judge Paul Magnuson in this very case. Numerous other courts have likewise rejected the educational malpractice defense in personal injury cases such as this. Moreover, this Court has specifically approved imposition of tort liability on school teachers and

administrators for failing to follow a prescribed curriculum resulting in injuries to a student.

Established Minnesota law provides the basis for the liability of the defendants, whose negligence was a cause of the death of plaintiffs' decedents. To hold otherwise, this Court will have to significantly re-write established Minnesota law.

I. STANDARD OF REVIEW

The court of appeals vacated the judgment entered in the district court based on its interpretation of Minnesota law, 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). Put simply, this Court must determine whether the jury's verdict is manifestly against the evidence viewed in a light most favorable to the plaintiffs. *Pouliot v. Fitzsimmons,* 582 N.W.2d 221, 224 (Minn. 1998); *Lee v. Lee*, 248 Minn. 496, 498, 80 N.W.2d 529, 532 (1957) (verdict may be set aside only if it is in contravention of the law applicable to the case when the evidence is viewed in light most favorable to nonmoving party).

Moreover, in applying the educational malpractice doctrine, the court of appeals relied principally on its own prior decision in *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999). *See Glorvigen*, 796 N.W.2d at 552-57. However, decisions of the court of appeals are not a "definitive statement of the law of Minnesota" until adopted by this Court. *Willis v. Cnty. of Sherburne*, 555 N.W.2d 277, 282 (Minn.

1996). Indeed, the court of appeals itself recognizes that it is an error-correcting court and not a law-making court. *Lake George Park, L.L.C. v. IBM Mid Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998). This Court alone decides the scope and shape of Minnesota common law.

Finally, no deference is afforded to the decision of the court of appeals on legal questions. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (no deference to lower court ruling on legal issues). *Cf. Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 822 (Minn. 1977) (recognizing that when the supreme court reviews decision of district court acting in an appellate capacity, it accords the lower court only such deference as it would give to the opinions of other appellate courts, that is, considering the decisions for their persuasive weight).

II. PLAINTIFFS' THEORY OF LIABILITY IS WELL FOUNDED IN ESTABLISHED MINNESOTA LAW

Plaintiffs sued Cirrus, the manufacturer and seller of the SR22, asserting product liability claims based on negligence, strict liability, and warranty. The case went to the jury only on the negligence claim. Plaintiffs did not sue UNDAF. Instead, UNDAF intervened in the case as a defendant, ostensibly to protect itself from the consequences of a verdict against its principal and joint venturer, Cirrus, based on UNDAF's failure to provide the training called for in the transition training syllabus. It was the defendants who sought to turn a product liability case based on negligent failure to provide adequate instructions for the safe use of a product into an educational malpractice claim.

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

Judge Magnuson succinctly summarized the applicable Minnesota law with regard to plaintiffs' negligence claim in this case:

> The principal dispute at this stage is whether Cirrus owed a duty regarding Prokop's "transition training." Duty is a question of law. *Bjerke v. Johnson,* 742 N.W.2d 660, 664 (Minn. 2007). In Minnesota, a duty arises when there is an "obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *L&H Airco, Inc. v. Rapistan Corp.,* 446 N.W.2d 372, 378 (Minn. 1989) (quotation omitted). The duty to warn can arise in the negligence context and "includes the duty to give adequate instructions for the safe use of the product." *Gray v. Badger Mining Co.*, 676 N.W.2d 268, 274 (Minn. 2004) (citing *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977)). In addition, "one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so." *Isler v. Burman,* 305 Minn. 288, 295, 232 N.W.2d 818, 822 (1975).

Glorvigen v. Cirrus Design Corp., Civ. No. 06-2661, 2008 WL 398814, at *3 (D. Minn. Feb. 11, 2008). (Add.136-42.)

Judge Magnuson also rejected Cirrus' attempt to invoke the educational malpractice doctrine as a defense, and in the course of his analysis, specifically distinguished the cases upon which defendants relied, including *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) and *Sheesley v. Cessna Aircraft Co.,* Nos. 02-4185, 03-5011, 03-5063, 2006 WL 3042793 (D.S.D. Apr. 20, 2006) (A.539-550) (holding that claim against third-party defendant flight school was educational malpractice barred under South Dakota law). He concluded that general negligence principles apply. *Glorvigen*, 2008 WL 398814, at *3-4. Judge Magnuson

then proceeded to examine the Minnesota law that he determined was controlling in this case:

> The Court finds the analysis in *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922 (Minn. 1986) instructive:
>
> > In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists. Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution.
>
> *Id.* at 924-25. . . .
>
> Here, by manufacturing an aircraft with an autopilot mechanism and including "transition training" as part of the aircraft's purchase price, Cirrus could have foreseen the injury as alleged in this case. The connection between Cirrus' allegedly negligent training and the Plaintiffs' claimed damage is not so remote that the Court can conclude that public policy requires awarding summary judgment in favor of Cirrus at this stage.
>
> . . .
>
> Under the unique facts of this case, the Court concludes that the law should "give recognition and effect" to the duty as Plaintiffs allege in their negligence causes of action. *See L&H Airco., Inc.* 446 N.W.2d at 378. Accordingly, the Court denies Cirrus' motion for Summary Judgment as it relates to negligence-based claims. In denying summary judgment, the Court expresses no opinion on whether Cirrus breached the duty or whether any breach caused the crash. *See Germann*, 395 N.W.2d at 924-25 ("[o]ther issues such as ... breach of duty and causation remain for jury resolution").

Glorvigen, 2008 WL 398814, at *4.

It is difficult to improve on this succinct and thoughtful analysis of the controlling Minnesota law. The manufacturer of a product, like Cirrus, has a duty imposed by law to

provide reasonable instructions for the safe use of its product, and to use reasonable care in conducting the transition training that Cirrus itself deemed necessary for pilots to safely fly the SR22 in an emergency.

B. Cirrus' Admissions And Undertakings Conclusively Refute The Court Of Appeals' Conclusion That Cirrus Did Not Owe A Duty Here

The duty of reasonable care in the context of product liability is "well developed." *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004). "The duty to warn includes the duty to give adequate instructions for the safe use of the product." *Id.* Moreover, determining whether a manufacturer provided adequate instructions and warnings, and thereby satisfied its duty of reasonable care, is a question of fact to be determined by the jury. *See, e.g., Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987) (advising that the jury determines "the adequacy of the warning, breach of duty and causation"); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 327, 79 N.W.2d 688, 694 (1956) (concluding that the trial court erred in directing the verdict because it was within the jury's province to weigh the testimony and evidence and determine whether the manufacturer provided adequate instructions and warnings).

As noted above, the court of appeals' majority questioned whether Cirrus had any duty to warn Prokop about the unique features of the SR22, and concluded that Cirrus had no duty to provide training to Prokop. With respect, those conclusions fly directly in the face of this Court's jurisprudence, and the uncontradicted record in this case:

- Cirrus admitted that transition training is standard practice in the aviation industry (T.587-88), a fact confirmed by the expert testimony of Capt. Walters (T.181);
- Cirrus sold transition training as part of the marketing of its sophisticated, high performance airplane (T.182, 245, 466, 489, 711-12, 1476);
- Cirrus admitted that despite his prior flight training and experience, Prokop needed the training prescribed by Cirrus in its training syllabus, specifically including Lesson 4a; as John Glenn Wahlberg admitted, that training "needed to be done" (T.626);
- Cirrus undertook to provide the high performance endorsement to Prokop, which was required by federal law, and without which Prokop could not take his new plane from the Cirrus facility. (T.182, 245, 466, 489, 711-12, 1476).

Based on these undisputed facts, the conclusion of the court of appeals that Cirrus had no duty is flatly wrong. Minnesota law imposes on a manufacturer of a product a duty reasonably to warn and instruct in the safe use of its product; the specifics of that duty vary depending on the nature of the product and the nature of the danger posed by the use of the product.

> In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a

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

Germann v. F. L. Smithe Mach. Co., 395 N.W.2d 922, 924-25 (Minn. 1986).

In a negligence case, the question will be whether the manufacturer acted reasonably in providing instructions and warnings for the safe use of its product. Simple products or minor dangers may require little, if any, instruction or warning; complex and highly dangerous products may require more. The extent of warning and instruction necessarily varies depending on the sophistication of the user, and the custom and practice in a particular industry. *See Bigham v. J.C. Penney Co.*, 268 N.W.2d 892, 897 n.4 (Minn. 1978) ("A condition is unreasonably dangerous if it is dangerous when used by an ordinary consumer who uses it with the knowledge common to the community as to the product's characteristics and common usages."); *McCormack v. Hankscraft Co.*, 278 Minn. 322, 333, 154 N.W.2d 488, 497 (1967) (considering whether the dangers of a product were obvious or "outside the realm of common knowledge of potential users"); 4A Minn. Dist. Judges Ass'n, *Minnesota Practice – Jury Instruction Guides, Civil,* CIVJIG 75.25 (5th ed. 2010). All of these factors inform a jury's determination of whether the manufacturer acted reasonably in discharging the duty imposed by law. However, the duty of reasonable care exists in every case.

Finally, if there is any remaining doubt that Cirrus and UNDAF, as its agent, owed a duty of reasonable care in providing instruction to Prokop for the safe operation of the SR22, the Court need only look to its numerous decisions recognizing that when a party undertakes a duty, it must exercise reasonable care in the discharge of that undertaking.

See, e.g., Lovejoy, 248 Minn. at 325, 79 N.W.2d at 693 (stating that it is well established that where a manufacturer "undertakes . . . to advise of the proper use to be made of a chattel, he assumes the responsibility of giving accurate and adequate instructions").

A manufacturer has a duty to provide adequate instructions for the safe use of its product. *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977). While the existence of a duty is a question of law for the court. *Balder*, 399 N.W.2d at 81, once a duty is found to exist, the question of whether a defendant has acted reasonably in discharging that duty is a question for the jury. *Id.* (instructing that the adequacy of the warning is a question of fact for jury resolution). The trial court properly determined that defendants owed plaintiffs a duty of reasonable care, and the jury had ample basis to determine that they breached that duty.

C. Cirrus And UNDAF Set The Standard Of Conduct

In both the district court and before the court of appeals, the defendants maintained that they had no such duty, and were being sued for breach of contract, which does not give rise to a negligence claim. That argument was properly rejected.

As the seller of a potentially dangerous piece of equipment, Cirrus had an obligation imposed by law to provide adequate instructions in the safe use of the SR22. Cirrus wrote a detailed curriculum to provide the requisite instructions. The jury concluded that the instructions that Cirrus itself considered reasonable and appropriate for the safe operation of the SR22 were not given to Prokop. Under established Minnesota law, the jury could consider Cirrus' undertaking to provide specific transition

training, and its failure to do so, in determining whether Cirrus was negligent in discharging its duty to provide adequate instructions for the safe use of its product.

While the contractual undertaking of Cirrus to provide specific training is relevant to plaintiffs' claims, it is not the source of the duty Cirrus owed to Prokop. In a negligence action, the duty of care does not arise from a contract but rather from the obligation imposed by law to use due care for the protection of others. *Rausch v. Julius B. Nelson & Sons, Inc.*, 276 Minn. 12, 19, 149 N.W.2d 1, 6 (1967). However, while the terms of a contract do not fix the duties of the parties to exercise reasonable care, contract terms can be considered in deciding the reasonableness of the conduct of those parties. *See Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 504-05 (Minn. 1997); *Dornack v. Barton Constr. Co.*, 272 Minn. 307, 317-18, 137 N.W.2d 536, 544 (1965).

In *Mervin v. Magney Construction Co.*, 416 N.W.2d 121 (Minn. 1987), this Court succinctly stated the rule that a contract does not define the standard of care – that is imposed by operation of law. The contract does, however, provide evidence of the standard of conduct which the jury may decide is reasonable, and if not met, may be found to be a lack of reasonable care.

In *Mervin*, the plaintiff claimed that a Corp of Engineers General Safety Requirements Manual, incorporated into a construction contract, established a standard of care, the breach of which was negligence *per se*. *Id.* at 124. After first rejecting the claim that the violation of a contract constitutes negligence *per se*, the Court explained that contractual terms are relevant to the determination of whether a party had acted

reasonably, and failure to comply with contractual requirements may be evidence of negligence.

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

416 N.W.2d at 124-25.

The defendants expressly recognized that a pilot such as Prokop who is transitioning to the technically advanced Cirrus SR22 would be in significant danger if he encountered VFR into IMC conditions. They also recognized the need for specific instructions on how to safely recover from that emergency situation, and developed a detailed curriculum to provide that instruction. The jury and the trial court could take into consideration evidence that defendants failed to provide what they sold as reasonable instruction when deciding whether the defendants breached their duty of reasonable care. *Cf. 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)[6] (evidence of a curriculum manual's provisions "was

[6] In *Anderson*, the Court distinguished and refined the analysis in *Larson* of ministerial versus discretionary duties as they impact governmental immunity, an issue not present here.

relevant for the jury's determination whether defendants breached the duty of care owed").

Under well established Minnesota law, the duty owed by defendants was the duty of reasonable care. That duty was imposed by law, and arose out of the sale of the product by Cirrus. The traditional test for liability in product liability cases based on negligence was whether the defendants' actions were reasonable, and the contract between Prokop and Cirrus was evidence that Cirrus's conduct was not reasonable.

D. Cirrus And Its Agent UNDAF Breached Their Duty Of Reasonable Care Owed To Prokop As The User Of A Dangerous Product.

Cirrus and UNDAF had a duty to act reasonably in providing instructions for the safe use of the SR22. The substance of the instructions is not in dispute. It was Cirrus' judgment that Lesson 4a was reasonable instruction for the safe use of the SR22 when a pilot goes from VFR into IMC conditions. And notwithstanding the fact that Cirrus provided other training materials, the jury could consider Cirrus' admission that the lesson "had to be given" and its failure to provide the complete course of prescribed instruction in assessing the reasonableness of defendants' conduct.[7]

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[7] Although the defendants contracted to train Prokop to proficiency, and although they certified to the FAA that Prokop was trained to fly a high performance plane, the tort duty they breached was the obligation reasonably to provide appropriate instruction. The defendants were not obligated to ensure that Prokop learned, but they were obligated by law to act reasonably in providing the instruction. The claim is that they did not give Prokop the chance to become proficient, because they skipped the lesson by which he would have learned proficiency.

Viewing the evidence at trial in a light most favorable to the verdict, it is clear that the jury concluded Cirrus and UNDAF did not act reasonably in providing that instruction, because the lesson was skipped, and because Cirrus officials did nothing to oversee Shipek's actual instruction of Prokop. Those are precisely the type of claims that resulted in liability in *Larson*, and it is no stretch of the law to impose liability in this case. Cirrus clearly owed a duty to Prokop, and the jury appropriately found that it had breached that duty. This Court should reverse the ruling of the court of appeals holding otherwise.

III. THE EDUCATIONAL MALPRACTICE DOCTRINE IS INAPPLICABLE IN THE CONTEXT OF TORT CLAIMS FOR INJURY AND DEATH

Because plaintiffs' claims were based on the failure of Cirrus reasonably to provide the instruction it had promised as part of the sale of its product, the defendants repeatedly tried to re-cast this case as an "educational malpractice" claim. But that characterization is inapt. This case was from the beginning a negligence claim based on the sale of a dangerous product, and the policy considerations previously embraced by this Court in such cases are not affected by the principles underlying the educational malpractice doctrine.

Educational malpractice generally describes claims asserting liability based on the broad failure of schools to adequately educate students. Courts have, in many instances, rejected such claims, doing so on equally broad policy grounds. *See* Glorvigen Br. at 39-45 Estate Br. at 23-24. For example, in *Alsides*, the court pointed to the lack of a clear standard of care, uncertainties in proving causation because measuring educational

"success" was at times uncertain, the difficulty in establishing limits on the scope of the claim, and the difficulty of courts in overseeing school operations. *Alsides*, 592 N.W.2d at 472. Those concerns are not present here.

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

The Connecticut Supreme Court has recognized the significant policy distinctions between a true educational malpractice claim (a student suing a school and claiming that the education received was substandard) and "a cognizable negligence claim arising in the educational context."

> We conclude . . . 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.

Doe v. Yale Univ., 748 A.2d 834, 847 (Conn. 2000) (internal citations omitted). *See also In re Air Crash Near Clarence Ctr.*, 2010 WL 5185106, at *6 (W.D.N.Y. Dec. 12, 2010)

(rejecting argument that negligence claims based on inadequate flight training are barred, despite controlling state cases barring educational malpractice claims on public policy grounds; cause of action challenging "narrow, specialized training provided to adults by a commercial institution" presented significantly different policy considerations than claims for damages based on inadequate education).

Appellant Glorvigen cites to a number of foreign cases which specifically addressed, and approved, claims similar to those presented here. *See* discussion, Glorvigen Br. at 32-35. *See also* Prokop Br. at 28-30. While this Court has not previously addressed claims based on an alleged failure to reasonably instruct in the aviation context, it has affirmed liability for personal injuries in the educational context based on nearly identical theories as those presented here – failure to follow a prescribed curriculum intended to provide instruction for the safety of the student, and failure to reasonably supervise the implementation of the curriculum.

In *Larson v. Independent School District No. 314, Braham*, 289 N.W.2d 112 (Minn. 1979), *overruled in part on other grounds*, *Anderson v. Anoka Hennepin Independent School District 11*, 678 N.W.2d 651, 657 (Minn. 2004), a student was injured in a junior high school gym class while trying to perform an exercise known as a running headspring over a rolled mat. The exercise was one of several exercises contained in a physical education curriculum guide promulgated by the Minnesota Department of Education. The curriculum guide called for teaching the exercise through a series of increasingly difficult exercises known as "progressions." Plaintiffs' claim was that having the student attempt the running headspring without first teaching the predicate

progressions was negligence on the part of the teacher. 289 N.W.2d at 116. In addition, they claimed that the school principal was personally and directly negligent in failing to adequately administer the physical education curriculum to ensure that progressions were being taught.

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

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

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

Application of the educational malpractice doctrine in the context of this case conflicts directly with this Court's decision in *Larson*. The court of appeals tried to distinguish *Larson* on the ground that the injury there occurred in the classroom and under the supervision of a teacher. *Glorvigen*, 796 N.W.2d at 556. However, the principal's personal negligence, which the jury found to be a direct cause of the student's injuries, took place outside of the classroom and long before the injury, facts which

conclusively refute the court of appeals' distinction. The principal failed to administer the physical education curriculum to ensure that reasonable instruction for the safety of the students was provided.

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

This case simply does not implicate the "educational and pedagogical factors" which were the court's concern in *Alsides* and similar cases. As the district court noted, to consider Cirrus' liability in this case did not require inquiry into the "nuances" of the curriculum. (Add.68-69.) Judge Magnuson reached the same conclusion when he rejected the very arguments that defendants advance here. And cases in other jurisdictions reach the same results. *See* Glorvigen Br. at 41-45.

The policy considerations that underlie the educational malpractice rule, whatever their merit in another context, do not carry the day in a tort case against a product manufacturer involving personal injury. To adopt the doctrine and then apply it in this case would be a dramatic and unwise abandonment of decades of established Minnesota law. It would significantly limit the duty to warn and instruct in product liability cases, and would significantly alter the tort liability of educational institutions. Neither result is wise, and neither result is necessary for a just resolution of this case.

CONCLUSION

Cirrus marketed and sold a sophisticated, high performance airplane. It recognized that the private pilots who bought that plane would need significant instruction in how to fly it safely. Cirrus undertook to provide the transition training, and made the availability of that training part of its sales program by including the cost of the training in the price of the plane. Both the established law of negligence in product liability claims and Cirrus' own actions imposed a duty on Cirrus to provide reasonable instruction for the safe operation of its sophisticated, high performance aircraft. Cirrus decided that a particular course of instruction would discharge that obligation, and undertook to provide that instruction. Unfortunately for the families of Gary Prokop and James Kosak, Cirrus and UNDAF failed to meet the standard of conduct they set for themselves. Whether Cirrus acted reasonably in discharging that obligation was a question properly submitted to the jury.

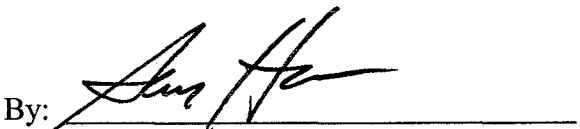
The negligence claim against Cirrus does not implicate the educational malpractice doctrine. Cirrus is not an educational institution, but a product manufacturer, and the harm to be guarded against was not an inadequate education, but significant personal injury or death. If the educational malpractice doctrine, which this Court has never embraced, applies in the product liability and personal injury contexts, then all a manufacturer need do to avoid liability for failure to warn or provide adequate instructions is to employ an educator to provide that information. And educators would be, in effect, immune from claims for personal injuries suffered by students whom they

instruct when the claims arise in the instructional context. Either result would be a staggering shift in well established law.

The decision of the court of appeals should be reversed, and the judgment of the district court based on the jury's verdict should be affirmed.

Dated: July 28, 2011

BRIGGS AND MORGAN, P.A.



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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Gartland, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 11,488 words, including headings, footnotes and quotations.

Dated: July 28, 2011

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