

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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 OF DECEDENT GARY R. PROKOP**

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STATEMENT OF ISSUES FOR CROSS-REVIEW

- 1. Plaintiffs presented evidence that Cirrus and UNDAF failed to give instructions necessary for the safe recovery from an emergency frequently encountered in the use of Cirrus' airplane, and that the fatal crash was caused by the failure to recover from that very emergency. Was the evidence sufficient to support the jury's apportionment of 75% of the causal fault to Cirrus and its agent, UNDAF?**

The district court carefully reviewed the evidence and concluded that there was ample evidence to support the jury's findings of fault and causation. The court of appeals did not reach this issue.

Apposite Authorities:

Osborne v. Twin Town Bowl, Inc.,
749 N.W.2d 367 (Minn. 2008).

Int'l Fin. Servs., Inc. v. Franz,
534 N.W.2d 261 (Minn. 1995).

Tayam v. Exec. Aero, Inc.,
283 Minn. 48, 166 N.W.2d 584 (1969).

Robinson v. Butler,
234 Minn. 252, 48 N.W.2d 169 (1951).

- 2. UNDAF intervened as a defendant, answered plaintiffs' complaints, actively participated in the pre-trial and trial proceedings, fully litigated both liability and damages, and the jury found UNDAF was Cirrus' agent and engaged in a joint enterprise with Cirrus. Did the district court properly enter judgment against UNDAF?**

The district court determined that it was appropriate to enter judgment against UNDAF jointly and severally based on the jury's verdict. The court of appeals did not reach this issue.

Apposite Authorities:

Miss. Valley Dev. Corp. v. Colonial Enters., Inc.,
30 Minn. 66, 217 N.W.2d 760 (1974).

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

State ex rel. Moser v. Kaml,
181 Minn. 523, 233 N.W. 802 (1930).

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

OVERVIEW

Gartland's opening brief contained a detailed recitation of the facts contained in the record, and appropriately recited those facts in a light most favorable to the jury's verdict. While defendants have admitted some important and undisputed facts, they take great liberties with the record in other respects, and their arguments are based on a view of the evidence that does not apply on appeal. They essentially ask this Court to re-weigh the evidence. (*See, e.g.*, Cirrus Br. at 68, arguing for reversal "given this body of evidence.") The record evidence, properly viewed, may be stated succinctly:

1. The Cirrus SR22 is a high performance, sophisticated airplane. In order for the plane to be safely flown, the purchaser must receive "transition training" to learn about the unique handling and operating characteristics of the SR22. (T.181, *see also* Gartland Opening Br. at 10-11 ("Br.")). Transition training is standard in the industry (T.181), and defendants admitted at trial that Prokop needed to receive transition training in order to safely fly the SR22 and that the defendants undertook to provide that training. (T.498, 1509.) Without objection by the defendants (T.1692-93), the jury was instructed to consider evidence of industry standards and customs to determine whether the defendants used reasonable care. (A.118.)

2. Cirrus offered transition training as part of its marketing and included the cost in the purchase price of the SR22. (Cirrus Br. at 7; UNDAF Br. at 9; *see also* T.466, 489, 1476, A.171.) After the successful completion of defendants' transition training, defendants issued a high performance

endorsement, which the FAA required to fly the new plane. (Cirrus Br. at 8; UNDAF Br. at 9; *see also* T.1494-95, 1528.) Although defendants quibble that Prokop could have received transition training or the endorsement elsewhere, defendants admit that Prokop needed transition training on the SR22 and the FAA endorsement before he could fly it. (Cirrus Br. at 8; UNDAF Br. at 9.) One Cirrus witness plainly stated, “[i]t would be illegal from the FAA point of view” for a purchaser to take an SR22 “home” if he does not have the endorsement. (T.1528.)

3. Cirrus and UNDAF developed the curriculum for the transition training they provided to purchasers such as Prokop. (T.490, 713-14.) Defendants’ curriculum was evidence of the reasonable care required for providing instructions to purchasers. (Br. at 10-11.) That curriculum included specific in-flight instructions about how to recover from VFR into IMC, which is recognized as a leading cause of small airplane crashes. (T.698.) “VFR” stands for visual flight rules; “IMC” stands for instrument meteorological conditions that deprive a pilot of visual ground references. Undisputed record evidence established that when a pilot inadvertently enters IMC while operating under VFR, immediate and specific steps must be taken to continue safe flight. (T.517-18, 524, 697.) Importantly, the required steps for VFR into IMC in the SR22 were significantly different from those required in the Cessna plane that Prokop had previously operated. (T.1190, 1244.) Defendants admitted that despite Prokop’s prior training, the VFR into IMC training “needed to be done.” (T.626.)

4. The transition training prescribed by the defendants involved more than written and classroom instructions provided on the ground; it included instructions provided during actual flight of the airplane. (T.488, A.152-60.) Although defendants argue on appeal that it was sufficient to give a purchaser written instructions (Cirrus Br. at 23-28; UNDAF Br. at 38-40), at trial defendants admitted that in-flight training was necessary to provide complete instructions to the purchaser on how to fly the SR22, particularly for response to emergency circumstances.

Q. And in order for [VFR into IMC] training to take, in order for training to be effective, you can't just do it on the ground, correct?

A. That's correct.

Q. It has to be done up in the sky with the pilot, correct?

A. You should do it in the airplane, yes.

Q. And it's extremely important that a pilot be proficient in this particular maneuver with this particular plane, correct?

A. He should know how to do this in any airplane, yes.

Q. But [Prokop] never had a plane with an autopilot before, correct?

A. Correct.

(T.696; *see also* T.526-27, 625-26.) Equally significant, defendants admitted at trial that they knew Prokop had never flown a plane with an autopilot before he purchased the SR22.¹ (*Id.*)

¹ The importance of transition training, including in-flight instructions, is reinforced by other evidence. Cirrus admitted during trial that transition training was necessary for *all*

5. Cirrus admits that the record supports the inference that Prokop's instructor skipped the portion of the syllabus that contained the VFR into IMC instructions. (Cirrus Br. at 11; *see also* Br. at 14-19.) Saliently, the failure to provide this training was evidence of negligence based on the customs and practices prevailing in the aviation industry as adopted by Cirrus' curriculum. (T.156-57, 181, 242, 276.) In fact, the jury found that Cirrus was negligent, that UNDAF was Cirrus' agent and acting in a joint enterprise, and that UNDAF was also negligent. (Add.50.) Neither defendant challenges the findings of agency and joint enterprise on appeal.

6. All parties agree that Prokop tried to hand-fly the SR22 out of the emergency VFR into IMC conditions that he encountered and that was the immediate cause of the crash – Prokop turned and climbed, and the fast powerful plane went into a power stall. (T.215, 218, 152-53, 1562-64.) It was clearly within the jury's province to accept plaintiffs' evidence and infer that Prokop hand-flew the plane because he was not adequately informed about the prescribed autopilot-assisted response. (Br. at 20-22.) While defendants assert on appeal that Prokop could have recovered by using other maneuvers, defendants admitted at trial that their curriculum for transition training presented use of the autopilot as mandatory because it was the safest maneuver for a VFR pilot to use when going into IMC. (T.695.) Indeed, defendants also admitted that they developed

purchasers. (T.627-28) Defendants also admitted that they knew Prokop was not instrument-rated at the time he purchased the SR22. (Cirrus Br. at 6; UNDAF Br. at 9.)

instructions on use of the autopilot because they knew VFR into IMC is one of the leading causes of airplane crashes. (T.698.)

These facts fully support the jury's verdict. And it is inappropriate for the defendants to ask this Court to decide the legal issues in this case based on their slanted view of the facts, or the record below.

ARGUMENT ON CROSS-REVIEW

An appeal is not the proper forum to re-argue the facts of a case. The jury could have accepted either of the two competing theories of how the accident occurred and why. In the end, the jury found some merit to the claims of both sides. It apportioned 25% of the causal fault to Prokop, despite evidence that he was a good and careful pilot, and 75% of the causal fault to Cirrus/UNDAF for failing reasonably to provide instructions as required by Minnesota law, industry practice, and Cirrus' own judgment as evidenced by the curriculum that Cirrus developed. The trial court reviewed the record and the verdict, and concluded that there was sufficient evidence of negligence and causation to support the jury's determination. The judgment entered on the jury's verdict should be affirmed.

I. THERE WAS MORE THAN SUFFICIENT EVIDENCE OF CAUSATION

The questions for the jury were whether defendants breached their duty of reasonable care, and if so, was that breach a cause of the accident. The duty to exercise reasonable care in providing instructions for the safe use of the product was imposed by law. The evidence of what constituted reasonable care in this circumstance was provided by defendants' own practice and industry custom, as established in the transition training

curriculum. There was ample basis for the jury to decide that defendants' conduct breached the duty of reasonable care when they skipped the crucial instructions during Prokop's training. There was also ample basis for the jury to find that this breach was a cause of the accident.

A. Standard of Review

Factual conflicts, such as those that were presented in this case, "are to be resolved by the jury, and its verdict will not be set aside unless it is manifestly and palpably contrary to the evidence as a whole." *Robinson v. Butler*, 234 Minn. 252, 254-55, 48 N.W.2d 169, 170 (1951) (upholding jury's verdict although it was based on the testimony of a single witness). This Court considers the record in the light most favorable to the verdict. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256 (Minn. 1980). And verdicts are upset only in "extreme cases." *Ralph Hegman Co. v. Transamerica Ins. Co.*, 293 Minn. 323, 327, 198 N.W.2d 555, 558 (1972). Indeed, Minnesota appellate courts "sustain a jury verdict if it is possible to do so on any reasonable theory of the evidence." *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 198 (Minn. 1986) (citing *Bergemann v. Mut. Serv. Ins. Co.*, 270 N.W.2d 107, 109 (Minn. 1978)).

An appellate court considers causation "a question of fact for the jury to decide." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008). "A jury determination of causation . . . '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)). In evaluating whether the evidence fairly supports the jury's finding of causation, this Court has held

that the verdict will be sustained where “the jury could with equal propriety draw the conclusion” that supports the verdict as it could a contrary conclusion. *Christy v. Saliterman*, 288 Minn. 144, 163, 179 N.W.2d 288, 301 (1970). The Court’s decision explains: “The jury was not required to draw either inference, but the evidence did provide a reasonable basis for each. Believing the plaintiff’s evidence as they obviously did” the jury’s finding of causation will be affirmed on appeal. *Id.*

B. Evidence Supporting The Verdict In This Case Is Similar To Other Cases Which This Court Has Affirmed On Appeal

In *Tayam v. Exec. Aero, Inc.*, the Court upheld a jury’s verdict against an airplane manufacturer and seller for negligence in failing to warn the purchaser about a “unique feature” that caused the plane to crash. 283 Minn. 48, 51, 166 N.W.2d 584, 586 (1969). The Court rejected defendants’ challenge to the opinion testimony supporting causation and to the jury’s finding of liability. The airplane was powered by a special engine that eliminated the need for a carburetor – “[i]t was equipped with what is called a ‘ram air’ or ‘power boost’ system.” *Id.* at 51, 166 N.W.2d at 586. Most importantly, “when flying in ‘icing conditions’ the power boost should be turned off” because, as the manufacturer admitted, ““partial power loss and probably complete power loss can occur during icing conditions if the Power Boost is left on.”” *Id.* The plane crashed when the engine stopped without warning during an unexpected snow storm. *Id.* at 50, 166 N.W.2d at 585.

The Court found that there was sufficient evidence to support a liability verdict against defendants. “[B]oth defendant manufacturer and defendant seller negligently

failed to communicate to plaintiff as an owner and pilot the danger – which the manufacturer expressly admitted at trial – that a ‘partial power loss and probably complete power loss can occur during icing conditions if the Power Boost is left on.’” *Id.* at 51, 166 N.W.2d at 586.

This Court also found there was sufficient evidence of causation based on testimony by one owner of the airplane that the probable cause of crash was icing. The Court held that the trial court properly admitted the evidence “since expert testimony as to the cause of a complete power failure and resulting airplane crash need not be limited only to the opinions of those holding aeronautical or engineering academic degrees.” *Id.* at 53, 166 N.W.2d at 587. The Court also explained that “even if we were to accept defendant’s argument that the witness was not properly qualified as an expert, we would not be warranted in reversing” because other evidence supported the jury’s verdict. *Id.*

The admissions of the manufacturer that a complete power loss can occur when flying in icing conditions if the power boost is left on coupled with the admissions of an officer of defendant seller that clogging of the power boost intake was probably the cause of the crash, and the fact that no other cause was advanced, much less suggested, by any other witness at the trial would alone provide sufficient evidentiary support for the jury’s conclusion that the cause of the airplane crash was as plaintiffs claimed. ... [T]here is evidence from which the jury could reasonably infer that flying in a snowstorm was equivalent to flying in ‘icing conditions’ where there was no apparent ice formation on the aircraft’s surface.

Id. at 54, 166 N.W.2d at 587-88.

The parallels to the record in this case are striking. VFR into IMC is a well-recognized hazard and a leading cause of crashes of small aircraft. (T.698.) Cirrus and UNDAF admitted the risk and had created specific instructions – including in-flight

instructions – for purchasers of the high performance SR22 to safely recover from that hazard. (T.695-96, A.156.) Cirrus and UNDAF also admitted that Prokop’s prior training and flight experience was not adequate to allow him to safely fly the SR22 and that in-flight instruction on VFR into IMC “needed to be done.” (T:626.)

Finally, the testimony of the expert witnesses for both sides confirmed that the crash occurred when Prokop tried to hand-fly the SR22 out of the dangerous conditions he encountered, rather than use the autopilot. (T.215, 218, 1552-53, 1562-64.) The jury could well have found that Cirrus and UNDAF did not reasonably provide instructions to Prokop about how to use the autopilot in this emergency. And the jury could have found that Cirrus was negligent in administering the training program. *See Larson v. Indep. Sch. Dist. No. 314, Braham*, 289 N.W.2d 112, 117-18 (Minn. 1979), *overruled in part on other grounds, Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 657 (Minn. 2004) (holding that negligence in administering an instructional curriculum was a basis for liability separate from the negligence in the instruction). When this evidence is viewed in a light most favorable to the verdict, there is more than enough evidence to support the jury’s findings of negligence and causation.

C. The Circumstantial Evidence Of Causation Was Not Speculative.

A jury’s consideration of circumstantial evidence necessarily involves drawing inferences from direct evidence. But that does not make those inferences speculative. “Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of

those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.” *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

Neither Prokop nor Kosak survived the crash. There is no direct evidence of what happened immediately before the plane stalled and crashed. But the record establishes that the SR22 flew VFR into IMC, the autopilot was not engaged, and the flight path ended in a power stall. All of this evidence points to the cause of the fatal crash. And taken together, it is clear that “the cumulative circumstantial evidence is sufficient to take the inference of causation out of the realm of speculation.” *Int’l Fin. Servs., Inc. v. Franz*, 534 N.W.2d 261, 266 (Minn. 1995).

Captain Walters explained that, in his opinion, Prokop did not use the autopilot because he was not instructed that its use was required in the circumstances in which he found himself. (T.227.) This was, in Captain Walters’ expert opinion, a “root cause” of the crash. (T.222-23.) The jury heard all of the evidence upon which Captain Walters based his opinion, and apparently agreed with him. The evidence was undisputed that the autopilot was not being used at the time of the crash and that the use of the autopilot would have made the entire maneuver safer, with much less chance for error. It would have reduced the impact of pilot disorientation, and would have provided the pilot with more time to react. Engaging the autopilot was the safest way out of VFR into IMC. (T.695.) As the district court noted, the importance of instructions on use of the autopilot was the whole reason that it was included in the curriculum. (Add.95-97.)

It is hardly a leap into speculation for the jury to conclude that Prokop, who did not receive any in-flight instructions on the use of the autopilot to recover from VFR into

IMC and who told others that he did not know how to use the autopilot and that he was not comfortable with it, chose to escape the hazard in which he found himself in the only way that he knew, by flying the plane by hand. The jury could also have concluded, without speculation, that a maneuver that might be safely executed in an aged, slow-moving Cessna was exactly the wrong thing to do in a new, high performance SR22 flying at significantly faster speeds. The trial court correctly concluded that there was ample evidence to support the verdict.

Defendants continue to attack Captain Walters' testimony on foundation and other grounds, but both Cirrus and UNDAF failed to challenge the admission of Captain Walters' testimony or any other evidentiary rulings in either their motions for a new trial or directly as an issue in their briefs. Evidentiary rulings not assigned as error in a motion for a new trial are not reviewable on appeal from a judgment. *Larson*, 289 N.W.2d at 118 n.12; *Fritz v. Arnold Mfg.*, 305 Minn. 190, 194, 232 N.W.2d 782, 785 (1975).

In *Larson*, the Minnesota Supreme Court specifically rejected this kind of backdoor effort to argue evidentiary issues not properly preserved:

Peterson also contends that it was error for the trial court to qualify one of plaintiffs' witnesses as an expert and to admit testimony by him concerning the duties owed by a principal to a student. Peterson claims the witness had neither education in nor work experience as a school principal or superintendent. Peterson did not include this objection in the grounds he cited as a basis for requesting an order granting a new trial on all issues. Objections to evidentiary rulings which are not assigned as error in a motion for a new trial are not reviewable by this court on appeal from judgment.

289 N.W.2d at 118 n.12. Where the issue of admission of evidence is not preserved in a motion for new trial, the appellate court's review is limited to an examination of whether the evidence that is in the record, viewed in a light most favorable to the verdict, is sufficient. See *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). In the context of this case, that rule means that defendants cannot attack or disregard Captain Walters' opinions.

Cirrus also argues that plaintiffs were required to prove that Prokop wanted to use the autopilot. But this argument ignores the impact of defendants' negligence. The jury could have found that Prokop did not know how and when he should use the autopilot because (as Cirrus knew) he had no prior experience with any autopilot and Cirrus provided inadequate instruction in its specific use to recover from VFR into IMC. Cirrus/UDAF admitted during trial that in-flight instructions were necessary to understand how to use the autopilot to recover from VFR into IMC, hence the inclusion of Lesson 4a in the curriculum. (T.696.) Thus the questions Cirrus posits – did Prokop have time to engage it? did he decide to use other measures? – all assume that he knew that the use of the autopilot was required and how to engage it in the emergency conditions in which he found himself. The jury was not required to accept any of Cirrus' assertions or to ignore its negligence.

Defendants rely on cases where the expert testimony on causation was speculative, but those cases are easily distinguishable from this case. *Gerster v. Estate of Wedin*, 294 Minn. 155, 199 N.W.2d 633 (1972) and *Huseby v. Carlson*, 306 Minn. 559, 238 N.W.2d 589 (1975), involved experts who could only opine that smoking might have caused the

fire, but there was no evidence that the defendant was in fact smoking at the time. *Gerster*, 199 N.W.2d at 635-36 (expert testified that smoking was possible cause and no evidence established defendant was smoking); *see also Huseby*, 238 N.W.2d at 590 (no physical evidence of cigarettes in room). Here, it is undisputed that Prokop did not use the autopilot, and the jury heard expert opinion that this was a cause of the crash. This case would be comparable to *Gerster* and *Huseby* only if Captain Walters had testified that Prokop might not have used the autopilot. Here, defendants' own expert agreed that Prokop did not use the autopilot and all of the evidence pointed to this being the cause of the power stall and crash.

Cirrus also argues that this Court should not conclude that the jury found the in-flight instructions, Lesson 4a, were not given, because other reasons for the crash – educational malpractice and “many factors” – were “equally possible.” (Cirrus Br. at 17, 71-74.) Cirrus is wrong, however, because the standard of review requires this Court to affirm on “any reasonable theory of the evidence.” *Hughes*, 389 N.W.2d at 198. More fundamentally, “equally possible” theories of causation do not defeat a jury’s *finding* that a defendant’s negligence caused an accident.

Jury verdicts are sustained where supported by a preponderance of evidence. Where “the circumstantial evidence furnishes a reasonable basis for inferences by the jury . . . that the alleged acts of the defendant caused the injury complained of, it is sufficient proof of causal connection to sustain a verdict.” *Erickson v. Strickler*, 252 Minn. 351, 355, 90 N.W.2d 232, 236 (1958); *see also Thoreson v. Nw. Nat’l Ins. Co.*, 29 Minn. 107, 108, 12 N.W. 154, 154 (1882). For example, circumstantial evidence

supported the jury's verdict in *Majerus v. Guelsow*, 262 Minn. 1, 113 N.W.2d 450, 452 (1962). Mr. Majerus was found dead at the bottom of a flight of stairs. Mrs. Majerus filed suit, accusing the landlord of negligence. *Id.* The jury returned a verdict in favor of Mrs. Majerus. *Id.*

Recognizing that there were other possible inferences from Mr. Majerus's death, e.g., "foul play resulting in someone pushing him down the stairs, his falling while intoxicated, [or] an injury received before he returned to the apartment," the Court nevertheless affirmed the jury verdict. In doing so, the Court was mindful that it was "obliged to give the verdict the benefit of every reasonable inference." 262 Minn. 1, 113 N.W.2d at 454. Put differently, "it is not necessary that the evidence in support of the inference adopted [by the fact finder] must outweigh other reasonable inferences." 262 Minn. 1, 113 N.W.2d at 455 (quoting *Burke v. B.F. Nelson Mfg. Co.*, 210 Minn. 381, 388, 18 N.W.2d 121, 124 (1945)).

Cirrus' argument regarding "equally possible" inferences fails because it confuses the civil burden of proof applicable to this case with a criminal burden of proof, where all reasonable inferences other than guilt must be eliminated. *See, e.g. State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) ("[It] must be true in order to convict, ... that there are no other reasonable, rational inferences that are inconsistent with guilt.")² That rule

² This Court's review of circumstantial evidence in a criminal case involves a two-step analysis. First, the Court identifies the circumstances proved by deferring "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quotation omitted). Second, the Court "examine[s] independently the reasonableness of all inferences that might be drawn from the circumstances proved."

does not apply in civil litigation, as the cases cited above amply demonstrate. Thus, based on the applicable standard of review and the jury's factual findings, this Court should hold that sufficient evidence supports the verdict and reinstate the judgment in favor of the plaintiffs and against the defendants.

II. JUDGMENT WAS PROPERLY ENTERED JOINTLY AND SEVERALLY AGAINST CIRRUS AND UNDAF, ITS AGENT AND ACTOR IN A JOINT ENTERPRISE.

A. Standard of Review

The jury found that UNDAF was negligent in training Prokop, that UNDAF's negligence was a direct cause of the plane crash, and that UNDAF was acting as Cirrus' agent and engaged in a joint enterprise with Cirrus at the time of training. (Add.49-50.) Finally, the jury allocated a significant portion of the causal negligence to UNDAF. (*Id.*) In the district court and on appeal, UNDAF challenged the district court's decision to enter judgment against it based on the jury's answers to the verdict form. Despite UNDAF's arguments, the district court properly accepted the jury's verdict, and appropriately entered judgment based on the jury's findings.

An answer to a special verdict question should be set aside only if it is "perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71, 76 (Minn. 1981); *see also Hauenstein v. Loctite Corp.*,

Andersen, 784 N.W.2d at 329 (internal quotation marks omitted) (citation omitted). A criminal conviction based on circumstantial evidence can stand only when the sole reasonable inference is consistent with guilt.

347 N.W.2d 272, 275 (Minn. 1984) (“If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed.”). (Emphasis original.)

Once the trial court accepts the factual findings of the jury, it must enter judgment as required by law based on those facts. In this case, the jury found UNDAF to be negligent and that negligence to be a cause of plaintiffs’ damages. Based on those facts, plaintiffs were entitled to judgment against UNDAF as well as Cirrus. *See, e.g.*, Minn. Stat. § 604.01; *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208-10, 203 N.W.2d 841, 846-47 (1973) (applying comparative fault in context of joint enterprise).

On appeal, UNDAF has not challenged the jury’s finding that it was Cirrus’ agent and acting in a joint enterprise. Instead, UNDAF has argued that after it chose to intervene in this case, plaintiffs never served UNDAF with a complaint and the statute of limitations expired before it intervened. While these assertions may have constituted defenses in some other context, UNDAF failed to assert them in its answer, which it filed and served at the time it intervened, and it proceeded to litigate fully this case as a defendant. The district court properly entered judgment against it on this record.

B. UNDAF Voluntarily Intervened In The Litigation As A Defendant And Participated Fully In All Aspects Of The Trial.

The district court was understandably bemused by UNDAF’s argument that judgment could not be entered against it. He observed that UNDAF sought the status of a defendant, and got it. (Add.100; *see* A.70-74.) Moreover, UNDAF filed answers to the plaintiffs’ complaints. (A.75-79, 80-87.) The trial court also observed that UNDAF fully participated in the entire case, well aware of the potential for its own liability. (Add.101-

02.) And the trial court remarked that it was clear that UNDAF was not in the case solely with respect to the contribution or indemnity claims, pointing out that neither Cirrus nor UNDAF ever submitted to the jury or to the district court a request that the court adjudicate any of those claims. (Add.101-02.) Moreover, the court noted that the joint enterprise and agency theories were tried to a conclusion. (Add.104-08.)

The district court also observed that UNDAF had not challenged either the procedure or the jury's findings on joint enterprise or agency. (*Id.*) The court concluded that because UNDAF's moved to intervene as a "Defendant" and that request was granted (*see* A.91-92), judgment was properly entered against them: "UNDAF is a Defendant and Judgment was properly taken against them."³ (A.108.)

By intervening, UNDAF became a party, and enjoyed all the benefits of that status, but also bore all the burdens it entailed. In *Faricy v. St. Paul Inv. & Sav. Soc'y*, 110 Minn. 311, 313, 125 N.W. 676, 677 (1910), the Court said, "[i]ntervention, in modern practice, as well as in the civil law, is an act or proceeding by which a third party becomes a party in a suit pending between others." It repeated that holding in *State ex rel. Bergin v. Fitzsimmons*, 226 Minn. 557, 564, 33 N.W.2d 854, 858 (1948), by noting

³ The district court considered the consequences if it decided UNDAF was not a defendant. It concluded that, "Cirrus would then assume the negligence proportion of UNDAF as a joint enterprise or agent thus making Cirrus 75% negligent, and the contribution or indemnity claims would be allowed to survive. This calculation of UNDAF's negligence would remain important however, for the later indemnity or contribution claims under the doctrine of issue preclusion." (Add.108.) This explanation appears consistent with Minnesota law. *See* Minn. Stat. § 604.02, subd. 1; *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992) (principal liable for agent's acts); *Ruth v. Hutchinson Gas Co.*, 209 Minn. 248, 259, 296 N.W.136, 141 (1941) (each member of joint enterprise liable for acts of all).

that an intervenor who prevails may tax costs like a party, and an intervenor who does not prevail is subject to liability for costs. *Accord Erickson v. Bennett*, 409 N.W.2d 884, 888 (Minn. Ct. App. 1987) (reversing decision to deny intervention and vacating judgment; noting that, “[u]pon intervention, [the insurer] becomes a party to the lawsuit”). By intervening in these cases, and seeking the status of a defendant, UNDAF unquestionably became a party to the litigation.

The gravamen of UNDAF’s claim appears to be that it was not served with a summons, and therefore it was never technically made a party-defendant within the time allowed under the statute of limitations. But based on UNDAF’s actions, *i.e.*, making a motion to intervene as a defendant, serving answers to the plaintiffs’ complaints, fully litigating the case, and attempting to defeat the plaintiffs’ claims, not just Cirrus’ indemnity claim, UNDAF has waived any potential objections.

Objections to service may be waived by conduct and the defense of the statute of limitations may be waived if not timely asserted. *Miss. Valley Dev. Corp. v. Colonial Enters., Inc.*, 30 Minn. 66, 72, 217 N.W.2d 760, 764 (1974) (concluding that a defendant who has taken affirmative steps in the action and invoked the power of the court on his behalf “cannot later claim that service was insufficient”); *State ex rel. Moser v. Kaml*, 181 Minn. 523, 527, 233 N.W. 802, 804 (1930) (holding that because statute of limitations affects the remedy and not the right, defense can be waived); *Hardwick v. Ickler*, 71 Minn. 25, 27, 73 N.W. 519, 520 (1897) (holding limitations defense is “waived, unless taken by demurrer or answer, and cannot be made for the first time on the trial or after judgment”). In this case, UNDAF failed to raise either defense in its

answers to the complaints and acted affirmatively in district court, therefore, the defenses were waived. (A.75-87.) See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (concluding that this court “will not consider the applicability of the statute of limitations on appeal . . . if it was not passed on by the trial court”).

The cases cited by UNDAF in an attempt to support its claim are inapposite. First, there is nothing in *Avery v. Campbell* that remotely suggests that for a defendant-intervenor to be held liable, plaintiff must have served them with a summons and complaint. 279 Minn. 383, 387-88, 157 N.W.2d 42, 45-46 (1968) (recognizing that intervention is allowed “to grant to one who is left out of a suit a right to become a party despite objection by the parties to the action,” but not requiring either a summons or complaint to be served upon them). Second, *Sister Elizabeth Kenny Found., Inc. v. National Found.* has no application. It only stands for the proposition that “mere hope of being a beneficiary” is not a sufficient interest to allow intervention as a matter of right. 267 Minn. 352, 360, 126 N.W.2d 640, 645 (1964).

Similarly, *State ex rel. J. F. Konnen Constr. Co. v. U.S. Fid. & Guar. Co.*, 382 P.2d 858 (Or. 1963), *remanded*, 401 P.2d 48, 50 (Or. 1965) is neither controlling nor persuasive. *Konnen* involves a distinctly different factual history – the plaintiff “steadfastly refused” to seek a judgment against intervenors after a bench trial. 401 P.2d at 50.⁴ Here, plaintiffs urged the trial court to enter judgment against UNDAF based on the special verdict.

⁴ Additionally, UNDAF’s summary of the decision is not accurate. Neither the supreme court or the trial court determined that “the intervenor could not be liable to the plaintiff.”

UNDAF intervened in these cases so it could be treated as a defendant; it fully litigated its causal fault, attempting to defeat the plaintiffs' claims, but never raised service or the statute of limitations as defenses to plaintiffs' claims. On many different bases, the trial court properly entered judgment against UNDAF.

REPLY ARGUMENT ON REVIEW

I. PLAINTIFFS PURSUED A PRODUCTS LIABILITY CLAIM THROUGHOUT THIS LITIGATION

In an effort to recast plaintiffs' claims, Cirrus and UNDAF persist in asserting that plaintiffs' product liability claims were dismissed by the federal district court, and that plaintiffs did not challenge that action on appeal. This revisionist history is simply not accurate.

In his complaint, Gartland pled a claim based on negligent failure to warn and instruct in the safe use of a product. (A.9-10.) This claim is well recognized in Minnesota law which "does not sharply distinguish between negligence and strict liability in failure to warn cases." Michael K. Steenson, Peter B. Knapp, *Minnesota Practice: Jury Instruction Guides – Civil*, CIVJIG 75.25 (5th ed. 2011). The claim can be stated as one for strict liability or for negligence, but the plaintiff must elect one theory where both

(UNDAF Br. at 54.) Instead, after remand from the first appeal, the district court "dismissed the action without prejudice." 401 P.2d at 50. The supreme court affirmed based on the instructions for remand: "Konen on this appeal would have us change the law of the case and direct the trial judge to enter judgment against intervenors, notwithstanding we previously held this to be a matter of the discretion of the trial judge. This we decline to do." *Id.* Additionally, the supreme court commented it was concerned with plaintiff's "*volte face*" upon remand – asking for a judgment that had not been sought after trial, or even in the first appeal, and was not raised until the petition for rehearing en banc. *Id.*

claims are tried to the jury. *Hauenstein*, 347 N.W.2d at 275. The difference is slight, although generally devolves to whether knowledge of the danger posed by a product is imputed to the manufacturer (strict liability) or must be proven by the plaintiff (negligence). *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984).

Defendants do not dispute that they were aware of the dangers inherent in flying Cirrus' high performance plane. In fact, defense witnesses agreed that the safe use of the product required in-flight instructions in the unique flight characteristics of the SR22, and that Prokop's prior experience and licensure were inadequate to prepare him to safely fly the plane. (T.526-27, 625-26, 696.) During trial, Cirrus moved for a directed verdict asserting that plaintiffs had failed to prove negligence against the manufacturer.⁵ Specifically, Cirrus argued a directed verdict was required because no evidence supported plaintiffs' theory, which Cirrus' counsel described as follows: "Did Cirrus fail to train the pilot as a normally prudent manufacturer of aircraft would under these circumstances?" (T.1404.) That motion was denied. (T.1422-24.)

When it came time to instruct the jury, it was clear to all that the case came down to simple, traditional negligence principles, in the context of the sale of a dangerous

⁵ Cirrus argued on directed verdict, as follows:

Cirrus obviously sold the aircraft, but this is a negligence case. And to the extent the Plaintiffs say that Cirrus sold this as part of the cost of their aircraft, well, this still is a negligence case. ... How this training came to pass is irrelevant. What is relevant to Plaintiffs' claim is whether there was a breach of a duty by Cirrus to the pilot. Did Cirrus fail to train the pilot as a normally prudent manufacturer of aircraft would under these circumstances? That was what Judge Magnuson said. We have no evidence, none, that Cirrus played any role in the training that took place.

(T.1404.)

product. Accordingly, after discussion, and without objection, the court and the parties agreed that a simple negligence instruction would be the clearest way to inform the jury regarding the controlling law. There was no objection by Cirrus or UNDAF to the instruction as given. (T.1651-52.) All parties fully argued to the jury the question of defendants' negligence in either providing or failing to provide adequate instructions for the safe use of the airplane.

Cirrus suggests that Gartland waived his product liability claim by failing to appeal from Judge Magnuson's dismissal of the strict liability and breach of warranty counts. To reach this conclusion, it argues that "Cirrus moved for and the federal court granted summary judgment on that failure-to-instruct claim for lack of evidence." (Cirrus Br. at 20.) Cirrus attempts to support that claim by relying on *Hauenstein* to suggest that the dismissal of the strict liability claim forecloses the negligent instruction claim. But *Hauenstein* is distinguishable and Judge Magnuson made it clear that the negligence claim survived.

Hauenstein discussed the relationship between strict liability and negligence in *dictum*, because the court affirmed the judgment for defendant based on the jury finding of no causation. 347 N.W.2d at 276. Further, the *dictum* was limited to discussing the situation where the jury receives two claims based on the duty to warn. *Id.* *Hauenstein* recognized that a strict liability claim may have one of three potential bases: a defect in the product, a defect in the packaging, or a defect in the instructions for safe use. *Id.* at 275. To the extent that the negligence and strict liability claims are similar, it is only for strict liability claims resting on the third basis.

Judge Magnuson's decision in the federal case focused on the first basis – “Gartland has made no initial showing of manufacturing defect.” (Add.140). *Hauenstein* cannot be read to suggest that a negligence claim for failure to warn is the same as a strict liability claim for a manufacturing defect. Judge Magnuson's further statement – “and his attempt to assert that the aircraft ‘was defective because of inadequate instructions’ fails” – merely elaborates that plaintiffs have no strict liability claim for a “defect.” (*Id.*) Clearly, that statement does not support the conclusion that plaintiffs did not have a viable negligent instruction claim. To the contrary, Judge Magnuson expressly ruled that the negligent instruction claim, based in large part on the omission of Lesson 4a, should be for the jury to resolve:

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 Plaintiff's 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.

(Add.139.) Plaintiffs had no reason to appeal Judge Magnuson's Order granting summary judgment on the strict liability claim because it expressly preserved for trial the negligent instruction claim. Moreover, the portion of Judge Magnuson's Order denying summary judgment on the negligent instruction claim was not itself appealable.⁶

⁶ Cirrus suggests that the negligence claim was somehow barred by the ruling on the strict liability claim because there was an “identity of claims” (Cirrus Br. at 20-21), but Judge Magnuson concluded otherwise. Thus, to the extent that Judge Magnuson's Order is seen as law of the case, it expressly preserves the negligent instruction claims for trial. Further, Judge Magnuson's interlocutory order was subject to revision by the trial court at any time before final judgment, *see* Minn. R. Civ. P. 54.02, and the state district court likewise ruled that the negligent instruction claim was for the jury.

Finally, even if *Hauenstein* applies, all it requires is that only one of the two theories go to the jury – which is exactly what occurred here.

II. PLAINTIFFS’ CLAIMS AT TRIAL WERE BASED ON A MANUFACTURER’S DUTY TO PROVIDE ADEQUATE INSTRUCTIONS FOR USE

Cirrus completely misstates plaintiffs’ theory at trial. Plaintiffs never argued that product manufacturers have a duty to “train” (Cirrus Br. at 23, 30-39), nor did plaintiffs agree that Cirrus’ written instructions were adequate (Cirrus Br. at 26-28). To the contrary, plaintiffs argued that Cirrus’ written instructions were not “effective” based on significant evidence, such as: (a) Cirrus’ own testimony (T.696); (b) Cirrus’ decision to include in-flight instruction during transition training, and (c) industry custom of doing likewise.⁷ (*See* record cites in Br. at 10-14).

It appears that Cirrus is asking this Court to determine that its written instructions were adequate as a matter of law. (Cirrus Br. at 23-29.) But adequacy of instructions is a question of fact for the jury. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987); *see* other authorities cited in Br. at 30. Cirrus completely avoids the law on this issue. While

⁷ Additionally, Gartland’s opening brief demonstrates that the jury properly considered the contract between the parties in determining the reasonableness of defendants’ conduct. (Br. at 33-36.) Cirrus asserts that this is an “assumed duty claim” and argues it was improper. (*Id.* at 39-45.) Yet Cirrus admits that it described the training it sold to Prokop along with the SR22 would be “to proficiency, in accordance with the trainer’s standards.” (Cirrus Br. at 7.) The point entirely missed by defendants is that Cirrus’ statements about “proficiency” was more evidence of the reasonableness (or unreasonableness) of Cirrus’ conduct when it skipped Lesson 4a. This use of a contract as evidence of the standard of conduct is well-recognized in Minnesota negligence law. (*See* authorities cited in Br. at 33-36.) Moreover, Gartland joins Glorvigen’s analysis of assumed duty in section II of its reply and response brief.

Cirrus agrees that “[t]here is no question that as an aircraft manufacturer, Cirrus” has a duty to warn and provide instructions (Cirrus Br. at 24), Cirrus does not discuss case law recognizing that adequacy is a question for the jury. Instead, Cirrus argues that its duty to instruct is cabined by what “may be necessary for the safe use of the product.” (*Id.*) But a “necessary” instruction was not the standard adopted in *Frey v. Montgomery Ward & Co.*, which Cirrus cites for its position. *Frey* says the manufacturer’s duty is to “give adequate instructions for safe use.” 258 N.W.2d 782, 787 (Minn. 1977) (emphasis added).

Cirrus also avoids Minnesota law establishing that the jury’s factual determination of adequacy may turn on various considerations, such as the sophistication of the user, industry custom and usage, along with likelihood and seriousness of the harm, and whether the user could be expected to notice and understand the instructions. *See, e.g., Johnson v. W. Fargo Mfg. Co.*, 255 Minn. 19, 24, 95 N.W.2d 497, 501 (1959) (concluding it was a question of fact for jury to determine, among other things, whether manufacturer was negligent in not providing adequate instructions); *see generally Broughton V. Curran v. Nielsen Co.*, 287 N.W.2d 640, 642 (Minn. 1979) (recognizing that the jury properly considered “the customs and practices of the trade” when determining whether defendant was negligent); *see also* authorities cited in Br. at 32.

Gray v. Badger Mining Corp. provides even more guidance on adequacy. *Gray* discusses warnings, not instructions, but the considerations are similar. *Gray* says that adequacy requires the manufacturer to “attract the attention,” “explain the mechanism,” and provide instruction on “ways to safely use the product to avoid injury.” 676 N.W.2d

268, 274 (Minn. 2004). Other jurisdictions have stated it this way: a jury must determine whether instructions are “accurate, strong, and clear, and readily noticeable.” *Kozlowski v. John E. Smith’s Sons Co.*, 275 N.W.2d 915, 922 (Wis. 1979) (reversing directed verdict for a manufacturer who had provided written operating instructions for sausage stuffing machine and ordering jury trial).

Based on ample evidence in this record of what are adequate instructions for the safe operation of the SR22, Cirrus’ negligence was properly submitted to the jury. Specifically, defendants testified that to be effective, instructions should be given in-flight on how to use the SR22 autopilot to recover from VFR into IMC. (T.696; *see also* T.526-27, 625-26.) In light of this evidence, no new law is required to affirm the jury’s finding that Cirrus was negligent when it skipped the in-flight instructions during transition training.⁸

And, in light of the controversy at trial over Cirrus/UNDAF’s failure to provide in-flight instructions, Lesson 4a, Cirrus has no basis for its assertion that “it is undisputed Cirrus met Minnesota’s standard for adequate warnings and instructions.” (Cirrus Br. at 26.) Plaintiffs repeatedly disputed this proposition throughout the trial by establishing

⁸ Plaintiffs’ theory in this case is no different than the theory recognized in a case cited with approval by Cirrus, *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) (cited in Cirrus Br. at 26). The Pennsylvania Supreme Court approved and remanded for a new jury trial plaintiff’s theory that the written instructions in a helicopter flight manual and cockpit placard were inadequate qualitatively. The court explained that the jury should decide whether the manufacturer’s instructions were “*sufficient*” to make the user “*aware* of the dangers of power failure and delayed autorotation” and “*adequately conveyed* the urgency of the situation and the need to react almost instantaneously.” *Id.* at 902 (emphasis added).

that defendants skipped the lesson their own witnesses testified was necessary to make the instructions effective. Cirrus' written instructions allowed defendants to argue that they had acted reasonably, and so Cirrus and UNDAF made that argument to the jury. (T.1807, 1880, 1892.) But with record evidence from defendants' own witness that "You should do it in the airplane [instruct on VFR into IMC]" (T.696), the jury was not required to accept this argument.

Finally, Cirrus makes much of instructions and instruction. (Cirrus Br. at 31-33.) The argument is a distraction from core legal principles and their application to the jury's factual findings. Under Minnesota law, Cirrus had the duty reasonably to provide adequate instructions, *see Gray*, 676 N.W.2d at 274, and the jury's duty was to determine whether the instructions were adequate, *see Balder*, 399 N.W.2d at 81. Other cases hold that where a manufacturer undertakes to provide instructions, it "assumes the responsibility of giving accurate and adequate instructions." *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 325, 79 N.W.2d 688, 693 (1956). The jury decided Cirrus was negligent based on record evidence that in-flight instructions on the autopilot were not given to Prokop, even though defense witnesses admitted it "needed to be done," and defendants' practice was to provide in-flight instructions, consistent with industry custom. (T.626; Br. at 10-12.) There is no basis for overturning the negligence judgment against Cirrus.

III. MINNESOTA PRODUCTS LIABILITY LAW DOES NOT IMPLICATE, AND SHOULD NOT BE NEGATED OR SUPPLANTED BY, THE EDUCATIONAL MALPRACTICE DOCTRINE

This case was tried to the jury based on Minnesota products liability law and it should be decided by this Court based on the same law. While the educational malpractice doctrine someday may prove to be an important issue for this Court in the proper case, this is not that case. The amicus curiae brief filed by the Board of Regents of the University of Minnesota highlights this distinction when it asserts that, while it supports recognition of the educational malpractice doctrine, it “takes no position” on whether plaintiffs may recover based on product liability theory. (Amicus Br. at 1.)

Defendants’ appellate briefs suggest that plaintiffs’ theory at trial was based on a “broad indictment of the curriculum and educational methods employed by Cirrus and UNDAF.” (Cirrus Br. at 14-15.) But this mischaracterizes plaintiffs’ focus at trial, which was on the unique features of the SR22 and, specifically, on the crucial Lesson 4a.

Plaintiffs’ attorneys argued that the Cirrus/UNDAF instructor skipped Lesson 4a, even though he testified otherwise, and his testimony was not credible. (T.1924-25.) Additionally, plaintiffs argued that the crash was Cirrus’ fault because it sold Prokop a plane, knowing the plane’s equipment was different from Prokop’s old plane, but did not provide instructions on the new equipment. (T.1955-56.) Defendants’ response to plaintiffs’ theory was that the written instructions were adequate and that the only cause of the crash was Prokop’s decision to fly in bad weather. (T.1807, 1880, 1892.)

Because Cirrus is a product manufacturer with a duty reasonably to provide instructions adequate for the safe use of its product, and UNDAF does not challenge the

jury's finding that it was Cirrus' agent and engaged in a joint enterprise to provide these instructions for the SR22, it is not necessary for this Court to address the educational malpractice doctrine, its policy considerations, or any exceptions to the doctrine. This Court frequently abstains from deciding issues that are not necessary to the resolution of the appeal. *See, e.g., Augustine v. Arizant, Inc.*, 751 N.W.2d 95, 101 n.6 (Minn. 2008) (holding it "is not necessary to decide here, and we do not decide" whether sworn admissions made in connection with a guilty plea are encompassed within an indemnification statute); *In re of Welfare of J.W.K.*, 583 N.W.2d 752, 756 (Minn. 1998) (refusing to decide scope of consent to take blood sample); *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981) (refusing to decide whether first amendment proscriptions apply to a nursing home as the "functional equivalent" of a town). It is sufficient for this Court to hold that the educational malpractice doctrine does not apply in this case. That conclusion is supported by the record and the applicable law.

Reinforcing the conclusion that the educational malpractice doctrine does not apply, the policy considerations underlying that doctrine have no relevance here. First, the standard of care that applies to Cirrus and its agent is clear and determined by case law – the reasonably prudent manufacturer. *Lovejoy*, 248 Minn. at 325, 79 N.W.2d at 693 (holding manufacturer may become liable if it fails to exercise reasonable care in design, manufacture, warnings, or instructions). Second, the "inherent uncertainties about causation and damages" decried by Cirrus amount to nothing more than argument that the fault of the product user should be compared to the manufacturer. Minnesota has long applied comparative fault principles in product liability cases and this jury assessed

comparative fault in this case. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977) (applying comparative fault statute and holding “[w]e find no difficulty in applying comparative concepts to products liability cases”).

The remaining policy concerns repeated by Cirrus are clearly overblown given Minnesota’s extensive experience with product liability litigation. Courts will not be “flooded” with claims; this is just another product liability case, not a new form of malpractice. Nor does this suit “embroil” courts in “overseeing the day-to-day operations of schools”; the district court applied the well-established duties of a product manufacturer and allowed the jury to determine whether it was negligent in providing adequate instructions. Finally, federal preemption is not now and never was at issue in this appeal. Cirrus’ claim to preemption was rejected by Judge Magnuson at the early stages of this case. (A.31-43.) The issue has not been raised on appeal and has been waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding issues not raised in lower court briefs on appeal have been waived).

Gartland also joins in Glorvigen’s analysis of existing case law on the educational malpractice doctrine and Cirrus’ non-delegable duty to reasonably provide instructions for safe use of its product, as set forth in section III of Glorvigen’s brief.

CONCLUSION

It is not an overstatement to say that the Court's decision in this case will have significant impact regardless of the outcome. If the Court allows the decision of the court of appeals to stand, it will be because the Court has either significantly departed from the traditional rules governing review of a jury verdict, or, more dramatically, fundamentally

altered decades of Minnesota product liability law. If the Court reinstates the district court judgment, it will reaffirm established rules regarding the responsibilities of product manufacturers, and maintain the established balance of policy considerations that led to the development of those rules.

Cirrus marketed and sold a sophisticated, high performance airplane. It recognized that the private pilots who bought that plane would need instructions on how to fly it safely notwithstanding their prior experience, as the SR22 presented significant risks not inherent in other private aircraft. Cirrus developed the curriculum to provide the necessary instructions during transition training, and made those instructions a part of its sales program by including the cost in the price of the plane. The jury heard conflicting evidence concerning the Cirrus/UNDAF instruction provided to Prokop, including evidence establishing that Prokop's instructor skipped the critical in-flight portion of the instructions prescribed by Cirrus. The jury also heard evidence that these instructions were critical to safe recovery from a sudden emergency in the SR22 that Cirrus was a leading cause of small airplane crashes. Finally, the jury heard evidence that Prokop, having received no in-flight instructions on the specific procedure to be followed in the emergency conditions in which he found himself, tried manually to fly the SR22 out of the emergency conditions, resulting in a power stall and the fatal crash of the plane.

The jury's verdict does not rest on speculation or conjecture. Nor does the negligence claim against Cirrus implicate the educational malpractice doctrine. The law imposed on Cirrus as a product manufacturer an obligation reasonably to provide adequate instructions for the safe use of its product. Cirrus decided that a particular

course of instruction would discharge that obligation. Unfortunately for the families of Gary Prokop and James Kosak, Cirrus and UNDAF failed to meet the standard of conduct they set for themselves.

Dated: October 3, 2011.

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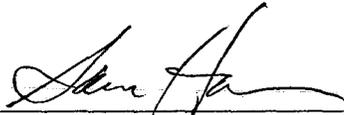
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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in Times New Roman 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2007 and contains 9,390 words, including headings, footnotes and quotations.

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