CASE 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,*

THOMAS M. GARTLAND, as Trustee for the Next-of-Kin of Decedent GARY R. PROKOP,

*Appellant/Cross-Respondent,*

vs.

CIRRUS DESIGN CORPORATION,

*Respondent,*

ESTATE of GARY PROKOP, by and through KATHERINE PROKOP As Personal Representative,

*Appellant/Cross-Respondent,*

UNIVERSITY OF NORTH DAKOTA AEROSPACE FOUNDATION,

*Respondent/Cross-Appellant.*

## BRIEF AND ADDENDUM OF *AMICUS CURIAE* AIRCRAFT OWNERS AND PILOTS ASSOCIATION

*(All Counsel Listed on the following Inside Cover Pages)*

2011-EXECUTEAM /BRIEF SERVICES DIV., 2565 Hamline Ave. N., Ste. A, St Paul, MN 55113 651-633-1443 · 800-747-8793

MATONICH & PERSSON
CHARTERED
David Arndt (#0149330)
Edward Matonich (#0068603)
Darrold Persson (#0085364)
2031 Second Avenue East
Hibbing, MN 55746
(218) 263-8881

BRIGGS AND MORGAN, P.A.
Sam Hanson
Diane B. Bratvold (#018696X)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8249

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

FAEGRE & BENSON, LLP
Bruce Jones (#0179553)
Daniel J. Connolly (#0197427)
Daniel J. Herber (#0386402)
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
(612) 766-7000

*Counsel for Respondent Cirrus Design Corporation*

ROBINS, KAPLAN, MILLER
& CIRESI, LLP
Philip Sieff (#0169845)
Vincent J. Moccio (#0184640)
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402-2015
(612) 349-8500

*Counsel for Appellant/Cross-Respondent Rick Glorvigen, as Trustee for the Next-of-Kin of Decedent James Kosak*

GASKINS, BENNETT, BIRRELL
SCHUPP, LLP
Timothy R. Schupp (#0130837)
Robert W. Vaccaro (#0313750)
333 South Seventh St., Ste. 2900
Minneapolis, MN 55402
(612) 333-9500

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

*(Additional Counsel listed on following pages)*

REED SMITH, LLP
Patrick E. Bradley
Tara E. Nicola
Princeton Forrestal Village
136 Main Street, Suite 250
Princeton, NJ 08540-7839
(609) 987-0050

*Counsel for Respondent Cirrus Design Corporation*

FLUEGEL LAW OFFICE
Wilbur W. Fluegel (#0030429)
150 South Fifth St., Suite 475
Minneapolis, MN 55402
(612) 238-3540

*Counsel for Amicus Curiae Minnesota Association of Justice*

OFFICE OF THE MINNESOTA ATTORNEY GENERAL
Alan I. Gilbert (#0034678)
John S. Garry (#0208899)
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2128
(651) 296-3353

*Counsel for Amicus Curiae State of Minnesota*

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

*And*

LEIB & KATT, LLC
William J. Katt
Corey J. Wright
740 N. Plankinton Ave., Ste. 600
Milwaukee, WI 53203
(414) 276-8816

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

OPPENHEIMER, WOLFF & DONNELLY, L.L.P.
Mark S. Olson (#0082120)
PlazaVII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7000

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

*(Additional Counsel listed on following page(s)*

OFFICE OF GENERAL COUNSEL
UNIVERSITY OF MINNESOTA
William P. Donohue (#0023589)
Deputy General Counsel
360 McNamara Alumni Center
200 Oak Street S.E.
Minneapolis, MN 55455-2006
(612) 624-4100

*Attorneys for Amicus Curiae*
*University of Minnesota*

MEAGHER & GEER, PLLP
William M. Hart (#0150526)
Damon L. Highly (#0300044)
33 South Sixth St., Suite 4400
Minneapolis, MN 55402
(612) 338-0661

*Attorneys for Amicus Curiae*
*MN Defense Lawyers Assoc.*
*MN Private College Council*
*& MN Career College Assoc.*

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 THE CASE

### Introduction

This case involves an airplane crash near Hill City, Minnesota, in January 2003. The aircraft was a Cirrus SR22 purchased in 2002 from respondent Cirrus Design Corporation. The owner was piloting the aircraft. The owner received his pilot's license in 2001 and logged approximately 225 hours of flight time, mostly in another aircraft.

At the time of purchase, Cirrus provided the owner with a Pilot's Operating Handbook and Federal Aviation Administration (FAA) Approved Airplane Flight Manual for the Cirrus Design SR22. The handbook is divided into ten sections. It provides detailed information on the safe operation of the aircraft. The autopilot system, which is central to this litigation, is described in section seven of the handbook.

Although FAA regulations did not require Cirrus to offer training, Cirrus included two days of "transition training" in the purchase price of the SR22. Transition training is a specialized type of training that is provided when a licensed pilot learns to fly a new type of aircraft. It is intended to teach the pilot the intricacies of the new plane that he or she will be flying.

The owner took advantage of the transition training included in the purchase price of the SR22 and separately contracted for an additional one and one-half days of flight training. Cirrus, in turn, contracted with respondent University of North Dakota Aerospace Foundation (UNDAF) to provide the transition training. The training materials

included an "Initial Training Syllabus" that detailed the "Cirrus Factory Training Course."

The owner's training consisted of five flights, totaling 12.5 hours of flight training, and 5.3 hours of ground instruction. The ground instruction included a two hour segment entitled "VFR into IMC Procedures SR20/22," and a PowerPoint presentation, all of which explained how to use the autopilot. Instruction on how to use the autopilot was also included in the "pre-training packet" that owners received and were expected to review prior to attending the training. The syllabus indicates that the owner completed the Final Evaluation Flight with a satisfactory grade and was awarded a certificate of completion and a high-performance endorsement.

On the morning of January 18, 2003, the owner intended to fly in the SR-22 from Grand Rapids to St. Cloud to attend a hockey tournament. The owner called FAA weather briefers twice that morning. At 4:56 a.m., he was informed of some low clouds. He called again at 5:41 and was informed of "marginal" conditions around Grand Rapids and that the sky was partially obscured with clouds. He told the briefer that he "was hoping to slide underneath it and then climb out." He departed from the Grand Rapids airport at approximately 6:30 a.m. Minutes later, the aircraft crashed, killing the owner and his passenger.

The Aircraft Owners and Pilot's Association (AOPA) supports the majority decision by the Minnesota Court of Appeals in this case. Specifically, AOPA agrees with the court's holding that (1) an airplane manufacturer's duty to warn does not include a

duty to provide pilot training and (2) negligence claims against flight training providers are barred when the essence of the claim is a failure to provide effective training. Beyond the legal issues that are presented by the parties on the issue of product liability and educational malpractice, AOPA wishes to use this *amicus* brief to apprise the court of policy implications this case has for aircraft manufacturers, flight training providers, and in turn, aviation safety in general.

It is AOPA's intention to provide a voice for members who are not parties to this case but who may be affected by the decision. AOPA is especially sensitive to the fact that this case presents a strong potential for unintended consequences that could impact its members—especially those providing or receiving flight training and education. AOPA has a strong interest in encouraging a legal environment where aircraft manufacturers and other flight training providers are willing to provide instruction at all levels. A ruling exposing (1) manufacturers who voluntarily provide training to claims under product liability theory and/or (2) flight training providers to second-guessing regarding the effectiveness of federally mandated flight training regimens will have a chilling effect on the flight training community. In turn, this will reduce the availability and quality of flight instruction for pilots. This is a result AOPA seeks to avoid.

AOPA[1] agrees with the statement of the first and third legal issues in the brief of Cirrus Design Corporation, as well as the most apposite cases, and with its statement of

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[1] Other than the identified *amici* and their counsel, no person has made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored the brief in whole or in part.

the applicable legal standard of review on this issue. AOPA takes no position on the remaining issues identified by Cirrus for review. AOPA agrees with the statement of the first legal issue in the brief of the University of North Dakota Aerospace Foundation, as well as the most apposite cases/statutes, and with it statement of the applicable legal standard of review on this issue. AOPA takes no position on the remaining issues identified by UNDAF for review.

## Identification of Amici

AOPA is a nationwide, non-profit, membership organization, incorporated under the laws of the State of New Jersey. Founded in 1939, AOPA has long represented the interests of its members in the field of general aviation, including their interests as they relate to aviation safety and pilot training. Membership in AOPA includes over 400,000 pilots and 60,000 flight instructors. AOPA, its membership, its history, its mission, and its activities, are described in detail on the Internet at www.aopa.org.

## Summary of Argument

One of AOPA's primary concerns is aviation safety. Aviation is a heavily regulated industry with virtually every aspect of operations and training being addressed in the Federal Aviation Regulations (FARs). In view of this, AOPA makes the following arguments in this *amicus* brief.

1. There is no legal duty for an aircraft manufacturer to provide pilot training.

2. As a matter of policy, the contract/fraud exception to the educational malpractice bar identified in the *Alsides* case should not be expanded to include negligence cases against highly-regulated flight training providers.

## Argument

### I. THERE IS NO LEGAL DUTY FOR AN AIRCRAFT MANUFACTURER TO PROVIDE PILOT TRAINING

AOPA applauds the fact that aircraft manufacturers are willing to provide "factory" training to aircraft purchasers. Several manufacturers beside Cirrus currently establish training programs (typically through third-party training facilities) for new aircraft purchasers and recurrent training. The additional choices and high quality instruction is a big plus for aviation safety.

In view of this, AOPA is concerned by the argument in this case that an aircraft manufacturer's duty to warn by providing adequate instructions for safe use includes a legal obligation to train the end user. AOPA disagrees with this contention. Neither the law nor the FAA has imposed a duty on aircraft manufacturers to train.

Minnesota law has never imposed a duty to train on manufacturers. The law in Minnesota is that "[W]here the manufacturer or the seller of a product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to give warning of such dangers." *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977). "To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury." *Gray v. Badger*

*Mining Co.*, 676 N.W.2d 268 at 274 (Minn.2004). The adequacy of a warning must be evaluated in light of the knowledge and expertise of those who may be reasonably expected to use the product. *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. App. 1984), *review denied* (Minn. Feb. 6, 1985). Manufacturers traditionally fulfill this obligation by providing written instructions/manuals.

AOPA concurs with the Court of Appeals observation that the argument this duty to warn requires a manufacturer to provide training is "unprecedented." There is no place in federal law or regulation supporting (or even suggesting) such a contention. AOPA further avers that creating, or even inferring such a duty would cause manufacturers to cease providing such training. This would come at a great expense to aviation safety.

As noted in the Court of Appeals decision, Cirrus fulfilled its duty to warn on the use of a Cirrus SR22 aircraft, to the extent it might have been obligated, by providing an FAA approved Flight Manual. See *Glorvigen v. Cirrus Design Corp*, 796 N.W. 2d 541 at 547 (Minn. App.2011). The Court of Appeals further recognized that the handbook provided "detailed instructions regarding how to activate and operate the autopilot." See *Glorvigen* 547.

Any contention that Cirrus's duty to warn extends beyond providing the FAA approved flight manual is without any foundation. The law has not imposed a duty to train or instruct on an aircraft manufacturer.

Neither has the FAA imposed a duty to train on aircraft manufacturers. The FAA has imposed a huge number of other requirements on aircraft manufacturers. The Federal

Aviation Regulations (often referred to as "FARs") include a pervasive scheme of requirements that must be adhered to by aircraft manufacturers. 14 C.F.R. §23 et seq. These requirements are in place for any manufacturer applying for an aircraft type certificate (such as the SR22). 14 C.F.R. §23.1. Essentially, Part 23 of the FARs lays out all standards and requirements that must be met before an aircraft manufacturer can bring an airplane to the marketplace.

The requirements include, but are not limited to the following standards:

(1) Flight (14 C.F.R. §23 Subpart B): This subpart includes forty-nine (49) detailed standards for flight characteristic/performance requirements including specific requirements for takeoff speeds, landing distance, trim, stall warnings, static longitudinal stability, spinning, etc.

(2) Structure (14 C.F.R. §23, Subpart C): This subpart includes seventy-one (71) detailed standards for structural requirements including control system loads, gust loads, unsymmetrical loads, side load conditions, etc.

(3) Design and Construction (14 C.F.R. §23, Subpart D): This subpart includes seventy-eight (78) detailed standards for the design and construction of aircraft including specific regulations for hinges, cable systems, joints, fasteners, hulls, ventilation, etc.

(4) Powerplant (14 C.F.R. §23, Subpart E): This subpart includes eighty-seven (87) detailed standards for aircraft powerplants (engines) including propellers, fuel flow, fuel system drains, oil radiators, cooling tests, ignition switches, firewalls, etc.

(5) Equipment (14 C.F.R. §23, Subpart F): This subpart includes fifty-five (55) detailed standards for any equipment that will be made a part of an aircraft including airspeed indicators, flight director systems, warning lights, riding lights, ice protection, hydraulic systems, automatic pilot systems, etc.

(6) Operating Limitations and Information (14 C.F.R. §23, Subpart G): This subpart includes thirty-one (31) detailed standards for operating limits and information that must be supplied by manufacturers including items such as powerplant limitations, oil quantity indicators, control markings, operating limitations, etc.

Again, it is noteworthy that with all of the detailed regulatory requirements in FAR Part 23 for aircraft manufacturers, there is no duty to train prospective pilots. There is simply no such duty created in any federal law or regulation.

In further support of the Court of Appeals observation regarding the flight manual, 14 C.F.R. §23.1581(a) specifically establishes a requirement for an aircraft manufacturer to furnish an airplane flight manual for each airplane manufactured. Among other things, the manual is required to provide information necessary "for safe operation because of design, operating or handling characteristics." See 14 C.F.R. §23.1581(a)(2).

In this case, Cirrus met all FAA requirements in place for the design and manufacture of an automatic pilot system. See 14 C.F.R. §23.1329. Further, Cirrus met all legal requirements with respect to furnishing information related to the SR22 with its Airplane Flight Manual that was approved by the FAA as required by 14 C.F.R. §23.1581.

Thus, Cirrus did everything required by the FAA of an aircraft manufacturer as well as everything required by Minnesota law. The Airplane Flight Manual met any legal duty that Cirrus may have had to warn. There is no basis to imply a duty for a manufacturer to train an aircraft purchaser.

## II. AS A MATTER OF POLICY, THE CONTRACT/FRAUD EXCEPTION TO THE EDUCATIONAL MALPRACTICE BAR IDENTIFIED IN THE *ALSIDES* CASE SHOULD NOT BE EXPANDED TO INCLUDE NEGLIGENCE CLAIMS AGAINST HIGHLY REGULATED FLIGHT TRAINING PROVIDERS.

AOPA agrees with the Court of Appeals holding that the contract/fraud exception to the educational malpractice bar identified in *Alsides v. Brown Inst., Ltd.*, 592 N.W. 2d 468 (Minn. App. 1999) should not be expanded to include negligence claims against flight training providers. This is not to say that a flight training provider should never be liable for its training. AOPA acknowledges that flight training providers are liable for breach of contract or fraud claims when training promised is not delivered. AOPA further acknowledges that flight training providers may be held liable for negligent acts that cause harm during the course of training (e.g.--when the instructor is present in the aircraft). However, flight training providers should not be held liable for negligence once the training provided is completed or terminated.

As with aircraft manufacturers, there is also a pervasive scheme of well-established federal law and regulations in place choreographing virtually every facet of piloting and flight training. This pervasive scheme allows and encourages flight training providers to exercise flexibility and judgment in the application of a training syllabus. To allow for educational malpractice claims that question the effectiveness of training will cause confusion and uncertainty among flight training providers. AOPA is concerned that

this result will negatively impact flight safety by causing flight training providers to discontinue certain types of training.

### A. All U.S. Aviation Activities Are Pervasively Regulated By Federal Law and Rules.

As stated above, aviation is one of the most highly regulated activities in the United States. From the time a neophyte pilot begins training to the time he/she commands his/her last flight as an airline captain, the Federal Aviation Regulations (FARs) (14 C.F.R. et seq.) play a hand in every aspect of training and virtually every decision and every subsequent action in operations.

A brief overview of the regulatory framework for private pilot flight training, flight instructors, and high performance training (all relevant in this case) follows. The purpose of this overview is to offer some insight as to the detailed regulatory scheme that permeates all aspects of flight training, including training for a high-performance aircraft.

1. Regulatory Framework for Private Pilot Training

All private pilots must meet detailed standards laid out in 14 C.F.R. §61.102 et seq. (Subpart E). 14 C.F.R. §61.103 details general eligibility requirements for private pilots, including successful completion of written knowledge and practical tests.

14 C.F.R. §61.105 describes the requisite aeronautical knowledge for private pilots including the FARs, use of navigational charts, radio communications, and recognition of crucial weather situations, procurement and use of aeronautical weather reports and forecasts.

14 C.F.R. §61.107 of the FARs provide a high level of detail in evaluating flight proficiency. This section refers to at least twelve (12) specific areas of operation, including instrument maneuvers, where an applicant for a private pilot certificate must demonstrate competency in performance.

14 C.F.R. §61.109 includes detailed regulatory requirements for aeronautical experience. The requirements include cross-country flight hours. A specified ten (10) hours of solo flight time. Perhaps most relevant to this case, the rules require three (3) hours of flight training in a single-engine airplane where the pilot operates solely by reference to instruments. See 14 C.F.R. §61.109(a)(3).

By the time a typical private pilot gets to operate a high-performance aircraft (like the Cirrus SR22 involved in this cases), he/she would have been tested and found competent in all areas of aeronautical knowledge, flight proficiency, and aeronautical knowledge spelled out in detail in the FARs.

Furthermore, the FAA expands upon its detailed regulatory requirements in FAA in its "Private Pilot Practical Test Standards" ("PTS"). These standards are issued by the FAA's Flight Standards Service and designated as FAA publication number FAA-S-8081-14A. Within the PTS, there are over one hundred pages listing tasks and maneuvers where a private pilot must demonstrate proficiency.

The private pilot training regimen is very carefully detailed in the regulations and the PTS. Similarly, detailed regulations and PTS standards exist for commercial (see 14 C.F.R. §61.121 et seq. and FAA-S-8081-12B), airline transport pilot certificates (see 14

C.F.R. §61.151 et seq. and FAA-S-8081-5F), and instrument ratings (see C.F.R. §61.65 and FAA-S-8081-4E).

A pilot who earns a private pilot certificate has demonstrated competence in basic airmanship, aviation weather, navigation, landings, take-offs and numerous other complex skills and competencies. Contrary to the analysis drawn in the dissenting opinion, this is not a case of presenting instructions on how to operate a coffee pot. By the time a pilot reaches transition training to a high performance aircraft, he/she is a sophisticated user of a sophisticated product. This is high level training and should be recognized as such.

2. Flight Instructors

Flight instructors are highly trained aviation professionals. The FAA's definitive guide for flight instructors, the "Aviation Instructor's Handbook" (FAA-H-8083-9A) includes the following chapters and topic matter that must be mastered by all flight instructors:

Chapter 1: Human Behavior

Chapter 2: The Learning Process

Chapter 3: Effective Communication

Chapter 4: The Teaching Process

Chapter 5: Assessment

Chapter 6: Planning Instructional Activity

Chapter 7: Instructor Responsibilities and Professionalism

Chapter 8: Techniques of Flight Instruction

Chapter 9: Risk Management

In order to become a flight instructor, an applicant must (among other requirements):

1. Hold a commercial pilot or airline transport plot certificate (14. C.F.R. §61.183(c)(1);

2. Pass a knowledge test; and

3. Pass a practical (flight) test.

Flight instructors must also remain current. Every two years, a flight instructor must renew his/her flight instructor certificate through practical tests, flight instructor refresher courses, or military instructor proficiency check rides. See 14 C.F.R. §61.197.

All of the requirements for flight instructor certification and renewal are found in 14 C.F.R. §§61.181 to 61.199. The requirements for earning and maintaining a flight instructor certificate are rigorous and subject to extensive regulation. See also FAA-S-8081-6C (Practical Test Standards for Flight Instructor—Airplane).

As noted above, it is only a highly-trained, individual, flight instructor who can endorse a pilot to operate high-performance airplanes. The FAA places great faith and trust in its certificated flight instructors to make the system work. Faithful adherence to the FAA's regulatory scheme is central to that trust. Ad hoc requirements emanating from courts and juries will clearly muddle this time-tested system.

3. Additional Training for High-Performance Airplanes

When a pilot purchases a new high-performance aircraft like a Cirrus SR22, he/she may not be legally qualified to operate the aircraft. In order to become qualified, he/she may be required to obtain additional training in accordance with 14 C.F.R. §61.31(f)(1)(i). See CA-82. This regulation states that no person may act as pilot-in-command (PIC) in a high-performance aircraft (an aircraft with an engine of more than 200 horsepower) unless that person (1) receives and logs ground and flight instruction from an authorized instruction in a high-performance aircraft and (2) is found proficient in the operation and systems of the aircraft. Note that the regulation does not require the pilot to receive training in a Cirrus SR22 aircraft. The pilot will be legally qualified to fly a new Cirrus as long as he/she had an appropriate logbook endorsement from an instructor who provided flight and ground instruction related to *any* high-performance aircraft. In fact, it should be further noted that contrary to the assertion in the Minnesota Association of Justice's *amicus* brief that the Cirrus SR22 is an unusually complex aircraft, the SR22 is not considered a complex aircraft under the FARs. "Complex" aircraft require retractable landing gear—a feature not found in the SR22. See 14 C.F.R.§61.31(f)(1) for the definition of a complex airplane. Further, there are many other aircraft that meet requirements for high performance training. Cessna 205s and 206s along with Piper Cherokee Six and Saratoga aircraft are all considered high-performance aircraft under the FARs. A high-performance sign-off in any one of these aircraft would be sufficient to operate other high-performance aircraft (such as the SR22).

4. Endorsement for High-Performance Aircraft

Therefore, the real question to be addressed in cases of additional training for high performance aircraft is whether requirements 14 C.F.R. §61.31(f)(1)(i) are properly met. That is, is the pilot in question proficient in the operations and systems of the Cirrus SR22 aircraft *at the time the additional training for high-performance airplanes is completed*?

The only requirements of legal import in flight training should emanate from the FARs, not common-law tests established through a state court applying common law negligence theory. In this case, there has been inappropriate focus on a syllabus that was not required by the FAA to accomplish the training undertaken (additional training in a high-performance airplane). Again, the requirements for such training are not found in a syllabus, they are found in the FARs, specifically in 14 C.F.R. §61.31(f)(1)(i). A syllabus may be useful as a means to an end—a safe, proficient pilot. However, a syllabus is not an end—it does not substitute for the definitive rules established by the FAA and, as discussed below, the judgment and discretion of a certificated flight instructor.

There is nothing to stop a flight school from adapting its own syllabus or curriculum to train private pilots (or for other training purposes). However, the pilot will only be able to earn certification, or, as in this case, a logbook endorsement, if they meet the specific requirements of the FARs. The FARs offer the only definitive training requirements and ends recognized by the FAA. There is no syllabus that can replace the detailed regulatory framework, and the judgment of a certificated flight instructor, for purposes of flight training.

**B. Aviation Safety Requires Flight Training Flexibility**

The FAR requirements for additional training in high-performance aircraft are broadly stated. However, that is for good reason—the high-performance endorsement permits a qualified pilot to operate any high performance aircraft. The endorsement is not limited to the aircraft utilized for the high-performance training.

FAA advisory literature helps to articulate another important reason for the broadly stated goal of proficiency as it relates to high performance sign-offs. In FAA Advisory Circular 61-98A ("AC 61-98A"): *Currency and Additional Qualification Requirements for Certificated Pilots*, the FAA presents advisory materials designed to provide information for certificated pilots and flight instructors for use in complying with FAR §61.31.[2] Specifically, in Chapter 4 of AC 61-98A, the FAA states: "In order to properly structure and record transition training in a high performance airplane, the certificated flight instructor (CFI) should plan a transition program tailored to the needs of the pilot requesting the training." The FAA goes on to provide a suggested format for developing a plan indicating that the intent is "[to incorporate elements in a referenced publication]... yet still provide the CFI with flexibility in developing an individual transition guide tailored to a specific pilot's needs. The CFI may wish to retain the completed guide as a record of the scope and content of the transition training given, even though the record is not required by FAR § 61.189."

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[2] FAA Advisory Circulars (ACs) are publications issued by the FAA to provide guidelines on certain FAA subject matter. The FAA publishes ACs on a wide-variety of topics. A list and complete text of FAA ACs can be found at www.faa.gov.

AC 61-98A's suggested format for a sample transition training plan includes ground instruction and flight instruction. With reference to the case at hand, it is noteworthy that the FAA suggests ground instruction with respect to: "Flight Instruments, Avionics, and Autopilot (if appropriate)." However, there is no suggestion to carry over any training on autopilot operation to the flight instruction portion of the sample training plan. A careful review of the FAA's sample training plan in AC 61-98A supports everything accomplished in the training program provided in this case--including the ground training for autopilot operations.

It is important to note that the AC 61-98A's guidance emphasizes the need for "individualized transition" and "flexibility." The emphasis in AC 91-68A on flexibility is echoed in the more recent version of the FAA's Aviation Instructor's Handbook (FAA-H-8083-9A). Chapter 6 of the handbook discusses the use of a training syllabus. In the handbook, the FAA states: "...adherence to a syllabus should not be so stringent that it becomes inflexible or unchangeable. It must be flexible enough to adapt to the special needs of individual students" (at 6-5). The FAA handbook also states that "[a]ny practical training syllabus must be flexible and should be used primarily as a guide" (at 6-4).

As stated earlier, one of AOPA's primary misgivings is the unwarranted attention devoted in this case to an allegedly skipped item or flight in a training syllabus. A syllabus is not a checklist. In the case of a high-performance check out, an instructor may

purposely or inadvertently omit a particular item on a syllabus.[3] But in the end, that instructor needs to make a judgment as to whether the pilot involved is proficient enough to operate a high-performance aircraft.

Syllabi cannot replace the judgment of a flight instructor. AOPA wants to avoid a scenario where litigation causes flight instructors to become slavishly attentive to a syllabus and treat it as a checklist instead of focusing on the appropriate end—proficiency in the aircraft's operations and systems by the end of a training program. It is conceivable that flight schools will do away with helpful syllabi in an effort to avoid the liability exposure they would create for high-performance (or other types of) airplane training. As discussed above, it is also conceivable that aircraft manufacturers who provide the type of no-cost training provided in this case will simply terminate the service due to the liability exposure.

As argued above, questions regarding pilot proficiency are regulatory questions, not questions for the courts. A close look at the final evaluation flight items in Exhibit 4 indicates that the flight included a very thorough examination of pilot skills in the SR22. See A-158. In fact, the flight included in the Cirrus program/syllabus covered every item that is recommended by the FAA in AC 61-98A. Further, the ground topics listed as covered in Exhibit 4, covered all items suggested in the AC 61-98A. The pilot in this case

[3] The syllabus in this case did not require that students perform every maneuver. In fact, it provided that maneuvers graded "unsatisfactory" or "marginal" could be "discontinued and remain incomplete at the instructor's discretion." Also, the syllabus clearly contemplated skipped items. Every lesson page indicates that "Skipped items should be left unchecked."

was provided two hours of ground instructions that included PowerPoint presentations and other materials related to autopilot operation. This is precisely what the FAA recommends in its advisory materials—ground training on the use of the aircraft's autopilot. See ADD-24.[4] When FAA suggested training/evaluation plans are complied with, courts/juries should not be allowed to second-guess a flight instructor.

A reversal of the Court of Appeals decision in this case will negatively impact safety by encroaching on the flexibility and discretion that flight instructors should exercise in the course of their duties. Indeed, the FAA strongly encourages the exercise of such judgment and discretion. It would be a setback for aviation safety if flight instructors and flight schools were more interested in syllabi than real-time evaluations of pilots and pilot training needs.

**C. As A Matter of Policy, Flight Training Providers Should Not Be Burdened With an Open-Ended Liability After Training Is Complete.**

Another troubling aspect in this case is the lack of a reasonable measure for terminating the liability of a flight instructor. After a student is endorsed for particular operations (such as a high-performance endorsement), when does the instructor's liability end?

An instructor may find that a pilot meets the standards of proficiency and competency on the date signed off. This is the judgment call of an instructor at the time

[4] ADD references the Addendum attached to this brief.

the instructor evaluates a student. It is made in real time and based on the experience and discretion of a flight instructor.

However, in aviation (as well as in many other human endeavors) the performance of a pilot can vary widely from one day to the next. A pilot who may be able to meet proficiency standards one day, may not be able to fly to those same standards the next. There is no way to deny this very human element when trying to assign liability or fault when things go wrong after training ends.

In the case at hand, the issue is further muddied by the fact that the pilot involved continued his instrument flight training directly after obtaining his high performance endorsement. See CA-51. When does the responsibility of a previous instructor for prior training end and the new responsibility begin? The hazards in answering this question are obvious—all the more reason to keep this question out of the courts.

In *Hubbard v. Pac. Flight Servs., Inc.* 2005 Cal. App. Unpub. LEXIS 9678 (October 25, 2005), the defendant rented an aircraft to a pilot who graduated from its flight school. The pilot was making a flight two weeks after receiving his private pilot certificate. In denying the plaintiff's claim of negligent training, the court reasoned that a "flight school, like a driving school, cannot anticipate and train for every possible hazardous situation. Having adequately trained [the pilot] to the point where he obtained his pilot's license, [the flight school's] duty to train should terminate at that point." *Hubbard* at *27-28.

This case also begs the question of pilot in command responsibility for her own training and subsequent performance. The FARs clearly state that: "The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of the aircraft." 14 C.F.R. §91.3(a). Substantial privileges inure to a pilot in command. With those privileges comes the responsibility to ensure that he/she is capable of operating the aircraft and understanding its systems. If the pilot in command is not fully competent due to time-induced erosion of skills, weather that exceeds their capabilities, or any other reason, she is responsible for ensuring they get the training to safely execute their responsibilities as pilot in command.

## CONCLUSION

Neither the law nor the FAA imposes a duty to train on aircraft manufacturers. Where the manufacturer or the seller of a product has actual or constructive knowledge of danger to users, the seller or manufacturer has a duty to warn of such dangers. However, contrary to contentions made in this case, the duty to warn does not create a duty to train. Aircraft manufacturers are thoroughly regulated by the FAA when it comes to issues of design and manufacturing. Any duty to warn is satisfied by the delivery of FAA approved airplane flight manuals. There is simply no duty for airplane manufacturers to train pilots on the use of their aircraft. Any such endeavor by a manufacturer is purely voluntary. The willingness of manufacturers to provide training, which enhances aviation safety, should not be threatened by product-liability exposure.

In addition, AOPA agrees with the Court of Appeals that the educational malpractice doctrine should apply to aviation instruction, Flight training is, and should continue to be regulated by federal law and regulations, not courts and juries. Allowing courts to second-guess flight instructors who endorse a student for operations based on demonstrated proficiency at the time of endorsement will only serve to lessen flight safety. Instructors may tend to either slavishly rely on syllabi or jettison them altogether—with negative impacts on flight safety. Further, the unanswered question regarding when liability may end will create uncertainty in the flight training community. It is not a stretch to imagine that with the open-ended liability tail created by the trial court's decision, schools and manufacturers will opt to abandon training programs. This would, no doubt, have a negative impact on aviation safety. These are precisely the sort of unintended consequences—consequences foreseen in *Alsides* --that should be avoided.

The decision of the Minnesota Court of Appeals should be affirmed.

Respectfully submitted,

Robert J. Hajek, #39512
HAJEK & BEAUCLAIRE, LLC
601 Carlson Parkway, Suite 1050
Minnetonka, MN 55305
Tel: 612.801.5076
Fax: 1.800.405.4530

and

Kenneth M. Mead
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Ave. NW
Washington, DC 2004-2400
202.639.7744

and

Ronald D. Golden, Esq.
Raymond C. Speciale, Esq.
YODICE ASSOCIATES
411 Aviation Way
Frederick, MD 21701
301.695.2300

Attorneys for *Amicus Curiae*
Aircraft Owners and Pilots Association

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Times New Roman 13 point or larger. The length of this brief is 6,097 words. This brief was prepared using Microsoft Word 2000.

By: _____
Robert J. Hajek, #39512