

**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).*

**RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT  
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AS PERSONAL REPRESENTATIVE**

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## STATEMENT OF LEGAL ISSUES FOR CROSS-REVIEW

- I. Was there sufficient evidence of the causal fault of Cirrus and UNDAF where the jury considered evidence that Cirrus and UNDAF undertook to provide Prokop with transition training, where they omitted an admittedly important and necessary flight lesson covering emergency procedures for inadvertent VFR into IMC flight, and where the crash that killed Prokop and Kosak resulted from the exact condition against which that flight lesson was intended to guard?

The district court carefully reviewed the evidence and found the jury properly considered and resolved the issue of causation. The court of appeals did not reach this issue.

### Apposite Authorities:

*Ponticas v. K.M.S. Investments,*  
331 N.W.2d 907 (Minn. 1983)

*Roman v. Minneapolis St. Ry. Co.,*  
268 Minn. 367, 129 N.W.2d 550 (1964)

*Smith v. Kahler Corp., Inc.,*  
297 Minn. 272, 211 N.W.2d 146 (1973)

- II. Was judgment properly entered against UNDAF where UNDAF intervened as a defendant in this case, fully and actively participated in the relevant proceedings through trial, and the jury determined it was acting as an agent of, and in a joint enterprise with, Cirrus?

The district court entered judgment against UNDAF jointly and severally based on the jury's verdict. The court of appeals did not reach this issue.

### Apposite Authorities:

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

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

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

## INTRODUCTION

Cirrus and UNDAF contend the issue on appeal is whether a “duty to train” should be broadly imposed upon manufacturers in Minnesota courts as a matter of law. With that premise laid, they advance the various potential complexities inherent in, and unintended consequences that could flow from, the imposition of such a duty—all of which can be avoided, they claim, through rejection of appellants’ position. But this issue need not be addressed, because neither the Estate of Gary Prokop (the “Estate”) nor the other appellants have sought this claimed expansion of law, and the Court’s adjudication of this appeal does not require it.

Respondents’ witnesses at trial acknowledged that the interactive instructions they offered to Prokop as part of his purchase of the SR22, specifically including the emergency autopilot procedure to be executed in the event a VFR-rated pilot encountered the same conditions in which Prokop and Kosak died, were important and necessary for a pilot to understand how to safely operate the airplane, and should have been given. As part of their defense at trial, respondents claimed that these instructions had, in fact, been given to Prokop, and that there was no basis on which to find they performed the transition training negligently. The jury considered all of this evidence and disagreed. It found that Cirrus and UNDAF were negligent, that their negligence was a direct cause of the accident, and that damages resulted. Respondents seek to reargue many of the facts that the jury received, considered, and appropriately resolved at trial.

Allowing the verdict to stand in this case will not effect any dramatic change in product liability or negligence law, as claimed. To the contrary, overturning it will grant immunity to those who perform obligations negligently and whose conduct results in foreseeable harm.

This negligence case also should not turn on a question of semantics. Whether Cirrus's and UNDAF's activities are considered flight training, or provision of instruction or instructions, the jury considered various evidence at trial that (1) Cirrus agreed, as part of the purchase price of the SR22, to conduct a highly specialized form of factory transition training that it deemed important and necessary for the safe use of its product; (2) Cirrus claimed that it did, in fact, accomplish the training, specifically including the challenged flight lesson; and (3) shortly after completing this course of training, Prokop and Kosak died in the exact condition against which a flight lesson that evidence indicated was omitted was undisputedly intended to guard. The jury weighed the credibility of the witnesses, and ultimately found liability on the part of respondents. The jury found some fault on the part of Prokop, too.

Under the applicable standard of review, the verdict should be affirmed if there is any competent evidence reasonably tending to sustain it, considered in the light most favorable to the prevailing party. In fact, ample evidence supports it. The Estate therefore respectfully requests that the decision of the court of appeals be reversed.

## ARGUMENT ON CROSS-REVIEW

### I. STANDARD OF REVIEW

The weighing of “conflicting testimony and determining witness credibility is within the province of the jury.” *Tsudek v. Target Stores, Inc.*, 414 N.W.2d 466, 469 (Minn. Ct. App. 1987), *review denied* (Minn. Dec. 18, 1987) (citing *Young v. Wlazik*, 262 N.W.2d 300, 310 (Minn. 1977)). Moreover, because it is the jury’s function to determine credibility, review of a jury verdict is even more limited when the decision rests, as here, on weighing the credibility of witnesses. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256 (Minn. 1980) (Court held that, in the review of jury verdicts, “we permit ourselves only a limited role.”).

“A jury determination of causation, like negligence, ‘will not be upset unless the court finds it to be manifestly contrary to the weight of the evidence.’” *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980) (quoting *Lamke v. Loudon*, 269 N.W.2d 53, 56 (Minn. 1978)); *Seivert v. Bass*, 288 Minn. 457, 466, 181 N.W.2d 888, 893 (1970) (it is for the jury, in “the exercise of its broad powers with respect to the drawing of inferences from the evidence, to determine the issue of causation.”). Indeed, “[i]t is only in those cases where the evidence is so clear and conclusive as to leave no room for differences of opinion” among reasonable people that causation is an issue of law for the court. *Seivert*, 288 Minn. at 466, 181 N.W.2d at 893.

Here, the trial court entered judgment against Cirrus and UNDAF after it denied

their motions for judgment as a matter of law. The trial court's decision must be affirmed if "there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). The evidence is to be examined "in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Id.*, 582 N.W.2d at 224 (citing *Stumne v. Village Sports & Gas*, 309 Minn. 551, 552, 243 N.W.2d 329, 330 (1976)). This analysis "admits every inference reasonably to be drawn from such evidence, as well as the credibility of the testimony for the adverse party . . ." *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979) (citation omitted).

## **II. AMPLE EVIDENCE SUPPORTS THE JURY'S DETERMINATION OF CAUSATION.**

Cirrus and UNDAF seek to affirm the decision of the court of appeals on an alternative ground that causation was insufficient as a matter of law. UNDAF calls it "rank speculation" that anything it "did or did not do caused the crash." (UNDAF Br. at 41.) Cirrus similarly challenges the "causal link" between an omission of Flight 4a from its transition training program and the crash. (Cirrus Br. at 67.) Respondents' claims are both grounded on the contention that Captain Walters provided speculative expert opinions at trial.

UNDAF specifically argues that Captain Walters assumed Prokop did not know how to use the autopilot, and, because there is no evidence that Prokop tried to use the

device before the crash, the verdict was against the entire evidence. (UNDAF Br. at 43.) Similarly, Cirrus references Captain Walters' testimony at trial acknowledging that he could not determine whether Prokop attempted to use the autopilot or if Prokop "in his head . . . wanted to use the autopilot[.]" (Cirrus Br. at 68.)

With respect, Cirrus's and UNDAF's analysis turns the applicable standard of review on its head, essentially seeking the Court's review of the evidence in the light most favorable to *their* position, and reversal of the jury's verdict if there is any competent evidence that does *not* reasonably tend to sustain the verdict. In doing so, Cirrus and UNDAF gloss over the various evidence submitted at trial with respect to causation, which is a classic fact issue for the jury.

In order for a party's negligence to be the proximate cause of an injury, "it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen." *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 915 (Minn. 1983). The negligent act is considered a proximate cause of harm if it was a "substantial factor" in bringing about the harm. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008). One cause is sufficient to establish liability even "though other causes may have joined in producing the final result." *Roman v. Minneapolis St. Ry. Co.*, 268 Minn. 367, 379, 129 N.W.2d 550, 558 (1964).

Proximate cause is generally a question of fact for the jury, and its determination “must stand unless manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Smith v. Kahler Corp., Inc.*, 297 Minn. 272, 279, 211 N.W.2d 146, 151 (1973) (quoting *Seivert*, 288 Minn. 457, 466, 181 N.W.2d 888, 893). Proximate cause becomes a question of law only “when reasonable minds could reach only one conclusion[.]” *Canada, By & Through Landy v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997).

Circumstantial evidence is sufficient to sustain a negligence verdict. As the Court in *Smith v. Kahler Corp., Inc.* observed:

Circumstantial evidence which justifies an inference in support of the verdict upon the issue of negligence is adequate to sustain the verdict, even though it may justify other conflicting inferences, if the supporting inference reasonably outweighs and preponderates over the other conflicting inferences and theories.

297 Minn. at 276, 211 N.W.2d at 150 (quoting *Knuth v. Murphy*, 237 Minn. 225, 230, 54 N.W.2d 771, 775 (1952)). It is the role of the jury, not the court, to draw inferences. *Id.* (citing *Gardner v. Coca Cola Bottling Co.*, 267 Minn. 505, 127 N.W.2d 557 (1964)).

Here, the jury heard substantial evidence linking respondents’ negligence to the crash. Shipek acknowledged that he was supposed to accomplish the tasks identified in the training syllabus, and that the VFR into IMC emergency procedure was an important maneuver to teach. Tr. 768; 792. Shipek testified that he conducted the lesson, but that it was simply not documented. Tr. 792. Shipek testified that he conducted this training

“under the hood,” although there was no hood time recorded in Prokop’s log book. Tr. 796-798. Shipek described the omission as a “clerical error on my part.” Tr. 798. Shipek’s credibility on the training issues was for the jury to consider.

Captain Walters testified that, on the morning of the fatal flight, Prokop entered “IMC-like” conditions that prevented him from being able to fly VFR, and that this circumstance was part of the “root cause” of the crash. Tr. 222-223. In addition, Captain Walters testified that Mr. Prokop did not use the autopilot during the flight but was hand-flying the aircraft, a conclusion with which Cirrus’s expert agreed. Tr. 223-224; 1552-1553. Captain Walters testified that, had the autopilot been used at a reasonably early point in the unfolding of the incident, it “would have prevented the accident.” Tr. 224; 274.

Captain Walters’ opinions at trial implicated precisely the transition training that Cirrus, through UNDAF, failed to provide to Prokop. This training was critically important to resolving the difficulties presented by a VFR-rated pilot encountering IMC-like conditions in the SR22.

Cirrus and UNDAF rely heavily on *Gerster v. Estate of Wedin*, 294 Minn. 155, 199 N.W.2d 633 (1972), but the case is distinguishable. In *Gerster*, the trial court granted a judgment notwithstanding the verdict following the jury’s determination that defendant’s decedent started an apartment fire due to his careless smoking. In doing so, the trial court held that there was:

absolutely no factual foundation for Mr. Braun's [city fire marshal] inference that careless smoking was a direct cause of the fire. Here there was no proof either from Mr. Braun's investigation or from other evidence submitted from which an inference could be reasonably drawn that smoking caused the fire, that any smoking was in fact carelessly done, or that Mr. Wedin was the careless smoker.

294 Minn. at 160, 199 N.W.2d at 636.

In contrast to the complete lack of evidence in *Gerster*, here both experts agreed at trial that Prokop was hand-flying the airplane in the moments leading up to the crash. In addition, Steven Day, Prokop's flight instructor, testified that after Prokop's factory training on the SR22, Prokop indicated either that he did not "know how to turn the autopilot on" or did not "know how to use the autopilot," which surprised Day because he thought Prokop would have been more familiar with the aircraft's avionics at that time. Tr. 1184-1185. Day also testified that Prokop was a very good, dedicated, and intelligent student. Tr. 1172. This evidence supports a reasonable inference that Prokop did not perform the VFR into IMC maneuver—a maneuver he was supposed to be able to execute—because he did not obtain the transition training Cirrus and UNDAF claimed he was given.

Contrary to Cirrus's claims, direct evidence did not need to be presented as to whether Prokop had actually attempted to engage the autopilot before the crash or whether Prokop "in his head . . . wanted to use the autopilot[.]" If that were the applicable standard, causation could rarely, if ever, be established. Because there was

ample non-speculative evidence for the jury to consider on the question of causation, and because Cirrus and UNDAF cannot reasonably contend the evidence is “so clear and conclusive as to leave no room for differences of opinion” on the matter, the jury’s determination as to causation should stand.

**III. THE DISTRICT COURT PROPERLY ENTERED JUDGMENT AGAINST UNDAF.**

UNDAF intervened and fully participated in this case through trial. A jury determined it was negligent and operated in a joint enterprise with Cirrus. UNDAF now contends it cannot face liability. This issue is directed specifically at appellants Gartland and Glorvigen, and, in the interests of judicial efficiency, the Estate joins in the arguments appellant Gartland makes in its response brief on this issue.

## REPLY ARGUMENT ON REVIEW

### **I. THE COURT SHOULD AFFIRM THE JURY'S VERDICT, AND IT NEED NOT IMPOSE BOUNDLESS DUTIES TO DO SO.**

#### **A. Appellants do not seek the imposition of novel duties on manufacturers, but affirmation of the jury's determination that transition training a manufacturer and its agent undertook to perform was negligently done, causing injury.**

In urging the Court to affirm the decision of the court of appeals, Cirrus characterizes this appeal as involving the broad issue of whether Minnesota courts should impose on product manufacturers a common law duty to train in the use of products that involve a foreseeable risk of injury. *See, e.g.*, Cirrus Br. at 19. But that question has never been at issue here. This case concerns Cirrus's duty, as a manufacturer of a highly complex and potentially dangerous product, to provide adequate instruction on the safe and proper use of that product.

Cirrus and UNDAF seek a holding that they should be absolved from any claims related to its transition training, no matter how negligent a jury might determine them to be, or what injury might flow from that negligence. They seek this immunity in a context in which they themselves represented to Prokop what standards would be met, and in which Prokop reasonably relied on obtaining the required instruction. This cannot be the law. Cirrus and UNDAF should not be immune from jury-determined negligence related to a training program they offered as part of the sale of the SR22, which they deemed necessary and important to safely acclimate new purchasers to it.

A critical disputed fact issue at trial was whether Prokop was actually provided Flight 4a, IFR Flight (non-rated). (A. 156.) Considering the evidence in the light most favorable to Prokop, together with reasonable inferences, Flight 4a was never given to Prokop. A reasonable inference from that conclusion would have been that flight instructor Shipek was not being truthful when he testified that he did, in fact, give the lesson. It was within the province of the jury to judge the credibility and believability of the witnesses. It did so here, and determined that Cirrus and UNDAF acted negligently.

Cirrus isolates a sentence from the Estate's opening brief to claim that appellants seek a dramatic shift in the law to impose "a new common-law duty on product manufacturers to train product purchasers to proficiency in any use of the product that might foreseeably cause personal injury or death." See Cirrus Br. at 23 ("This is no exaggeration; Plaintiffs' own briefs make clear that this is exactly what they are seeking. See, e.g., Estate Br. at 12 ("Proficiency equates to safe use.")). Cirrus does not, however, quote the immediately preceding sentence from the Estate's brief:

**But in the context of aircraft flight**, training "to proficiency" does not imply the inculcation of any particular skills beyond those required for the safe use of the product, since the performance of one of any number of flight maneuvers "non-proficiently" can easily result in injury or death. Proficiency equates to safe use. The court of appeals incorrectly characterized this term as imposing a seemingly unreasonable burden on Cirrus and UNDAF.

(Estate Br. at 12) (emphasis added). Cirrus cannot reasonably claim that transition training on the SR22 imposes an impermissible burden on it, because that is the very duty

it undertook, and therefore needed to discharge non-negligently, when it sold Prokop the SR22. Cirrus's transition training was fundamentally connected to the sale of this aircraft, a key circumstance Judge Magnuson recognized when this case was in federal court:

Here, by manufacturing an aircraft with an autopilot mechanism and including "transition training" as part of the aircraft's purchase price, Cirrus could have foreseen the injury as alleged in this case. The connection between Cirrus' allegedly negligent training and the Plaintiffs' claimed damage is not so remote that the Court can conclude that public policy requires awarding summary judgment in favor of Cirrus at this stage.

*Glorvigen v. Cirrus Design Corp.*, 2008 WL 398814, \*4 (D. Minn. Feb. 11, 2008) (Estate Add. 136). Because it recognized the importance of transition training to the safety of product purchasers, Cirrus undertook to provide it. Cirrus owed the concomitant obligation to perform it non-negligently, which the jury determined it breached. The jury's determination that Cirrus and UNDAF were causally negligent should not be vacated. Such a result does not impose any new or different duties in connection with the sale of products in Minnesota. See *Tayam v. Executive Aero, Inc.*, 283 Minn. 48, 166 N.W.2d 584 (1969) (holding ample evidence existed to support jury finding that airplane manufacturer and dealer "failed to communicate" to plaintiff the danger that airplane engine power loss could occur when airplane's Power Boost feature was left on in icing conditions).

**B. The Court should reject Cirrus's duty to warn analysis because it elevates form over substance.**

Cirrus contends the various written materials conveyed in connection with the sale of the SR22 were adequate to apprise Prokop of the risks involved with the operation of that airplane. Even if that were so, this argument sidesteps the issue of whether the non-written instructions Cirrus provided to Prokop with the purchase price of the airplane were adequate. Cirrus chose to warn not only through written instructions, but through the non-written, interactive flight training. The issue of the adequacy of the latter warnings (in addition to the former) was for the jury, not the court, to determine. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987). Cirrus seeks a ruling that, as a matter of law, it discharged its duty to warn, but the consideration of that issue under all of the circumstances was properly left to the jury.

This is not a case involving a mass-produced product such as a lawnmower, blender, or chainsaw, where the provision of written instructions might provide sufficient notice of danger to users. Here, given the sophistication and complexity of its product, Cirrus determined that something more than that—transition training—was required to introduce the purchaser to the safe operation of the SR22. The jury heard various evidence about Cirrus's undertaking and the reasons for it. The jury was in the best position to evaluate whether Cirrus's and UNDAF's conduct was reasonable.

Cirrus draws an untenable distinction when it seeks to divide its duty to warn

through written instructions and warnings from the transition training program it offered and gave to Prokop. (Cirrus Br. at 30-36.) The character of the instructions delivered should not matter, particularly where the witnesses admitted at trial that the specific aspects of transition training dealing with the very conditions that were subsequently involved in the crash, were important, necessary, should have been given, and were, in fact, given. UNDAF's John Wahlberg testified at trial as follows:

Q. And let's just go to the fifth page of this document. We've had a lot of discussion about this particular page. But flight 4-A, IFR nonrated is required for transition training on a VFR pilot, correct?

A. Yes.

Q. So Mr. Prokop should have been given this training as part of his transition training for the SR22 he purchased, correct?

A. And was, yes.

Tr. 511. Wahlberg later testified:

Q. Is it your testimony that the flight lesson VFR into IMC autopilot assisted with the SR22 was unnecessary for Gary Prokop?

A. That could have been my testimony, yes. I don't recall.

Q. Is that your position as you sit here today that that was unnecessary?

A. No, I don't think that it was unnecessary. I think that it needed to be done.

Tr. 626. Finally, Wahlberg testified:

Q. You know that one of the leading causes of VFR crashes is VFR into IMC prior to December of 2002, correct?

A. That is a leading cause, yes.

Q. That is why you came up with this procedure, correct?

A. This is why this procedure exists.

Q. And that is why he must be trained to proficiency in this procedure, correct?

A. Yes, I believe he was.

Q. And again, we have no documented proof and you never taught him, right?

A. That's correct.

Tr. 698.

Yu Weng Shipek also testified consistently as to this point:

Q. And you would agree that this is an important maneuver to teach, right?

A. Of course, sir.

Q. Now, it's your testimony that you actually did this inadvertent IMC, VFR into IMC, as part of one of the flights, correct?

A. This procedure, yes, sir.

Q. But you didn't document, correct?

A. No, it was not documented.

Tr. 792.

A VFR-rated pilot does not have the skills to fly an airplane in IMC conditions,

*i.e.*, without reference to the world outside the cockpit. Therefore, inadvertent IMC is an emergency procedure in the Cirrus Training Manual. (A. 295.) The omitted flight lesson, Flight 4a, included the critical emergency procedure “Recovery from VFR into IMC (auto-pilot assisted).” (A. 156.) The Cirrus SR22 was substantially more powerful, faster, and more complex than the Cessna 172 in which Prokop was initially trained, incorporating more complex avionics and an autopilot system. Prokop had no prior experience with the use of an autopilot. In order for Prokop to safely execute the inadvertent VFR into IMC emergency procedure in the SR22, it was critical to obtain assistance from the autopilot.

Whether the Cirrus instructions were conveyed in written form, or in the form of interactive transition training sessions, the jury was properly allowed to, and did, consider all of the evidence concerning whether Cirrus appropriately discharged its duty to reasonably apprise Prokop how to safely operate the SR22, and specifically in the context of a VFR into IMC situation. Cirrus’s argument that a distinction must be drawn between warnings or instructions and transition training should be rejected. *See Stanley v. ConocoPhillips Pipe Line Co.*, 451 F. Supp. 2d 1286, 1290 (D. Kan. 2006) (finding standard for duty to train “no different from the duty to warn because a warning may include such education.”) (quoting Webster’s New Collegiate Dictionary 1320 (5th ed. 1977) (defining “warn” to include “to give admonishing advice”)). Indeed, Cirrus’s primary defense at trial was not that it owed no duty to Prokop or Kosak with respect to

transition training, but that it gave all of the agreed upon training to Prokop, thereby discharging any duty it had, and that Prokop was solely negligent in the crash.

**II. THE EDUCATIONAL MALPRACTICE BAR DOES NOT APPLY TO THESE FACTS.**

- A. The Court need not contend with the educational malpractice doctrine in this case, because Cirrus, an airplane manufacturer, set the standard of conduct that the jury determined it failed to meet.**

The “general quality” of education has never been at issue here. This case involves the omission of specific aspects of a sophisticated transition training program that Cirrus undertook and acknowledged were important and necessary—negligent conduct that led to subsequent personal injury. The educational malpractice bar is therefore not implicated here.

*Doe v. Yale Univ.*, 252 Conn. 641, 659, 748 A.2d 834, 847 (2000) addressed the fundamental distinction between non-cognizable failure to educate claims and cognizable negligent conduct claims as follows:

We recognize that, at first blush, the distinction between an educational malpractice claim, rejected in *Gupta*, and a cognizable negligence claim arising in the educational context, permitted in *Kirchner*, may not always be clear. We conclude, however, that the distinction lies in the duty that is alleged to have been breached. If the duty alleged to have been breached is the duty to educate effectively, the claim is not cognizable. *Gupta v. New Britain General Hospital*, supra, 239 Conn. at 593-94, 687 A.2d 111. 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.

As appellants have argued, application of the educational malpractice doctrine in this case would conflict with the Court's decision in *Larson v. Indep. Sch. Dist. No. 314, Brahm*, 289 N.W.2d 112 (Minn. 1979), *overruled in part on other grounds*, *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 657 (Minn. 2004). In *Larson*, the Court's affirmance of the jury's negligence finding against the school principal refutes respondents' claim that negligence and injury, to be actionable, must occur during the actual course of instruction. As the *Larson* Court held:

In effect, the jury found that [principal] Peterson's actions as an administrator were unreasonable and that his failure to reasonably administer the curriculum and supervise the teaching of an inexperienced instructor **created the opportunity for Steven's accident to occur**. A review of the record demonstrates that the jury could make such a finding.

289 N.W.2d at 116 (emphasis added). Here, Cirrus and UNDAF similarly "created the opportunity" for Prokop's accident to occur by failing to provide him with appropriate, necessary flight instruction concerning the critical autopilot procedure for recovery from VFR into IMC conditions. The jury's negligence findings against them should therefore stand.

**B. Application of the educational malpractice bar to protect Cirrus and UNDAF does not advance public policy.**

The educational malpractice doctrine additionally does not fit the facts of this case because this is not a case in which a court or jury imposed an uninformed standard of care upon an “educator.” Instead, the jury determined that an airplane manufacturer and its subcontractor were negligent based on evidence and credibility determinations at trial that these parties failed to meet the standards they had set out for themselves. Although this was a unique case with unique facts, these types of factual determinations are routinely made by jurors in Minnesota and across the country.

In addition, affirming a jury verdict here will not invite broad judicial “second-guessing” of “schools.” This case does not involve a traditional educational institution or general education, but narrow, specialized transition training offered by a corporation in the business of selling airplanes, and included as part of the sale of the product. *See, e.g., In re Air Crash Near Clarence Center, New York*, 2010 WL 5185106, \*6-7 (W.D.N.Y. Dec. 12, 2010) (rejecting argument that specific policy considerations underlying New York’s educational malpractice doctrine foreclosed negligence claims against flight training company relative to the “commercial, specialized training of airmen”).

## CONCLUSION

The disposition of this case does not require the alteration of Minnesota tort law through application of any new duties or standards of care for manufacturers or their agents. This case was properly framed, tried and resolved as a negligence case under its particular facts, and the district court and jury applied ordinary tort principles to reach the result. A significant aspect of the jury's role involved its credibility determinations at trial. These determinations were precisely within the province of the jury. Also, the jury's resolution of the causation issues is supported by sufficient evidence and reasonable inferences derived therefrom. These jury findings should not be disturbed.

The educational malpractice doctrine does not apply because this case did not involve a general failure to educate, but personal injuries stemming from negligent conduct in a specialized transition training program offered as part of the sale of a sophisticated and potentially dangerous product. None of the public policies sought to be advanced through application of the educational malpractice bar applies here.

For all of these reasons, the decision of the court of appeals should be reversed, and the jury verdict and district court's decision should be affirmed.

Respectfully submitted,

**GASKINS, BENNETT, BIRRELL, SCHUPP, L.L.P.**

Dated: October 3, 2011



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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Appellant/Cross-Respondent Estate of Gary Prokop, by and through Katherine Prokop as Personal Representative, certifies that this brief conforms to Minn. R. App. P. Rule 132.01 in that it is printed in 13-point, proportionately spaced typeface using Microsoft Word 2010, and contains 5,643 words, including headings, footnotes and quotations.

**GASKINS, BENNETT, BIRRELL, SCHUPP, L.L.P.**



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