

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

**STATE OF MINNESOTA
IN SUPREME COURT**

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

and

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

vs.

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

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

and

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

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

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STATEMENT OF ISSUES

1. Should Minnesota impose on product sellers a common-law duty to train purchasers to proficiency in any use of the product that involves a foreseeable risk of personal injury or death?

Plaintiffs did not assert a product-liability claim at trial, so the trial court did not address this issue. Cirrus preserved the issue of liability through motions for JMOL and new trial, A-135-138;¹ CA-60-61(Tr. 1392:17-1397:8); CA-74-77 (2/19/10 Tr. 4:20-16:14) which the trial court denied. ADD-52-135.²

The Court of Appeals held that Minnesota law does not impose a duty on a product manufacturer to train a purchaser to proficiency. Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541, 549-52 (Minn. App. 2011)

Most apposite cases

Harper v. Herman, 499 N.W.2d 472 (Minn. 1993)

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

Hauenstein v. The Loctite Corp., 347 N.W.2d 272 (Minn. 1984)

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

¹ “A-___” citations are to the Joint Appendix of All Appellants/Cross-Respondents. “CA-___” citations are to Cirrus’s separately bound Appendix.

² “ADD-___” citations are to the Appellants’ Addenda bound with their briefs, all of which are numbered identically. “C-ADD-___” citations are to Cirrus’s Addendum, bound with this brief.

2. Does Minnesota recognize a tort claim for negligence where the only duty at issue was assumed solely by contract?

Cirrus moved for JMOL on the issue of liability at the close of the evidence, and for JMOL and a new trial based on this issue following the verdict. A-135-138; CA-60-61(Tr. 1392:17-1397:8); CA-75-78 (2/19/10 Tr. 4:20-16:14). The trial court denied both motions, approving Plaintiffs' claim as "a claim for negligent performance of contract." ADD-75-82.

The Court of Appeals rejected the claim on the ground that Minnesota law does not recognize the duty Plaintiffs claimed had been assumed, the duty to educate effectively. 796 N.W.2d at 556.

Most apposite cases

80 South Eighth Street Ltd. P'ship v. Carey-Canada, Inc., 486 N.W.2d 393 (Minn. 1992)

Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983)

Vermes v. American Dist. Tel. Co., 312 Minn. 33, 251 N.W.2d 101 (1977)

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

3. Does the educational malpractice doctrine bar Plaintiffs' claims for negligent training against Cirrus and UNDAF?

Cirrus moved for JMOL on the issue of educational malpractice at the close of the evidence, and for JMOL and a new trial based on this issue following the verdict. A-135-138; CA-60-61(Tr. 1392:17-1397:8); CA-

75-78 (2/19/10 Tr. 4:20-16:14). The trial court denied both motions, holding that although Plaintiffs' claims fell within the scope of educational malpractice, the claims were permitted under a new "negligent performance of contract" exception that the trial court created. ADD-75-82.

The Court of Appeals rejected the trial court's new exception and held that the educational malpractice doctrine bars Plaintiffs' claims for negligent training. Glorvigen, 796 N.W.2d at 552-56.

Most apposite cases

Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977)

Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006)

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986)

Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696 (Mo. App. 2008)

4. Was the evidence legally sufficient to support the jury's conclusion that the negligence of Cirrus and UNDAF caused the plane crash?

Cirrus moved for JMOL on the issue of causation at the close of the evidence and for JMOL and a new trial on this ground after the verdict.

A-135-138; CA-60-61(Tr. 1392:17-1397:8); CA-75-78 (2/19/10 Tr. 4:20-16:14). The trial court denied both motions. ADD-2, -115-120. Because

the Court of Appeals decided the case as a matter of law on other grounds, it did not reach this issue. 796 N.W.2d at 558.³

Most apposite cases

Gerster v. Estate of Wedin, 199 N.W.2d 633 (Minn. 1972)

Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006)

Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696 (Mo. App. 2008)

Donohue v. Copiague Union Free School District, 391 N.E.2d 1352, 1355 (N.Y. 1979)

³ The Court of Appeals also declined to reach the issue raised in Defendants' original appeal concerning the unfair prejudice created by Gartland's attorney's improper remarks in closing argument, ADD-120-133, see 796 N.W.2d at 558, and that issue is not addressed by any party in this Court. Should this Court reverse on the issue of liability, the case would need to be remanded to the Court of Appeals for resolution of the closing argument issue.

STATEMENT OF THE CASE

Plaintiffs/trustees Rick Glorvigen and Thomas Gartland brought wrongful death actions against Cirrus Design Corporation and (in Glorvigen) the Estate of Gary Prokop for damages resulting from the deaths of Gary Prokop and James Kosak in the crash of a plane piloted by Prokop. Cirrus joined the United States as a third-party defendant, and the United States removed the case to federal court. The federal court granted Cirrus partial summary judgment on Gartland's claims based on implied warranty, express warranty, and strict liability for product defect and "inadequate instructions." Glorvigen v. Cirrus Design Corp., 2008 WL 398814 at *5-*6 (D. Minn.). The federal court then granted summary judgment to the United States and remanded the case to state court. A-65-69.

After remand, the University of North Dakota Aerospace Foundation ("UNDAF") intervened. The two cases were tried together to an Itasca County jury in May and June of 2009 before the Honorable David J. Ten Eyck. The jury found pilot Prokop 25% negligent, Cirrus 37.5% negligent, and UNDAF 37.5% negligent, and awarded Glorvigen \$9,000,000 and Gartland \$12,000,000 in damages. After adding costs and offsetting for Prokop's fault where appropriate, the trial court entered judgments in favor of Plaintiffs Glorvigen and Gartland. Cirrus and UNDAF moved the trial court for JMOL or a new trial. The trial court

denied those motions, creating a new exception to the educational malpractice bar to permit claims for “negligent performance of contract.” ADD-52-135.

Cirrus and UNDAF appealed the judgment to the Minnesota Court of Appeals. The Court of Appeals reversed, holding (1) that Cirrus’s duty to warn did not include an obligation to train Prokop to proficiency in piloting the plane, and (2) the educational malpractice doctrine barred Plaintiffs’ claims against Cirrus and UNDAF. See 796 N.W.2d at 551-52, 555.

STATEMENT OF FACTS

Gary Prokop, age 47, was a licensed pilot and held a private-pilot certificate with a single engine rating. CA-50, -56-57(Tr. 1170:13-19, 1213:8-1214:10); A-151. Prokop had previously owned and trained in a Cessna 172 aircraft, CA-50 (Tr. 1171:2-19); A-151, in which he had accumulated over 240 hours of flight time, CA-56-57(Tr. 1212:19–1216:13).

Because Prokop lacked an instrument rating, CA-20(Tr. 369:13-16), he could fly only in VFR (“visual flight rule”) conditions. He was prohibited from flying into clouds or other inclement conditions, called “instrument meteorological conditions” or “IMC,” that might require reliance on instrument flying. CA-20(Tr. 367:3-16; 369:6-23). As part of his earlier training for his private pilot certificate, Prokop had received both ground and air instruction in how to recover from inadvertent entry into IMC conditions without the use of an autopilot, and in fact

such instruction was required for his private pilot's certificate. CA-30-31, -38-39, -54-55(Tr. 1201:22-1202:15; 440:14-444:17; 702:3-704:12). Although Prokop had not yet obtained his instrument rating (which would have permitted him to fly in IMC conditions), CA-36, -44(Tr. 617:8-16; 849:22-850:9), he had logged more than 60 hours of instrument in-flight instruction with an instructor unaffiliated with Defendants, CA-54(Tr. 1200:25-1201:2), and had fulfilled all the requirements to take his instrument flight examination. CA-51, -53, -57-58(Tr. 1180:9-10, 1195:5-9, 1214:6-1215:1, 1249:5-10).

The Transition Training Program

Prokop purchased a Cirrus SR22 aircraft and took delivery on December 9, 2002. CA-40, -43(Tr. 764:10-16, 841:22-24). With the purchase of the aircraft, Prokop received two days of "transition training," CA-35(Tr. 613:14-18), with such training to be "to proficiency, in accordance with the trainer's standards." A-163. UNDAF provided these two days of transition training, funded by Cirrus. A-399-400. Prokop separately contracted with and paid UNDAF for an additional one-and-one-half days of training. CA-36-37, -47(Tr. 619:7-620:15, 931:21-23); A-391-393; CA-10-11. The agreement between Cirrus and Prokop provided that neither Cirrus nor UNDAF would bear any responsibility for Prokop's competency as a pilot after he completed the course:

Neither Cirrus, nor its training contractor [UNDAF], will be responsible for competency of purchaser [Prokop]...during or after

the training. Cirrus does not warrant that this training will qualify Purchaser...for any license, certificate, or rating.

A-163.

Plaintiffs' and the MAJ's briefs mistakenly assert at least a dozen times in various ways that Cirrus would not let Prokop leave with his new plane unless and until he completed this training. See Glorvigen Br. at 6, 13, 22, Gartland Br. at 3, 5, 6, 7, 12, 31, MAJ brief at 5 & n.11 (most citing Tr.1528). In contrast, the cited testimony makes clear that FAA regulations, not Cirrus, prohibited Prokop from flying the plane alone without a high performance endorsement:

Q You also need a high performance endorsement to fly this plane, correct?

A Actually that's correct, yes.

Q And that's a requirement by the FAA, correct?

A Yes, to fly alone.

Q To fly the plane that alone, correct?

A Exactly.

CA-63-64(Tr. 1494:20-1495:2); CA-66 (1528:1-7). In fact, Cirrus's "Training Option Acknowledgement Form" noted that the training, while recommended, was "not mandatory," and the purchase documents and FAA regulations undisputedly gave Prokop a number of options for taking delivery of the plane without first receiving the training, including having someone take delivery on his behalf, receiving the training in-route to his home base, having someone ferry the plane home for him and taking the training there, or training in a flight simulator or flight-training device. A-391-392; A-394; 14 C.F.R. § 61.31(f)(1)(2002) (CA-81).

The Plaintiffs' and MAJ's briefs also repeatedly assert that the purpose of Cirrus' transition training was to provide Prokop with a high performance endorsement. See Glorvigen Br. at 6, 13, 22, Gartland Br. at 3, 5, 6, 7, 12, 31, MAJ brief at 5 & n.11 (most citing Tr.1528). Although UNDAF instructors could (at their discretion) provide a high performance endorsement to pilots like Prokop who did not have one, the training agreement expressly provided that there was no promise of a certificate or rating at the conclusion of the training. A-163(Section E).

UNDAF provided its instructors with a syllabus for the transition training course, which was used in instructing Prokop. CA-32(Tr. 499:8-10); A-152-160. At the time, there was no industry standard for such a syllabus; Cirrus was the first manufacturer to offer transition training for a single engine aircraft such as the SR22. CA-16, -34(Tr. 539:4-10; Tr. 327:3-7). The syllabus describes five sessions of ground training and complementary in-flight training. A-152-160. For the airborne sessions, it lists specific maneuvers alongside blank spaces, which the instructor is to check based on the pilot student's performance rating for each maneuver. Id. The syllabus does not require that a student perform every maneuver, and provides that maneuvers with which a student has trouble "may be discontinued and remain incomplete at the instructor's discretion." A-152. In order to receive a UNDAF Completion Certificate, however, a student must

complete all of the maneuvers in the Final Evaluation Flight with a grade of “S[atisfactory]” or “E[xcellent].” Id.

Prokop spent three and a half days, from December 9-12, 2002, completing training in the SR22 conducted by UNDAF. CA-36-37, -46-47(Tr. 619:7-620:9; 913:2-12; 931:21-23). Prokop’s course consisted of four flights (for a total of 12.5 hours of in-flight training) and 5.3 hours of ground instruction. CA-48, -52(Tr. 987:23-988:8, 1182:25-1183:5). The training was performed by YuWeng Shipek, a certified flight instructor employed by UNDAF. CA-42(Tr. 838:16-20).

The Cirrus SR22 is equipped with an autopilot, which performs turns and thus provides the pilot with an alternative means to exit IMC-like conditions (in addition to simply executing a 180-degree turn without autopilot). CA-30(Tr. 440:23-441:16). The operating handbook and a separate autopilot manual explain how to use the autopilot on the SR22, A-352-360; CA-3-9, and a pilot training manual, A-164-351, explains how to utilize autopilot-assisted recovery from VFR-into-IMC conditions. CA-22-23(Tr. 403:16-404:6). Plaintiff Gartland asserts (without record citation) that Prokop “had received no instruction” on IFR-into-IMC using autopilot. Gartland Br. 9; see also MAJ Br. at 6 n.13 (“No other part of the instruction covers the transition from VFR to IMC.”). In fact, it was undisputed at trial that, in addition to receiving the instructions described above, Prokop received SR22 in-flight training entitled “Intro to Autopilot operation” as

part of Flight 1, A-153, and attended two hours of ground instruction entitled “VFR into IMC Procedures SR20/22,” which included a detailed PowerPoint presentation. CA-21(Tr. 387:6-23); A-155-156; A-464-475.

Plaintiffs also mistakenly assert that UNDAF’s course manager “acknowledged that there is no portion of the syllabus that lists ‘VFR into IMC autopilot assisted’ other than lesson 4a.” Gartland Br. 14 (citing Tr. 514 (CA-33)). What the cited testimony actually states is that no portion of the syllabus other than Lesson 4a listed autopilot-assisted VFR-into-IMC *as a flight lesson*, a critical distinction that Plaintiffs’ attorney’s questioning makes clear:

Q [Glorvigen attorney] And there is no place in this syllabus anywhere where recovery from VFR into IMC autopilot assisted *as a flight lesson* is listed, correct?

A That terminology, that exact terminology is not used in any other place in this document.

Q There’s no other place that that specific lesson is denoted, that had specific maneuver *in flight*, correct?

A There’s no other place in the document that that terminology is used.

CA-33(Tr. 513:25-514:10) (emphasis added)).

Cirrus does not dispute for the purpose of this appeal that the jury could have found that Prokop did not receive Lesson 4a, in-flight training in VFR-into-IMC autopilot recovery. It is undisputed, however, that Prokop received ground training on operation of the autopilot, including autopilot-assisted recovery from VFR-into-IMC, and that the information on autopilot operation in the pilot manual,

the autopilot manual, and the training materials was complete and accurate. See Glorvigen Br. at 41-42 (“Here, Plaintiffs do not complain that the training materials-the Initial Training Syllabus..., the Cirrus SR-22 Training Manual..., and the PowerPoint slides used during the training ...were deficient.” (citations omitted)).

The Accident

On the morning of the crash, January 18, 2003, pilot Prokop and passenger Kosak intended to fly from Grand Rapids to St. Cloud to see their children play hockey in an early-morning tournament. CA-28(Tr. 433:8-11). Prokop called FAA weather briefers twice. At 4:56 a.m., he was informed of some low clouds and “potential for some ifr.” A-525. At 5:45 a.m., he was informed of “marginal” conditions around Grand Rapids, and he told the briefer “I was hoping to slide underneath it and climb out.” A-520; CA-67-68(Tr. 1592:25-1593:4). At approximately 6:30 a.m., pilot Prokop and passenger Kosak departed from Grand Rapids/Itasca County Airport to go to St. Cloud Airport. CA-14-16(Tr. 302:21-303:20; 329: 16-18). Minutes later, the aircraft struck the ground, killing both men. Id.

Plaintiffs’ expert James Walters testified that Prokop departed Grand Rapids in nighttime marginal weather conditions, became spatially disoriented, and crashed. CA-13, -15, -17, -31(Tr. 222:14-20, 304:21-305:3, 347:16-349:4, 446:10-

20). Both Walters and Steven Day (who provided Prokop's earlier training) testified that as a VFR pilot Prokop should not have taken off under those conditions. See, e.g., CA-18, -24, -59(Tr. 357:10-11; Tr. 412:8-11; Tr. 1253: 8-11).

The Causation Evidence

Plaintiffs' expert Walters testified that if Prokop had been adequately trained in the use of the autopilot, he would have been able to recover and the crash would not have occurred. C-ADD-10-11(Tr. 274:23-275:14). Walters also testified, however, that he could not tell whether Prokop attempted or even wanted to engage the autopilot (as opposed to performing the course reversal by hand):

Q And you said [Prokop] was hand-flying the aircraft?

A I believe he was hand-flying the aircraft.

Q As we sit here today you cannot tell me whether he ever attempted to use the autopilot?

A No, sir, I can't.

Q You can't tell me if in his head he wanted to use the autopilot, can you?

A I absolutely cannot.

CA-31(Tr. 445:9-17). The remainder of the record likewise contains no evidence suggesting that Prokop tried to use the autopilot or wished to do so.

The Litigation

Plaintiffs Glorvigen and Gartland sued Cirrus and (in Glorvigen's case) the Estate of Prokop alleging negligence, product liability, voluntary assumption of duty, and breach of warranty, A-1-8, A-9-11, and UNDAF later intervened. A-70-

79. Neither Plaintiff asserted any claim for breach of contract or misrepresentation based on the purchase agreement between Cirrus and Prokop. By the time of trial, only the negligent-training claim remained against Cirrus and UNDAF, and the court submitted only that claim to the jury.

In support of their negligent-training claim, Plaintiffs presented to the jury a broad indictment of the curriculum and educational methods employed by Cirrus and UNDAF. Plaintiffs' expert witness questioned:

- the reasonableness of Cirrus's transition training, see C-ADD-9(Tr. 260:25-261:2 ("Q. Was the training he received, transition training that he received reasonable? A. I don't believe so."));
- the effectiveness of the training, C-ADD-8, -10-11(Tr. 242:22-243:14; 274:15-275:8 (Plaintiffs' expert discussing his view of "the only effective way" to conduct the training));
- the adequacy of the training, C-ADD-9(Tr. 260:21-24 "Q. Do you have an opinion as to whether [the transition training given Prokop] meets industry standards? A. My opinion is, no, it does not meet industry standards."));
- Cirrus's curriculum decisions about scenario-based training and risk-assessment training, C-ADD-11-13(Tr. 288:17-291:15; Tr.277:10-281:19);

- Cirrus’s allocation of training between ground training and in-flight training, see C-ADD-9(Tr. 258:19-23 “[I]s simply doing the ground lesson enough to train a pilot to proficiency in how to execute VFR into IMC procedures? A. No, sir.”); and
- whether Cirrus trained Prokop to proficiency in the use of the autopilot, C-ADD-9(Tr. 259:25-260:4 “Do you have an opinion as to whether or not Prokop was ever trained to proficiency in use of the autopilot? A. My opinion is that he was not trained for proficiency.”).

Plaintiffs also affirmatively argued this evidence, both to the trial court, CA-62(Tr. 1421:19-23), and to the jury, CA-69-70, -72(Tr. 1922:16-20; 1943:12-15; 1967:14-18).

The Jury’s Verdict

The jury found Cirrus, UNDAF, and Prokop negligent and allocated fault as follows:

Cirrus	37.5%
UNDAF	37.5%
Estate of Gary Prokop	25%
TOTAL	100%

ADD-50. The jury also found that Cirrus and UNDAF were acting as a joint enterprise (*not* a joint venture).⁴ The jury awarded damages of \$9,000,000 to Plaintiff Glorvigen and \$12,000,000 to Plaintiff Gartland. ADD-51.

Plaintiffs' briefs overstate this jury verdict in several ways. First, Plaintiffs assert several times that the jury concluded that Flight lesson 4a was not given. See Glorvigen Br. at 8 ("The overwhelming evidence—accepted by the jury as true—was that neither Flight Lesson 4a nor anything resembling it was ever given to Prokop."), 13, 25 ("The overwhelming evidence-accepted by the jury as true—was that Flight Lesson 4a was never given to Prokop, and that no flight training whatsoever was given to Prokop for the subject matter of Flight Lesson 4a."). Plaintiffs also assert that the jury necessarily concluded that "Flight Lesson 4a was necessary for Prokop's safe use of the aircraft," Glorvigen Br. at 8-9, and that the omission of Lesson 4a caused the crash, Glorvigen Br. at 13 ("The jury found that Defendants' failure to give Flight Lesson 4a was a direct cause of the crash").

But in fact, the jury was never *asked* whether Flight Lesson 4a was given, or was necessary, or caused the crash. Indeed, Plaintiffs did not ask the trial court to pose any such questions to the jury. Instead, as Plaintiffs requested, ADD-49-50,

⁴ All three appellants mistakenly refer to Cirrus and UNDAF as "joint venturers." Joint enterprise and joint venture are not the same thing. See Delgado v. Lohmar, 289 N.W.2d 479, 482 n.2 (Minn. 1979).

the jury was asked *only* the much broader questions of whether Cirrus and UNDAF were negligent in training Prokop and whether that negligence was “a direct cause of the plane crash.” ADD-50. It is *possible* (as Plaintiffs contend) that the jury’s answers of “Yes” (ADD-49-50) meant that jurors believed that lesson 4a was not given, or was necessary, or caused the crash. It is *equally* possible, however, that these “Yes” answers meant that jurors instead believed one or more of the other types of educational negligence that Plaintiffs urged at trial concerning the adequacy or reasonableness of the training program and the content of the course curriculum.

SUMMARY OF ARGUMENT

The Minnesota Court of Appeals correctly concluded that Defendants here owed Plaintiffs no duty that could legitimately underlie the jury’s verdict in this case. Plaintiffs cannot and do not identify any viable legal ground on which to impose on Defendants the duty to train Prokop to proficiency. Specifically:

- Plaintiffs cannot look to product liability law for the duty to train because Minnesota common law does not impose on product manufacturers a duty to train buyers.
- Plaintiffs cannot look to the Cirrus/Prokop contract for the duty to train because they did not assert any contract claim and because Minnesota does not recognize a claim for negligent breach of contract.

- Plaintiffs cannot look to general principles of negligence for the duty to train because the educational malpractice doctrine bars negligence claims attacking the adequacy of educational instruction.

No court anywhere in the country has ever done what Plaintiffs propose here: impose on a product manufacturer a common law duty to train the purchaser to proficiency in the safe operation of a product. This Court should not be the first.

Finally, in the alternative, Plaintiffs failed as a matter of law to present sufficient evidence at trial to permit the jury to draw a causal link between the omission of Lesson 4a and the crash of the plane.

ARGUMENT

I. STANDARD OF REVIEW

The first three issues presented here—product liability, assumed duty, and educational malpractice—involve the application of law to established facts. This Court reviews such questions of law *de novo*. E.g., Morton Bldgs., Inc., v. Comm’r of Revenue, 488 N.W.2d 254, 257 (Minn. 1992).

With respect to the sufficiency of the evidence to support the jury’s causation finding, this Court reviews a decision on a motion for JMOL *de novo*. See Diesen v. Hessburg, 455 N.W.2d 446, 449 (Minn. 1990) (“Granting a JNOV is a question of law subject to *de novo* review.”). The court views the evidence in the light most favorable to the nonmoving party and considers “whether the verdict is

manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." Navarre v. S. Wash. County Sch., 652 N.W.2d 9, 18 (Minn. 2002).

II. PLAINTIFFS' PRODUCT-BASED "FAILURE TO TRAIN" CLAIM FAILS AS A MATTER OF LAW

In this appeal, the briefs submitted by Plaintiffs and the Estate of Prokop (hereafter collectively "Plaintiffs") try to frame Plaintiffs' claims as product liability claims. This effort fails for several reasons. First, Plaintiffs' product liability claims were dismissed below and Plaintiffs did not appeal that dismissal. Second, Plaintiffs did not present a product-liability case at trial; they presented, and the trial court put to the jury, a claim for "negligent training." Finally, Plaintiffs' claims here do not fit existing Minnesota product liability law. To create liability, this Court would need impose on product manufacturers a common-law duty to train product buyers to proficiency in any use of the product that involves a foreseeable risk of personal injury—a duty that neither this Court nor any other court anywhere in the country has ever imposed.

A. Plaintiffs' Product Liability Claims For "Inadequate Instructions" Are Not Part of the Case.

As a threshold issue, Plaintiffs have failed to preserve the "failure to instruct" claim that they now urge in this Court. All such product liability claims

were dismissed early in the action, and Plaintiffs never appealed from that dismissal. Plaintiffs have thus waived those claims.

1. Gartland's product claim was dismissed

Gartland has waived his product-based claim by failing to appeal from its dismissal. Although Gartland's original complaint asserted a claim for strict product liability based on failure to instruct, A-9, Cirrus moved for and the federal court granted summary judgment on that failure-to-instruct claim for lack of evidence. Glorvigen v. Cirrus Design Corp., 2008 WL 398814, at *5 (holding that "[Gartland's] attempt to assert that the aircraft was 'defective because of inadequate instructions' fails."). Gartland did not appeal that ruling, and the federal court ruling dismissing Gartland's product liability claim is final. See In re Shaefer, 178 N.W.2d 907, 909 (Minn. 1970).

This dismissal of Plaintiffs' strict-liability defective-instructions claim necessarily forecloses Plaintiffs' negligent instructions claim here. This Court has repeatedly stated that a claim for *strict-liability* failure to warn or provide instructions is identical in substance to a claim for *negligent* failure to warn or provide instructions. See Hauenstein v. The Loctite Corp., 347 N.W.2d 272 (Minn. 1984). In Hauenstein, the plaintiff asserted both negligent and strict-liability failure-to-warn claims; the jury found that the defendant was negligent, but also found that the product was *not* defective. Id. at 273. This Court found

these two findings irreconcilably inconsistent, concluding that “[u]nder both theories, Loctite’s duty to warn was defined in terms of reasonableness.” Id. at 275. Likewise here, if the Court were to treat Plaintiffs’ claims as product-based negligent failure-to-instruct claims (as Plaintiffs urge), it would create exactly the irreconcilable result that the Hauenstein court rejected: concurrent findings of *no* liability for *strict-liability* failure to warn (because of the summary judgment) and yet liability for *negligent* failure to provide instructions (through the jury verdict). See 347 N.W.2d at 275 (“We therefore conclude that the jury’s finding that Loctite was negligent cannot be reconciled with its finding that the product was not defective.”); see also Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922, 926 n.4 (Minn. 1986); CIVJIG 75.25 (proposing a single jury instruction covering both strict-liability and negligent failure to warn). Because of the identity of these claims, Judge Magnuson’s grant of summary judgment on Gartland’s strict-liability failure-to-instruct claim necessarily forecloses as a matter of law any claim for negligent failure to instruct about the aircraft.

The only appellant who addresses this summary judgment order, Glorvigen Br. at 39, fails to address both the substantive identity of negligent and strict-liability failure to instruct and the language the court used in dismissing Plaintiffs’ strict liability claim: “[Gartland’s] attempt to assert that the aircraft was ‘defective because of inadequate instructions’ fails.” Glorvigen v. Cirrus Design Corp., 2008

WL 398814, at *5 (D. Minn. 2008). This dismissed claim of inadequate instructions is in substance exactly the same claim Plaintiffs try to resurrect here; as Glorvigen states on the very same page, Plaintiffs’ “negligence claims were premised on Cirrus’s duty to instruct as a manufacturer and seller.” Glorvigen Br. at 39.

2. Glorvigen never made a product-based claim

As to Glorvigen, he has never asserted any product liability claim. His complaint made no claims against Cirrus based on either strict liability or negligence. Instead, as the federal court noted in its summary judgment order, “Glorvigen alleged that Cirrus breached its undertaken duty to provide adequate pilot training.” Glorvigen v. Cirrus Design Corp., 2008 WL 398814, at *1 (D. Minn. 2008); see also A-5-7 (Glorvigen Complaint).

In sum, despite Plaintiffs’ efforts to recharacterize the legal basis for the jury’s verdict, the product-based claims they now assert were not part of the case they took to trial. This Court should address the claims that Plaintiffs actually tried, the educational malpractice claims addressed in section IV below.

B. Plaintiffs Have No Viable Product-Based Claim Against Cirrus, Either Under Existing Law or Under Plaintiff’s Proposed “Duty to Train”

Even if Plaintiffs had not abandoned any product liability claims, the claims they assert here go far beyond anything recognized by existing Minnesota law. In

substance, Plaintiffs here ask this Court to create 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. 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 respectfully submits that Minnesota's current product liability law requiring manufacturers to provide adequate warnings and instructions properly balances the rights and duties of buyer and seller. Plaintiffs cite no case from any jurisdiction that has ever imposed the "duty to train" that Plaintiffs urge, and they offer no sound policy reasons for such an extension. This Court should reject the proposed new duty.

1. Cirrus Provided Adequate Instructions Concerning Use of the Autopilot Under Existing Minnesota Law

Both the lower court's rulings and the admissions in Plaintiffs' own briefs to this Court demonstrate that Cirrus met Minnesota's current standard for product warnings and instructions: the materials Cirrus provided to Prokop with the SR22 were undisputedly complete, accurate, and adequate to inform Prokop how to safely operate the aircraft, including the autopilot.

a. Minnesota law requires manufacturers to provide adequate warnings and instructions for the safe use of products.

There is no question that as an aircraft manufacturer, Cirrus has a duty to warn aircraft purchasers of non-obvious dangers and to provide purchasers with any instructions that may be necessary for the safe use of the product. See, e.g., Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 787 (Minn. 1977) (“The duty to warn has been described as two duties: (1) The duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage.”). As the MAJ correctly observes, Minnesota law “protects consumers by imposing duties on manufacturers to warn and instruct as to dangers that may not be fully apparent.” MAJ Br. at 20.

The reason for requiring such warnings and accompanying instructions for safe use is to put the user on notice of potential risks posed by the product. As the Restatement (Third) of Products Liability states:

Instructions inform persons how to use and consume products safely. Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.

Restatement (Third) of Torts: Products Liability § 2 cmt. i (1998) (emphasis added); see also Restatement (Second) of Torts § 388 (imposing strict liability on seller who “fails to exercise reasonable care to inform them of [product’s] dangerous condition or of the facts, which make it likely to be so”). Minnesota law

recognizes this informative purpose. E.g., Gray v. Badger Mining Co., 676 N.W.2d 268, 274 (Minn. 2004) (“To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury”).

The cases that Plaintiffs and their amici cite⁵ also bear out this purpose: each case involved a seller’s claimed failure to provide a warning regarding a non-obvious danger associated with the use of a particular product. See Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 923-24 (Minn. 1986) (failure to warn that safe operation of a hydraulic press required proper installation of functional safety bar); Hauenstein v. The Loctite Corp., 347 N.W.2d 272, 273-74 (Minn. 1984) (failure to warn of corrosive and hazardous properties of adhesive); Frey, 258 N.W.2d at 786 (failure to warn that space heater should not be used in poorly insulated and enclosed spaces); Tayam v. Executive Aero, Inc., 283 Minn. 48, 50-51, 166 N.W.2d 584, 586 (Minn. 1969) (failure to warn of the danger of power failure while flying aircraft in icing conditions if “power boost” equipment is left on); Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 326-

⁵ See Glorvigen Br. at 19-22; Gartland Br. at 28-30; Estate Br. at 13-16.

27, 79 N.W.2d 688, 694 (1956) (failure to warn of danger from operating a tractor in excess of the recommended speed).

b. Plaintiffs do not dispute that Cirrus provided adequate instructions for the safe use of the aircraft.

Applying this standard to the Cirrus aircraft here, it is undisputed that Cirrus met Minnesota's standard for adequate warnings and instructions. Plaintiffs do not claim (and have never claimed) that the operational instructions that Cirrus provided to Prokop for the SR22—including the Pilot Manual and the Autopilot Manual—were incomplete, inaccurate, or inadequate. Plaintiffs do not claim that these materials fail to point out or warn of any non-obvious danger that Prokop might encounter in using the aircraft. Plaintiffs do not claim that Cirrus's instructions for autopilot operation were inaccurate or inadequate, and do not dispute that the plane crash would not have occurred if Prokop had followed those instructions. This stands in stark contrast to the product-based aircraft cases that Plaintiffs cite, which all involve claims that written instructions, flight manuals, or warning placards failed to provide adequate information for safe operation of a vehicle. See Driver v. Burlington Aviation, 430 S.E.2d 476, 482 (N.C. Ct. App. 1993) (upholding claim based on allegation that written “instructional materials” for plane provided “dangerously inadequate information about preventing carburetor icing”); Berkebile v. Brantly Helicopter Corp., 311 A.2d 140, 142-45 (Pa. Super. Ct. 1973) (remanding claim that helicopter manufacturer “gave no

adequate warnings” in the flying manual or on the cockpit placard concerning “need for instantaneous reaction in emergency power failure”); DeVito v. United Air Lines, Inc., 98 F. Supp. 88, 96 (E.D.N.Y. 1951) (holding evidence sufficient to hold plane manufacturer liable where manufacturer did not warn of risks of rebreather mask use or instruct pilots of proper procedure “in any manual”).

Viewed from another perspective, if Plaintiffs claim that Cirrus failed to warn of an “unforeseen” risk in operating the SR22 aircraft, what was that risk? The possibility of crashing in adverse weather conditions? But that danger was obvious, and Prokop undisputedly knew of it. He was a licensed pilot, and he had specifically talked with the FAA weather briefers about trying “slide underneath” (A-520) and thus avoid just the IFR conditions that caused the crash. A-518-523. There was no unforeseen risk of which Cirrus did not warn.

Likewise, if Plaintiffs claim that Cirrus failed to provide Prokop with information necessary for the safe operation of the plane, what was that missing information? How to properly operate the autopilot? How to perform a 180-degree turn using the autopilot—the escape from IMC conditions maneuver? But Cirrus undisputedly provided that information, as discussed above. How to fly a plane out of VFR-into-IMC conditions *without* an autopilot? But not even Plaintiffs suggest that Cirrus had a duty to train Prokop concerning IMC recovery *without* autopilot. And in any event Prokop already had that information—he had

received both ground and air instruction in recovery from inadvertent entry into IMC conditions without the use of an autopilot as part of his original pilot training. CA-30-31, -38-39, -54-55(Tr. 1201:22-1202:15; 440:14-444:17; 702:3-704:12). There was no information necessary for the safe operation of the aircraft that Prokop did not have and that Cirrus did not provide.

As noted above, the federal court held that Gartland's "attempt to assert that the aircraft was 'defective because of inadequate instructions' fails." 2008 WL 398814, at *5. The Court of Appeals likewise noted: "[Plaintiffs] do not claim that this information was inadequate to put Prokop on notice of the dangers associated with piloting the SR22." 796 N.W.2d at 552. And finally, Plaintiffs' briefs here do not identify any problem with the Cirrus instructions.⁶

In sum, the record establishes as a matter of law that Cirrus satisfied its duty to provide adequate warnings and instructions under Minnesota's existing product liability law.

c. "Delegation of duty" has no bearing on Plaintiffs' claims.

Plaintiffs also offer the Court a "straw man" argument by suggesting that product manufacturers will evade established tort duties by delegating those duties

⁶ In addition to these instructions, of course, Prokop here had the additional information provided by the training course materials and ground training, which Plaintiffs concede were complete and accurate. See Glorvigen Br. at 41-42.

to others, citing comments in the Court of Appeals dissent. See Glorvigen Br. at 14 (accusing Cirrus of doing “an end-run around its long recognized duty to provide instruction in the safe use of its sophisticated and dangerous SR22 aircraft”); Estate Br. at 27; MAJ Br. at 4-8 (expressing concern that manufacturers will “delegat[e] their ‘instructive’ role to schools and avert liability for product safety”); see also 796 N.W.2d at 560-61 (Klaphake, J., dissenting).

Cirrus agrees that a manufacturer remains ultimately responsible for the safety of its product, even where it has delegated some portion of its production to others. See, e.g., Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn. 1984). But the issue of delegation has no bearing on the result here. The Court of Appeals decision did not rely on the fact that Cirrus had contracted with UNDAF to provide transition training for the SR22; instead, its decision turned on the legal conclusion that Cirrus’s duty to provide adequate warnings and instructions simply did not include a duty to train. 796 N.W.2d at 552.⁷

In sum, the Court of Appeals decision here did nothing to affect Minnesota’s rule that a product maker cannot avoid liability simply by delegating a portion of its production of the product.

⁷ Moreover, the jury found that Cirrus and UNDAF were joint enterprisers, ADD-50, meaning that the fault of each is imputed to the other in any event. See Delgado v. Lohmar, 289 N.W.2d 479, 482 (Minn. 1979).

2. The Court Should Reject Plaintiffs' Proposed New Common-Law "Duty to Train"

Although they try to couch their argument in existing Minnesota law, Plaintiffs in reality ask this Court to adopt and impose on product manufacturers a new common-law duty: the duty to train. Respondents argue that product manufacturers are legally obligated, not just to provide purchasers with warnings and instructions about the safe operation of the product, but to "ensure that the purchasers were adequately trained." Gartland Br. 20 (citing Plaintiffs' expert).

No case in Minnesota or any other jurisdiction has adopted such a "duty to train," and Plaintiffs' efforts to fit this new duty into existing law do not bear scrutiny. As discussed above, in each of the cases that Plaintiffs cite for support, the court held the seller had a duty to *provide information* to the buyer about product dangers; none of these cases held that the seller had a duty to train the buyer to proficiency in the use of the product. See, e.g., Hodder v. The Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833 (Minn. 1988) (imposing continuing post-sale duty to warn of newly discovered danger of product). Respondents fail to cite a single case from any jurisdiction that does what Respondents ask this Court to do: impose on a manufacturer an affirmative legal duty to ensure that a purchaser is adequately trained to safely operate a product.

a. Plaintiffs' attempt to equate "instructions" with "instruction" fails.

Plaintiffs try to gloss over the limits of existing case law by conflating courts' use of the word "instructions" (with an "s") with the word "instruction" (without the "s"). Common sense and common usage, however, defeat any attempt to equate the two terms. "Instructions" are a set of directions for performing a particular technical procedure. See Webster's Ninth New Collegiate Dictionary at 627 (1985) (also available at <http://www.merriam-webster.com/dictionary/instructions>) (def. 1c: "*plural* : an outline or manual of technical procedure : DIRECTIONS"). The legal authorities addressing product liability claims uniformly use the plural "instructions," and they use it in this sense, to mean information about how to use or operate a product. See, e.g., Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 787, 787-88 (Minn. 1977) (using "instructions" and "directions" interchangeably); Gray v. Badger Mining Co., 676 N.W.2d 268, 274-75 (Minn. 2004) (addressing seller's "warning and the accompanying instructions"); CIVJIG 75.25 ("A product that is not accompanied by reasonably adequate (warnings) (instructions) is unreasonably dangerous..."); Minn. Stat § 544.41(3)(a) (prohibiting dismissal of seller who "has provided instructions or warnings to the manufacturer"); Gartland complaint ¶ 4 (alleging that Cirrus was "negligent in the...warnings...and instructions given"). In short,

providing “instructions” is providing the user with the information necessary to use the product safely.

In contrast, “instruction” without the final “s” means teaching or training. See Webster’s Ninth New Collegiate Dictionary at 627 (1985) (also available at <http://www.merriam-webster.com/dictionary/instruction>) (def. 2: “the action, practice, or profession of teaching”). The legal authorities that address product liability claims rarely use the singular form of the word, and never in the sense of imposing a “duty to train.” Plaintiffs’ briefs, however, regularly use the word in this sense. See, e.g., Estate Br. at 1 (“provision of instruction concerning [] the SR22”); Glorvigen Br. at 19 (referring to “Flight Lesson 4a, An Instruction Needed For The Safe Use Of [Cirrus’s] Product”).

Plaintiffs’ attempt to equate the meaning of the two words is transparent on inspection. In Plaintiffs’ argument, a duty to provide adequate “instructions” is subtly rephrased into a duty to provide “adequate instruction,” which is restated as a duty to “adequately instruct,” which then morphs into a “duty to adequately train,” which finally becomes “a duty to train to proficiency.” See, e.g., Glorvigen Br. at 19-21 (shifting word choice from (1) discussion of case law imposing “duty to provide adequate instructions” to (2) need for Prokop to be “properly instructed” to (3) Cirrus’s “duty to provide that instruction” to (4) Prokop’s need for “transition training”). Plaintiffs offer no analysis or policy reasons that justify

equating “instructions” (directions for use) with “instruction” (training to proficiency). Indeed, Plaintiffs’ briefs do not even acknowledge that the two words have different meanings. Cirrus respectfully submits that Plaintiffs’ attempt to use the visual and aural similarity of the two words to shoehorn a negligent training claim into the common law duty of sellers to provide “adequate instructions” cannot be sustained.

b. No American court has recognized Plaintiffs’ proposed “duty to train”

Plaintiffs’ effort to stretch “instructions” to mean training is also undercut by the utter lack of case law supporting Plaintiffs’ proposed duty to train. As the Court of Appeals correctly noted in its decision here, Plaintiffs’ “contention that the duty to warn by providing adequate instructions for safe use includes an obligation to train the end user to proficiency is unprecedented.” 796 N.W.2d at 552. Plaintiffs cite no such precedent here.

Plaintiffs attempt to tie their proposed “duty to train” to the question of foreseeability, relying heavily on Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922, 926 (Minn. 1986). Estate Br. at 13-14; Glorvigen Br. at 12, 19-21. But the duty to provide a buyer with a warning of possible consequences where “misuse is foreseeable,” Germann, 395 N.W.2d at 925, is not the same as a “duty to train” to proficiency in avoiding every foreseeable danger. And again, Plaintiffs cite no case from any jurisdiction that uses mere foreseeability to suggest that

Cirrus had a common-law duty to provide Prokop with actual in-flight training on autopilot operation, much less a duty to “ensure” that that Prokop was “adequately trained” to operate the autopilot properly. Gartland Br. 20.

The problem with Plaintiffs’ proposed “duty to train” is even more glaring when Glorvigen invokes foreseeability to try to create a duty to passenger Kosak. See Glorvigen Br. at 14 n.3. Cirrus had no “special relationship” with Kosak, and thus had no duty to protect him from Prokop’s flying. As this Court has held:

The fact that an actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action...unless a special relationship exists...between the actor and the other which gives the other the right to protection.

Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979).

Nor is this a case involving the “general duty that ‘any individual owes another . . . to refrain from conduct that might reasonably be foreseen to cause injury to another.’” See Wicken v. Morris, 527 N.W.2d 95, 98-99 (Minn. 1995). Far from asking Cirrus to *refrain* from any conduct, Plaintiffs seek to impose on Cirrus an *affirmative* duty to protect Kosak from Prokop’s negligent conduct by training Prokop to proficiency. Minnesota law imposes no such affirmative duty. See, e.g., Harper v. Herman, 499 N.W.2d 472, 474-75 (Minn. 1993) (holding host who had actual knowledge of shallow water had no affirmative duty to warn diving guest).

c. The imposition of Plaintiffs' "duty to train" would have broad and undesirable consequences

In addition, the broad and costly effects on product sellers of Plaintiffs' proposed "duty to train" counsels strongly against the rule as a matter of public policy. The duty to train that Plaintiffs propose would be almost boundless.

Because the nature of flying means that almost any task a pilot undertakes could "foreseeably" cause a crash if improperly performed, the duty Plaintiffs urge here would effectively make an aircraft manufacturer the guarantor of the overall competence of any pilot who buys its plane.⁸ Nor would such a duty to train logically stop with the aircraft industry; if an aircraft manufacturer has a duty to ensure that everyone who buys its product is adequately trained to confront every reasonably foreseeable danger, then so does every manufacturer of a car, or a farm machine, or a gun, or a power tool, or even a bicycle. After all, each of these products could "foreseeably" injure or kill the operator or a bystander if the operator is not "adequately" trained. The costs of providing such training, or of paying judgments if such training is not given, would be enormous, both to sellers and ultimately to buyers. Plaintiffs offer no justification for imposing them.

⁸ Such a duty would be particularly incongruous here given that Federal Aviation regulations already set the training requirements for licensed pilots like Mr. Prokop. See 14 C.F.R. §§ 61.103, 61.105, 61.107, 61.109. The existence of these federal regulations weighs heavily against imposing on a plane manufacturer a common-law duty to train.

d. Cirrus has not agreed it owed Prokop a common-law duty to train

Plaintiffs try to avoid the need to demonstrate a common-law duty to train by mistakenly asserting that “Cirrus officials agreed that Cirrus was responsible for seeing that there was a transition program,” implying that Cirrus agreed that it had a common-law duty to provide such a program. Gartland Br. 11, Glorvigen Br. 8 (both citing Tr.1509 (CA-65)). In fact, Cirrus never agreed that it had any such common-law obligation. The Cirrus witness in the passage Plaintiffs cite testified *only* that he was *personally* responsible at Cirrus for the transition training program that Cirrus had chosen to offer, *not* that Cirrus believed it was obligated to offer such a program, as the cited testimony makes clear:

Q And you were in charge of transition training at that time, correct?

[objection omitted]

A UND were in charge of training. I think that we've had this discussion many times.

Q But you were in charge of transition training with regard to the Cirrus operation, were you not?

[objection omitted]

A Yes, I was responsible, you know, for insuring that there was a transition training program and recruited UND to do it.

CA-65(Tr. 1508:15-1509:8). Plaintiffs' assertion that Cirrus has conceded that it owed Prokop a common-duty to train him is in error.

e. Plaintiffs cannot disavow their reliance on training to proficiency.

In some of their briefs to this Court, Plaintiffs try to distance their arguments from the claim that Cirrus has a duty to train Prokop to proficiency in the use of the autopilot. See Glorvigen Br. at 12, 27-28 (“The Court [of Appeals] rejected a duty to train to proficiency, but no such duty is at issue in this case.”); Gartland Br. at 36 n.7 (“The claim is that [Defendants] did not give Prokop the chance to become proficient”).⁹ The Court should reject this attempted shift in position, which flatly contradicts Plaintiffs’ position at every earlier stage in this litigation.

Beginning with their complaints, Plaintiffs have consistently maintained that Prokop’s lack of expertise with the autopilot caused the plane crash, *not* because Cirrus did not give Prokop the *opportunity* to learn the autopilot (as they claim now), but because the training itself was *inadequate*. See Glorvigen Complaint ¶ 15 (“Prokop did not activate the autopilot because Cirrus had failed to provide him with *adequate* scenario-based flight training on use of the autopilot” (emphasis added)); Gartland Complaint ¶ 5 (alleging that “the failure of defendant to provide Gary Prokop other scenario-based flight instruction and training which would have

⁹ Appellants are not unanimous on this issue. The Estate of Prokop’s brief still maintains that training to proficiency was necessary for Prokop’s safe use of the aircraft. See Estate Br. at 9 (“Captain Walters opined that the failure to train Prokop to proficiency regarding the inadvertent flight into IMC emergency procedure was the proximate cause of the crash.”), 12 (“Proficiency equates to safe use.”)

adequately trained Gary Prokop on the necessary piloting procedures to follow in order to safely pilot the aircraft” (emphasis added)).

At trial, training to proficiency was the central theme in Plaintiffs’ case.

They presented the issue directly with their expert:

Q Do you have an opinion as to whether or not Mr. Prokop was ever trained to proficiency in use of the autopilot?

A My opinion is that he was not trained for proficiency.

C-ADD-(Tr. 260:1-5). Plaintiffs explicitly argued to the jury that—contrary to what they say now—the important thing was not whether the lesson took place, but whether Prokop was trained to proficiency:

The training didn’t take place. But even if it had taken place, we know for a fact that Mr. Prokop was not trained to proficiency in a very important lesson, VFR into IMC.

CA-73(Tr. 1990:8-11) (Glorvigen closing). See also CA-69(Tr. 1919:13-14)

(Estate’s attorney: “Two, ‘Flight training to proficiency.’ That’s their promise to him.”); CA-69(Tr. 1922:17-20); CA-71(Tr. 1959:6-7) (Gartland attorney: “And what about proficiency. Was Gary [Prokop] trained to proficiency?”); CA-72(Tr. 1967:11-13); CA-74(Tr. 1995:3-9) (Glorvigen attorney: “if you’re going to... tell people you’ll train them to proficiency, you have an obligation to do it. And if you don’t, you have to be held responsible for the consequences.”)

Plaintiffs repeatedly invoked their expert’s testimony about training to proficiency in their opposition to Defendants’ posttrial motions, see CA-

80(2/19/10 Tr. 30:4-23), and in their briefs to the Court of Appeals, Gartland COA Br. at 9, 10, 11, 20 (“Prokop was not trained to proficiency in the use of the autopilot”); Glorvigen COA Br. at 10 (“the weight of the evidence...supports the jury’s finding...that Prokop was not trained to proficiency in the use of the SR-22’s autopilot”), 12. A duty to train to proficiency has been Plaintiffs’ drumbeat throughout this case, and they cannot shift ground now.

III. PLAINTIFFS’ ASSUMED DUTY CLAIM FAILS AS A MATTER OF LAW

Although they never explicitly call it an alternative theory, Plaintiffs also argue that Cirrus “assumed” the duty to train Prokop to proficiency in the use of the autopilot through the training course syllabus and breached its obligation to discharge that duty with reasonable care. E.g., Glorvigen Br. at 13, 22 (“by promising and undertaking to provide Flight Lesson 4a, Cirrus and UNDAF undertook and assumed the responsibility of giving it in a nonnegligent manner.”); Estate Br. at 21 (“Cirrus failed to live up to the commitment it assumed”). This alternative theory of recovery fails for a number of reasons.

A. The Doctrine of Assumed Duty Does Not Apply Here.

First, the doctrine of “assumed duty” that Plaintiffs invoke does not apply here. As Plaintiffs’ own citations demonstrate, this doctrine comes into play where a duty is assumed unilaterally or gratuitously, and in the absence of a contract.

See, e.g., Isler v. Burman, 305 Minn. 288, 294-95, 232 N.W.2d 818, 821-22 (Minn.

1975) (holding church that gratuitously assumed duty to inspect land before snowmobiling event owed duty to use reasonable care in inspection); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 832 (Minn. 1988) (manufacturer voluntarily undertook post-sale duty to warn users about newly discovered dangers in tire rim); Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567, 570 (Minn. 1979) (“The city, while having no affirmative duty to assist in the preservation of private property, voluntarily undertook to render fire protection services to airport users.”).

Here, Cirrus did not assume the obligation to train Prokop gratuitously or unilaterally; the training was a contractual obligation under the purchase agreement for the SR22. There was thus no need or justification to look to the “assumed duty” doctrine to define the parties’ duties to each other; the contract itself specifically defines those duties. As this Court noted in a case where the plaintiff claimed the defendant had assumed duties outside the contract:

[T]he contract between [plaintiff] and [defendant] formed the basis of their legal relationship and placed boundaries on their legal obligations to one another. The record shows that [defendant] did not act in any manner implying an assumption of obligations beyond the contract...

Vermes v. American Dist. Tel. Co., 312 Minn. 33, 38, 251 N.W.2d 101, 103-04 (1977) (distinguishing “cases of gratuitous undertakings” and finding only duties defendant owed were those in contract). Indeed, if a contractual promise constituted an “assumed duty,” then every contractual duty would be subject to a

requirement of reasonable care and enforceable through an action for negligence. That is not the law in Minnesota. E.g., Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983).

Moreover, Cirrus's mere inclusion of Lesson 4a in the course syllabus did not create a common-law tort duty to train Prokop on the autopilot. See Gartland Br. at 41 ("[T]he claimed negligence was based on the failure of Cirrus...to provide the training called for in the curriculum Cirrus designed."). Plaintiffs' argument confuses the legal *existence* of a duty with facts that may indicate *breach* of a duty. *If* a common-law legal duty exists, the presence of a particular item in a school's curriculum may bear on whether the school *breached* that duty. The curriculum itself, however, does not *create* a common-law duty. See Larson v. Indep. Sch. Dist. No. 314, 289 N.W.2d 112, 117 n.8 (Minn. 1979) (holding that items prescribed in curriculum "did not establish mandatory affirmative duties for teachers, principals, or superintendents").

B. "Assumed Duty" Was Not Submitted to the Jury

In addition, Plaintiffs' claims were not presented to the jury as "assumed duty" claims. In submitting an "assumed duty" claim to a jury, a court must of course define for the jury what duty has been assumed. See Isler v. Burman, 305 Minn. 288, 295, 232 N.W.2d 818, 821 (Minn. 1975) (setting out specific instructions court gave jury concerning duty assumed: "When one undertakes to

make an inspection for conditions on land which may be dangerous, he assumes the duty of making an adequate inspection and discovering those conditions which are discoverable by such reasonable inspection.”). Here, Plaintiffs never requested and the trial court never gave the jury any instructions concerning what duty Cirrus had assumed.

C. Plaintiffs Cannot Use “Assumed Duty” as a Back Door for a Breach-of-Contract Claim.

Plaintiffs likewise cannot rely on any claimed breach of the Prokop/Cirrus agreement to support their claim based on an “assumed duty” to train Prokop to proficiency in operation of the autopilot. Most fundamentally, Plaintiffs did not assert and the jury did not decide a breach-of-contract claim, A-1-8, A-9-11; ADD-49-51, so no judgment can be based on such a claim. Allen v. Central Motors, 204 Minn. 295, 298-99, 283 N.W. 490, 492 (1939) (“The theory of trial is said to become ‘law of the case’ for purposes of appeal.”).

Beyond that, any attempt to recast the tort claim Plaintiffs actually tried into a pseudo-contract “assumed duty” claim runs afoul of the express and implied terms of the Cirrus-Prokop contract. In effect, Plaintiffs want the benefit of the training obligation that Cirrus assumed under the contract without the corresponding burden of any of the conditions or limitations that obligation carries with it. Some of those conditions and limitations are imposed by law, including a limitation of the contractual duty to intended beneficiaries, see Cretex Cos., Inc. v.

Const. Leaders, Inc., 342 N.W.2d 135, 139 (Minn. 1984), and a limitation on consequential damages. See, e.g., Lesmeister v. Dilly, 330 N.W.2d 95, 103 (Minn. 1983).

Other conditions and limitations arise from the terms of the contract itself. Here, for example, the contract provides that proficiency in flight training will be evaluated “in accordance with the trainer’s standards.” C-ADD-2. Likewise, assuming *arguendo* that the syllabus were part of the Prokop/Cirrus contract, the syllabus expressly grants flight instructors discretion to omit lessons. A-152 (maneuvers “may be discontinued and remain incomplete at the instructor’s discretion”). Because Plaintiffs never asserted any contract claims, the jury was not asked to and did not address any of these contract issues. Plaintiffs cannot now preempt jury consideration of these issues by using “assumed duty” to retroactively convert a negligence-based verdict into a contract-based judgment.

Plaintiffs’ posttrial “assumed duty” theory also ignores the parties’ agreed contractual limitation on liability. Minnesota permits contracting parties to limit their obligations under a contract, and enforces contractual provisions that protect parties from liability for their own negligence. See, e.g., Ind. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co., 266 Minn. 426, 434, 123 N.W.2d 793, 798 (Minn. 1963) (“It is well established that the parties could, by contract, without violation of public policy, protect themselves against liability resulting from their

own negligence.”); Morgan Co. v. Minnesota Min. & Mfg. Co., 310 Minn. 305, 311-12, 246 N.W.2d 443, 448 (Minn. 1976).

So here, Cirrus and Prokop expressly agreed that Cirrus and UNDAF bore no responsibility for Prokop’s post-training competency:

Neither Cirrus, nor its training contractor [UNDAF], will be responsible for competency of purchaser [Prokop]...during or after the training. Cirrus does not warrant that this training will qualify Purchaser...for any license, certificate, or rating.

A-163. Yet Plaintiffs’ “assumed duty” theory of recovery would effectively override this valid disclaimer and would impose on Cirrus the very responsibility the parties disclaimed: ensuring Prokop’s competency as a pilot.

Again, these problems are magnified with respect to the claims of passenger James Kosak. Even *assuming* that Cirrus had a tort-type duty to pilot Prokop based on the training agreement between them, where did a duty to passenger Kosak come from? Kosak was not a third-party beneficiary of the Cirrus-Prokop training agreement because nothing in the agreement shows any intention to benefit Kosak. See Hickman v. SAFECO Ins. Co. of Am., 695 N.W.2d 365, 369-70 (Minn. 2005) (quoting Restatement (Second) of Contracts § 302 (1979)). Thus, even assuming *arguendo* that Cirrus owed Prokop an “assumed duty” based on the contract between them, Minnesota law offers no basis for imposing on Cirrus any “assumed duty” to Kosak based on that contract.

Finally, Plaintiffs' alternative "assumed duty" theory fails because Minnesota does not recognize a claim for negligent breach of contract. If the duty at issue arises from a contractual promise—as Plaintiffs' "assumed duty" theory posits—there can be no claim for negligence. See United States v. Johnson, 853 F.2d 619, 622 (8th Cir. 1988). As this Court has noted, tort and contract actions arise from different sources and serve different interests:

Tort actions and contract actions protect different interests. Through a tort action, the duty of certain conduct is imposed by law and not necessarily by the will or intention of the parties. The duty may be owed to all those within the range of harm, or to a particular class of people. On the other hand, contract actions protect the interests in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific parties named in the contract. See W. Prosser, Handbook of the Law of Torts § 92 (4th ed. 1971).

80 South Eighth Street Ltd. P'ship v. Carey-Canada, Inc., 486 N.W.2d 393, 395-96 (Minn. 1992). Because of this distinction, Minnesota law permits a plaintiff to recover damages in tort *only* if the defendant had "some duty imposed by law, not merely one imposed by contract." D&A Dev. Co. v. Butler, 357 N.W.2d 156, 158 (Minn. App. 1984). Stated conversely, if the duty arises from the terms of a contract, there can be no claim for negligence. See Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983). Inasmuch as the only claim submitted to the jury here was negligence, Plaintiffs cannot sustain the judgment based on a contractual promise.

IV. THE EDUCATIONAL MALPRACTICE DOCTRINE BARS PLAINTIFFS' NEGLIGENCE CLAIMS

Despite Plaintiffs' current protestations, the claim that they tried to the jury was a claim for educational malpractice. Plaintiffs and their expert presented explicit opinions and arguments that Defendants' educational curriculum and teaching methods were inadequate, unreasonable, ineffective, and failed to conform to industry standards, and on that basis persuaded the jury that Defendants were negligent in training Prokop.

The vast majority of states that have addressed such educational malpractice claims has barred them, as has the Minnesota Court of Appeals. See Alsides v. Brown Inst., Ltd., 592 N.W.2d 468 (Minn. App. 1999); see also Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. App. 2007) (“[C]urrent Minnesota law does not recognize a cause of action for negligent training.”). Cirrus urges this Court to adopt the educational malpractice doctrine and to affirm the Court of Appeals application of the doctrine here to bar Plaintiffs' negligence claims.

A. The Bar on Educational Malpractice Claims Serves Several Public Policies.

Although none of the parties or amici in this case suggests that Minnesota should permit educational malpractice claims,¹⁰ an examination of the policy reasons behind the bar is important to understand its scope and purpose and the reasons for applying it here. Courts have noted at least five public policies supporting the bar on educational malpractice claims:

1. The lack of a satisfactory standard of care by which to evaluate an educator. A claim for educational malpractice “necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen,” an evaluation courts and juries are ill-equipped to make. Andre v. Pace Univ., 655 N.Y.S.2d 777, 779-80 (N.Y. App. Term 1996); see also Swidryk v Saint Michael’s Medical Center, 493 A.2d 641, 643 (N.J. Super. 1985) (“[T]he conflicting theories of the science of pedagogy prevented the construction of a workable rule of care.”).

2. The inherent uncertainties about causation and damages in light of intervening factors such as the student’s attitude, motivation, temperament, past experience, and home environment. “[B]ecause both the educational process and the

¹⁰ Although amicus MAJ originally “support[ed] the recognition of ‘educational malpractice’ or ‘negligent training’ under both tort and contract theories,” MAJ Petition at 2 (July 17, 2011), the MAJ’s current brief reverses that position.

result are subjective, there exists a practical impossibility of proving whether the alleged malpractice caused the complained-of injury.” Nalepa v. Plymouth-Canton Community School Dist, 525 N.W.2d 897, 904 (Mich. App. 1994).

3. The potential for a flood of litigation against schools and other educational and training institutions. Many lawsuits claim that a person who was trained in a particular skill—be it a doctor, a driver, an electrician, or a car mechanic—employed that skill negligently. The Iowa Supreme Court focused on this problem in Moore v. Vanderloo, 386 N.W.2d 108, 114-15 (Iowa 1986):

[I]f a cause of action for educational malpractice is recognized in Iowa, any malpractice case would have a malpractice action within it. For example, a doctor or attorney sued for malpractice by a patient or client might have an action over against his or her educational institution for failure to teach the doctor or attorney how to treat or handle the patient or client’s problem. This would deplete a great amount of resources, both in terms of time and money spent by an institution, on litigation.

See also Swidryk, 493 A.2d at 645 (“To allow a physician to file suit for educational malpractice against his school and residence program each time he is sued for malpractice would call for a malpractice trial within a malpractice case.”).

4. The possibility that such claims will embroil the courts in overseeing the day-to-day operations of schools. See Hunter v. Board of Educ. of Montgomery County, 439 A.2d 582, 585 (Md. 1982) (“[T]o allow petitioners’ asserted negligence claims to proceed would in effect position the courts of this State as overseers of both

the day-to-day operation of our educational process as well as the formulation of its governing policies.”).

5. An additional policy concern comes into play where, as here, the training at issue involves a highly regulated field such as aviation or medicine, where the government sets standards and issues licenses. In such fields, courts have declined to substitute their own standards for those of government regulatory and licensing bodies. See Sheesley v. Cessna Aircraft Co., 2006 WL 1084103, at *23 (D.S.D. Apr. 20, 2006) (applying federal preemption law, “the court finds that federal aviation regulations, not a common law negligence standard, determine what emergency procedures FlightSafety must include in its course curriculum”); Swidryk, 493 A.2d at 645 (noting pervasive state regulation of both physicians and medical schools and holding that “[i]t would be against public policy for the court to usurp these functions and inquire into the day to day operation of a graduate medical education program”); Moore, 386 N.W.2d at 115 (“we refuse to interfere with legislatively defined standards of competency”).

B. Courts Overwhelmingly Reject Educational Malpractice Claims

These public-policy grounds have led the overwhelming majority of states addressing the issue to reject educational malpractice claims, including claims for

economic damages, claims for personal injury and wrongful death,¹¹ and other negligence claims.¹² With respect to flight instruction, Cirrus urges the Court to direct particular attention to Sheesley, 2006 WL 1084103, at *14-18 (rejecting wrongful death plaintiff's attempt to hold flight school liable for failing to include certain emergency procedures in curriculum, noting "if the court recognizes educational malpractice in this case, virtually every future plane crash will raise the specter of a negligent training claim"); Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696, 701 (Mo. App. 2008) (sustaining summary judgment on negligent training claims against flight school after pilot student crashed aircraft, stating that "recognition of liability, of course, would be a great invitation to speculation as to causation."); and Hubbard v. Pac. Flight Servs., Inc., 2005 WL 2739818 (Cal. App.), at *10 (noting that the "imposition of a duty of special

¹¹ See, e.g., Swidryk, 493 A.2d at 642 (involving underlying claim of infant brain damage); Page v. Klein Tools, 610 N.W.2d 900, 901, 903 (Mich. 2000) (alleging fall from utility pole); Dallas Airmotive, 277 S.W.3d at 698, 700 (wrongful death claim).

¹² See, e.g., Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992); Blane v. Alabama Commercial College, Inc., 585 So. 2d 866 (Ala. 1991); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. App. 1976); Wickstrom v. North Idaho College, 725 P.2d 155 (Idaho 1986); Finstad v. Washburn University of Topeka, 845 P.2d 685 (Kan. 1993) As far as Cirrus is aware, only Montana has recognized a variant of educational malpractice, in the much-criticized case of B.M. v. State, 649 P.2d 425 (Mont. 1982) (permitting claim for negligent placement of child in class for mentally retarded); but cf. Moore, 386 N.W.2d at 114 n.1 (criticizing B.M.). The MAJ collects a broad array of these cases in footnote 3 on page 2 of its amicus brief.

training under these circumstances would open the door to a wide assortment of duties, potentially boundless in scope”).

C. Plaintiffs’ negligence claims are educational malpractice claims

Plaintiffs’ negligence claims here fall squarely within the scope of educational malpractice. Educational malpractice claims are characterized by their focus on the nature and quality of instructors’ curriculum choices and teaching methods. The Missouri Court of Appeals provided a useful catalog of such claims in a passage quoted by the MAJ in its brief:

“In educational malpractice cases, a plaintiff sues his or her academic institution for tortiously failing to provide adequate educational services.” ... If a negligence claim raises questions concerning the reasonableness of the educator’s conduct in providing educational services, then the claim is one of educational malpractice Similarly, if the claim requires “an analysis of the quality of education received and in making that analysis the fact-finder must consider principles of duty, standards of care, and the reasonableness of the defendant’s conduct,” then the claim is one of educational malpractice If the duty alleged to have been breached is the duty to educate effectively, the claim is one of educational malpractice. . . . A claim that educational services provided were inadequate, substandard, or ineffective constitutes a claim of educational malpractice. . . . Where the court is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an educational institution, the claim is one of educational malpractice

Dallas Airmotive, 277 S.W.3d at 700 (quoted at MAJ Br. at 13)(citations omitted).

Plaintiffs’ claims against Cirrus here fall within nearly every one of these educational malpractice categories. Although Plaintiffs’ briefs try to imply that the

evidence at trial focused solely on whether Prokop received in-flight training in Lesson 4a, Plaintiffs in fact presented the jury with broad and lengthy expert testimony attacking Defendants' training curriculum, teaching methods, and educational oversight as inadequate, unreasonable, ineffective, and out of compliance with industry standards. For example:

- Plaintiffs asserted that the training Defendants provided was inadequate. E.g., C-ADD-9, -15(Tr. 258:19-259:5; 450:10-451:12). This claims educational malpractice. Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119 n.15 (Conn. 1996) (educational malpractice claim involves student suing educator “for *tortiously* failing to provide adequate educational services” (emphasis in original)).
- Plaintiffs asserted that the training defendants provided was not “reasonable.” See C-ADD-9(Tr. 260:24-261:1 “Q. Was the...transition training that he received reasonable? A. I don't believe so.”); see also C-ADD-8-10(Tr. 242:22-243:14; 274:15-275:8). This claims educational malpractice. Dallas Airmotive, 277 S.W.3d at 700 (“If a negligence claim raises questions concerning the reasonableness of the educator's conduct in providing educational services, then the claim is one of educational malpractice.”).

- Plaintiffs asserted that the training Defendants provided did not meet industry standards. E.g., C-ADD-9(Tr: 260:21-24 “Q. Do you have an opinion as to whether [the transition training] meets industry standards? A. My opinion is, no, it does not meet industry standards.”). This claims educational malpractice. Dallas Airmotive, 277 S.W.3d at 700 (noting claim that educational services are “substandard” “constitutes a claim of educational malpractice”).
- Plaintiffs asserted that Defendants’ curriculum was flawed because it did not include risk assessment or scenario-based training. C-ADD-11(Tr.277:10-281:19) (failure to include risk assessment in training was “casually related” to crash); C-ADD-13-14(Tr. 288:17-291:15) (lack of scenario-based training was “causally related” to crash). This claims educational malpractice. See Sheesley, 2006 WL 1084103, at *14-18 (holding claim that curriculum should have included certain emergency procedures is barred educational malpractice claim).

Based on this evidence, Plaintiffs urged the jury to find Defendants negligent.

CA-69-70, -72(Tr. 1922:16-20; 1943:12-15; 1967:14-18).

Even in this Court, Plaintiffs’ briefs demonstrate that their negligence claims allege educational malpractice. Plaintiffs claim that “the tort duty [Defendants] breached was the obligation reasonably to provide appropriate instruction.”

Gartland Br. at 36 n.7. But one cannot evaluate whether an instructor “reasonably” provided instruction without comparing the instructor’s teaching methods to some educational standard of care, and one cannot determine whether that instruction was “appropriate” without evaluating the educational curriculum. Both aspects of the claim thus involve the very inquiries the educational malpractice doctrine forbids. See also Glorvigen Br. at 28 (“written instructions alone were inadequate and Flight 4a was therefore necessary”).

Plaintiffs do not dispute that the case law barring educational malpractice claims is directly on point with the types of negligence they alleged at trial through their expert. Instead, Plaintiffs simply ignore this substantial part of their case entirely and do not address its impact on the issues here. As the summary above shows, however, the main body of Plaintiffs’ negligence case against Cirrus and UNDAF directly attacked the curriculum and teaching methods of the transition training, which is the central feature of an educational malpractice claim.

As the amicus MAJ correctly states, “[t]he courts should not dictate what curricula schools should teach or intrude themselves on how that teaching is done.” MAJ Br. at 10. Here, Plaintiffs’ case at trial asked the jury to do both. This Court should hold that the educational malpractice doctrine bars Plaintiffs’ negligence claims.

D. Plaintiffs' claims do not fall within the exception for contract and misrepresentation claims involving specific promises

Plaintiffs cannot avoid the educational malpractice bar simply by claiming that they are relying on a specific promise by Cirrus. *Glorvigen Br.* at 43 (“The claim here is that Cirrus failed to deliver on the specific promise it undertook”). It is certainly true that many of the educational malpractice cases around the country recognize a possible exception to the bar where a plaintiff asserts a claim for breach of contract or misrepresentation based on the educator’s failure to perform a specific promise. *See, e.g., Cencor, Inc. v. Tolman*, 868 P.2d 396, 398 (Colo. 1994) (contract); *Squires v. Sierra Nev. Educ. Found.*, 823 P.2d 256, 258 (Nev. 1991) (breach of contract and misrepresentation). Courts recognize that some such claims may avoid the public policy concerns underlying the doctrine because they can be objectively evaluated based on the specific promise and do not involve the application of an educational standard of care or the court’s interference in pedagogical decisions. *See, e.g., Alsides*, 592 N.W.2d at 473.

Plaintiffs here, however, did not assert claims for breach of contract or misrepresentation; they asserted, and the jury addressed, only negligence claims. Negligence claims by their nature involve the evaluation of “reasonable care,” which necessarily raise the problems of the educational standard of care and the judicial micromanagement of classwork that underlie the educational malpractice doctrine in the first place. Plaintiffs cite no case from any jurisdiction that permits

a plaintiff to avoid the educational malpractice bar by alleging a negligent failure to perform a specific promise.

Nor does Plaintiffs' decision to rest their claim here on the omission of a single "promised" lesson (as opposed to the broad negligence claims they made at trial) alter the result. As the Sheesley court noted:

[N]egligent failure to provide an overall education and negligent failure to train how to perform a specific procedure is a distinction without a difference. In both instances, the plaintiff is alleging that the school did not teach the student what he or she needed to know.

2006 WL 1084103 at *16.

E. The fact that Cirrus is also an aircraft manufacturer does not undercut application of the educational malpractice doctrine.

Plaintiffs assert that the educational malpractice bar cannot apply here because Cirrus is primarily an aircraft manufacturer that provides education, not an institution whose primary function is education. *Glorvigen Br.* at 32-36; *Estate Br.* at 20-21. This argument fails for a number of reasons.

1. Plaintiffs' claims rely on Cirrus's provision of educational services.

Most prominently, the argument is inconsistent with Plaintiffs' theory of recovery. Plaintiffs acknowledge that the educational malpractice bar applies "to organizations that were providing educational services." *Glorvigen Br.* at 32. But Plaintiffs' negligence claim here *depends* on the fact that Cirrus was "providing educational services": the fundamental premise of Plaintiffs' case is that

Defendants had a common-law “duty to train” Prokop how to fly his plane safely. Glorvigen Br. at 36; Estate Br. at 33 (“duty to provide transition training.”). Indeed, it is difficult to see how a claim that asks a jury whether a defendant was “negligent in its training of Gary Prokop” (ADD-50) can be anything other than a claim for negligent training. Plaintiffs cannot have it both ways, claiming Cirrus does not provide educational services while seeking recovery for Cirrus’s negligent provision of educational services.

In addition, Plaintiffs ignore the fact that the jury found that Cirrus provided the transition training program in a joint enterprise with UNDAF, ADD-50, which Plaintiffs’ expert Walters described as a large “general aviation training facility” with a “wonderful” and “outstanding” reputation. C-ADD-14(Tr. 291:16-292:8). And of course UNDAF actually provided the training and employed the flight instructor. See C-ADD-4-6; CA-10-11. Given the jury’s joint-enterprise finding—which Plaintiffs do not dispute—Cirrus submits that it is impossible to avoid the conclusion that Cirrus was providing educational services.

2. The public policies barring educational malpractice claims apply to the claims against Cirrus.

The public policies underlying the educational malpractice doctrine (see section IV(a) above) also apply regardless of whether the defendant is a “traditional” educational institution or an institution that offers educational services as an adjunct to some other business. Specifically:

- The same problems arise with the appropriate standard of care arise here as with the pilot training courses at issue in Dallas Automotive, 277 S.W.3d at 701 and Sheesley, 2006 WL 1084103, at *14-18. As Plaintiffs note, the training here “was to be tailored to the individual purchaser, depending on his or her prior experience.” Gartland Br. at 12; see also Tr. 181:12-17. And, the testimony of Plaintiffs’ expert Walters made clear, his evaluation of that training undeniably involved “an evaluation of...the effectiveness of the pedagogical method chosen.” Andre, 655 N.Y.S.2d at 779-80.
- The same problems of causation arise here as in cases involving traditional educators. The problem of determining whether an accident occurred because of an instructor’s method of teaching, because of a student’s method of studying, or because of the student’s independent conduct after completion of the training remains the same regardless of whether the instruction is offered by a traditional flight school or a private company. Dallas Airmotive, 277 S.W.3d at 701 (“recognition of liability, of course, would be a great invitation to speculation as to causation.”).
- The same potential for a flood of litigation arises here as in cases involving traditional schools and colleges. Sheesley, 2006 WL

1084103, at *14-18 (“if the court recognizes educational malpractice in this case, virtually every future plane crash will raise the specter of a negligent training claim”); Moore, 386 N.W.2d at 114-15 (“any malpractice case would have a malpractice action within it”). The only difference here would be that, unlike traditional educational institutions, private companies like Cirrus would likely stop offering pilot education at all, a result that would neither benefit aircraft purchasers nor improve the safety of the general public.

- The same risks of judicial entanglement with educational decisions arise here as in claims against fulltime schools. Again, Walters’ testimony demonstrates the extent to which such negligence claims cast the court as the “overseer” of the reasonableness, adequacy, and effectiveness of Cirrus’s—and UNDAF’s—curriculum and day-to-day teaching. See Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108, 114 (Minn. 1977) (noting that plaintiff’s insistence on exact compliance with a student bulletin’s representations “likely should be regarded as interfering beyond an acceptable degree in [the university’s] discretion to manage its affairs.”). As the MAJ observed, each institution must be allowed “to set its own standard of conduct about

what it will and will not choose to teach, based on educational decision-making.” MAJ Br. at 12.

- And the same concern would arise regarding courts substituting their own standards for those of the bodies that regulate and license program graduates. See Sheesley, 2006 WL 1084103, at *23. It is the FAA that ultimately determines whether a pilot is qualified to fly, regardless of whether the pilot was trained by a public college or a private company.

Given that Cirrus’s circumstances here implicate all of the public policies underlying the educational malpractice bar, Plaintiffs’ suggestion that the bar should not apply because Cirrus is a manufacturer is an elevation of form over substance. Courts have regularly rejected such a formalistic approach and have applied legal protections to parties based on whether the policies behind the protection apply to what the party was actually doing, and not based just on the party’s label or title. See, e.g., Carradine v. State, 511 N.W.2d 733, 736 (Minn. 1994) (holding that police officer’s absolute immunity from defamation liability depends not on status as officer but on “the nature of the function assigned to the officer and the relationship of the statements to the performance of that function”); Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 315 (Minn. 1998) (holding application of official immunity depends not on status as public employee but on

whether actions are discretionary or ministerial); In re Swenson, 183 Minn. 602, 606-07, 237 N.W. 589, 591 (1931) (in evaluating applicability of clergy-penitent privilege, court must look to circumstances leading up to communication); cf. Pickrel v. City of Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995) (holding court cannot “simply conclude that any off-duty officer also employed by a private entity could not have been acting under color of state law” for purposes of section 1983 claim). Here, Cirrus’s function in providing educational services is just the same as traditional educational institutions providing such services, and Cirrus should be entitled to the same protection of the educational malpractice bar.

Cirrus does not of course suggest that any odd suggestion or piece of advice given by a business automatically falls within the educational malpractice doctrine. But where, as here, an institution provides a multi-day, thoroughly outlined course of instruction taught by a federally licensed flight instructor covering a clearly defined subject area and aiming at a specific government licensure, Cirrus submits there is no rational reason to base the applicability of the educational malpractice doctrine on whether the sponsoring institution is a public university or a private company.

3. Case law supports application of the educational malpractice bar to the claims against Cirrus

In contrast to these policy reasons supporting application of the bar to Cirrus here, Plaintiffs offer no case law or analysis supporting their conclusory assertions

that the application of the educational malpractice bar should depend on the type of entity that does the teaching. Plaintiffs appear to contend that, because manufacturers owe separate tort duties to purchasers, the bar should not apply to them. But the existence of those tort duties provides no reason to treat manufacturers that provide educational services differently in situations, where, as here, those tort duties are undisputedly satisfied. See section II(B)(1)(b) above.

The law recognizes education generally and the training of pilots specifically as a public good. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 437 (1993) (Blackmun, J. concurring) (“Our cases have consistently recognized the importance of education to the professional and personal development of the individual.”); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104–264 § 271, 110 Stat. 3213, 3238-39 (1996) (enumerating congressional findings on value of FAA certification of training schools, pilot examiners, and pilots). Plaintiffs do not and cannot reasonably question the benefits of training already-licensed pilots to improve their skills. Whether this is done by a traditional educational institution or a manufacturer providing the same training does not alter either the value of the training or the considerations weighing against interference with teaching decisions.

Moreover, contrary to Plaintiffs' implication, courts *have* in fact rejected educational malpractice and negligent training claims against defendants that were not "traditional" educational institutions, albeit in circumstances somewhat different from those presented here. For example, the Missouri Court of Appeals rejected a claim by an injured electrician that a trade association "failed to exercise reasonable care in furnishing educational services to him...in safety matters which caused his injuries," holding (among other things) that plaintiff had "failed to establish any duty which the law would impose on the defendant Association for failure to effectively educate its students." Bunker v. Ass'n Mo. Elec. Coop., 839 S.W.2d 608, 609, 611 (Mo. App. 1992); see also Gupta v. New Britain Gen. Hosp., 239 Conn. 574, 589-91, 687 A.2d 111, 118-20 (Conn. 1996) (applying educational malpractice bar where hospital "assumed educational responsibilities related to, but distinct from, its function as an institution for healing the sick"); Page v. Klein Tools, 610 N.W.2d 900, 901, 905-06 (Mich. 2000) (rejecting negligent training claim where defendant both sold pole-climbing equipment to plaintiff and trained him); Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. App. 2007) (rejecting negligent training claim against insurance company and insurance agent's supervisor).

F. The Cases on Which Plaintiffs Rely are Inapposite

The educational malpractice cases on which Plaintiffs rely are all readily distinguishable and in no way undercut the Court of Appeals reasoning in this case.

Plaintiffs' reliance on Judge Magnuson's earlier decision in this case as precedent is misplaced for several reasons. 2008 WL 398814 (D. Minn. Feb. 11, 2008). Most obviously, it is an earlier decision in this same case, and in fact part of what this court is reviewing. Second, a federal court decision is not precedential in this Court. See Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 330 (Minn. 2000) ("While a federal court's interpretation of a lacuna in Minnesota law may be persuasive, we are not bound to follow it."). Third, Judge Magnuson concluded that, because the Alsides case did not involve a claim of negligence, the educational malpractice bar it adopted did not apply to negligence. 2008 WL 398814, at *3. But educational malpractice claims are inherently negligence claims, see, e.g., Hunter v. Bd. of Educ., 439 A.2d 582, 583-84 (Md. 1982) (equating claim of educational negligence with educational malpractice), and seven of the ten cases on which Alsides relied in fact rejected negligence claims based on the educational malpractice doctrine. Finally, Judge Magnuson made clear that he was addressing the issues as they stood "at this stage." 2008 WL 398814. He did not know and could not have known the actual educational malpractice evidence that Plaintiffs put in at trial, as set forth above.

Plaintiffs also cite In re Cessna 208 Series Aircraft Products Liability Litigation, 546 F. Supp. 2d 1153 (D. Kan. 2008). But In re Cessna is an outlier decision that specifically notes that multiple other cases—including Alsides—“have *rejected* educational malpractice claims *in analogous circumstances*.” Id. at 1158 (emphasis added, also distinguishing Dallas Airmotive and Sheesley). Faced with this body of authority, the Cessna court makes clear that it is deferring to an earlier Texas state court judge’s analysis of Texas law (which it does not discuss) and “declines to re-visit this issue under Texas law.” Id. at 1159.

Finally, Plaintiffs gain no useful support for their arguments from Larson v. Indep. Sch. Dist. No. 314, 289 N.W.2d 112 (Minn. 1979), Doe v. Yale University, 748 A.2d 834 (Conn. 2000), and similar cases involving claims for injuries suffered *during* classes or training. It is one thing to require a teacher to safeguard a minor student from injury *during* a gymnastics exercise in a compulsory physical education class where the teacher is in control. See Larson, 289 N.W.2d at 115-16. It is quite another to impose the duty Plaintiffs urge here: to require a flight instruction provider to protect the whole world from the conduct of a licensed pilot *after* he finishes its course and the provider has no control over his actions. See Page, 610 N.W.2d at 906 (noting defendant “certainly was not in a position to ensure that plaintiff would make proper use of the instruction he received”).

The court in Doe v. Yale University emphasized this very distinction in the

context of the educational malpractice bar. The court recognized that, under the educational malpractice doctrine, a claim based on a “the duty to educate effectively...is not cognizable.” 748 A.2d at 847. The Doe court permitted the claim before it to proceed, however, because that claim alleged a breach of “[t]he duty of an educator or supervisor to use reasonable care so as not to cause physical injury to a trainee *during the course of instruction or supervision.*” Id. (emphasis added)); see also Kirchner v. Yale Univ., 192 A.2d 641, 642-43 (Conn. 1963) (permitting claim based on injuries plaintiff sustained in school’s woodworking shop *during* performance of coursework), cited at Glorvigen Br. 35.

In sum, Cirrus urges this Court to endorse and adopt the bar on negligence claims based on educational malpractice, and to apply that bar here to affirm the Court of Appeals decision reversing the judgment of the trial court.

V. IN THE ALTERNATIVE, PLAINTIFFS DID NOT AS A MATTER OF LAW ESTABLISH THE ELEMENT OF CAUSATION.

In the alternative,¹³ this Court should affirm the decision of the Minnesota Court of Appeals reversing the judgments against Defendants on the ground that the evidence Plaintiffs adduced at trial failed as a matter of law to establish

¹³ Consistent with the Court’s Orders of June 28, 2011 and July 21, 2011, Cirrus presents this alternative argument for affirmance based on causation in the posture of a cross-appellant. Cirrus takes no position on the issue raised in UNDAF’s brief concerning the propriety of the trial court’s entry of judgment against UNDAF.

causation. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (holding negligence plaintiff must prove “breach of the duty was the proximate cause of the injury”). To establish causation, the evidence must show that the negligent act “was a substantial factor in the harm’s occurrence.” George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006). Here, Plaintiffs failed to establish a causal link between the omission of Lesson 4a and the plane crash. Cirrus is therefore entitled to judgment as a matter of law.

A. Plaintiffs’ Expert Testimony Failed as a Matter of Law to Establish a Causal Link Between the Omission of Lesson 4a and the Crash

The record evidence here is insufficient to support a finding of causation. Plaintiffs claim that Cirrus’s failure to give Prokop in-flight training in autopilot-assisted VFR-into-IMC conditions in addition to the written instructions and classroom instruction on that topic caused the plane crash. Glorvigen Br. at 25. To establish this link between the crash and the omission of in-flight training in “autopilot-assisted VFR into IMC” procedures, Plaintiffs relied on their expert Walters. Walters testified that Prokop had been hand-flying the plane at the time of the crash, but he could not opine with any certainty whether Prokop attempted to use the autopilot, or even whether he *wanted* to use the autopilot on the flight in question. Walters testified:

Q And you said he was hand-flying the aircraft?

A I believe he was hand-flying the aircraft.

Q As we sit here today you cannot tell me whether he ever attempted to use the autopilot?

A No, sir, I can't.

Q You can't tell me if in his head he wanted to use the autopilot, can you?

A I absolutely cannot.

CA-31(Tr. 445:9–17). Walters also testified that, prior to the crash, Prokop was taught each and every one of the risk management factors that every pilot must consider on every flight prior to take-off, including fitness to fly, competency in the airplane, flight experience, aircraft knowledge, weather and other environmental conditions, human factors, and situational awareness. CA-25-29(Tr. 421:12–436:20). It was also undisputed that as part of his VFR training, Prokop had received *both* ground *and* air instruction in how to recover from inadvertent entry into IMC conditions without an autopilot, CA-30-31, -38-39, -54-55(Tr. 1201:22-1202:15; 440:14-444:17; 702:3-704:12), and that he had received in-flight training in the operation of the SR22 autopilot from his friend Patrick Bujold, who also saw Prokop operate the autopilot. CA-48-49(Tr. 987:23-988:24; 1010:18-1013:4).

Given this body of evidence, the record was insufficient to permit a jury to conclude that any omission of autopilot-assisted VFR-into-IMC recovery training was a “direct cause” of the plane crash. See Gerster v. Special Adm’r for Estate of

Wedin, 294 Minn. 155, 160, 199 N.W.2d 633, 636 (Minn. 1972) (upholding JNOV based on lack of sufficient evidence of direct cause of fire, noting that “the opinion of an expert must be based on facts sufficient to form an adequate foundation for his opinion and that an opinion based on speculation and conjecture has no evidentiary value”). In Gerster, the plaintiff’s expert opined that Wedin’s careless smoking probably caused the fire based on circumstantial evidence (e.g., decedent Wedin smoked cigarettes, Wedin had been drinking, Wedin had just arrived home). This Court, however, rejected the expert’s opinion for lack of foundation because “there is no evidence whatever that Wedin was smoking in his apartment at or just prior to the time of the fire.” 199 N.W.2d at 636.

Plaintiffs face the same problem here. Plaintiffs rely on evidence of three facts as the foundation for their expert Walters’ opinion that Defendants’ conduct caused the crash:

1. Prokop did not receive lesson 4a, in-flight training on autopilot assisted VFR-into-IMC conditions;
2. Prokop did not employ the autopilot during the flight; and
3. Had Prokop employed the autopilot, the crash would not have occurred.

Glorvigen Br. at 13-21.¹⁴

But even taking these three propositions as true, this evidence is not sufficient foundation under Minnesota law (and Gerster in particular) for an expert causation opinion that goes beyond speculation. In Gerster, the court focused on the critical unanswered question “Was Mr. Wedin smoking?” Likewise here, the evidence leaves unanswered several critical questions, including:

1. “Did Prokop *try* to use the autopilot?” Expert Walters could not opine whether Prokop tried or even wanted to use the autopilot, CA-31(Tr. 445:9–17), and the trial court conceded that “Prokop may not have tried to activate the autopilot or may not have wanted to.” ADD-99.
2. “Did Prokop have time after he realized the emergency to activate the autopilot?” See CA-12(Tr. 221:19-22) (expert Walters: “The airplane

¹⁴ At trial, Plaintiffs also claimed that the lack of risk-assessment training and the lack of scenario-based training were also “causally related” to the crash. See C-ADD-11-13(Tr. 275:10-277:10; Tr. 281:13-19; Tr. 288:18-291:16); CA-14(Tr. 300:1-24). On appeal, Plaintiffs have abandoned these claimed causes, apparently recognizing (as discussed in the text above) that they rest on clear claims of educational malpractice. Plaintiffs, urging of these improper grounds at trial, however, means that the Court cannot sustain the judgment here in any event. See Schroht v. Voll, 245 Minn. 114, 118, 71 N.W.2d 843, 846 (Minn. 1955) ((holding that where trial court submits several issued of fact to jury and one or more of them cannot legally sustain the verdict, the defendant is entitled to a new trial”).

rapidly descended to the ground, and I don't think anybody can tell you exactly how that happened because we just don't know.")

3. "Did Prokop decide to get out of trouble by means other than the autopilot?" See CA-30-31, -38-39, -54-55(Tr. 1201:22-1202:15; 440:14-444:17; 702:3-704:12) (discussing Prokop's earlier ground and in-flight training in recovery from VFR-into-IMC conditions *without* autopilot); CA-19(Tr. 361:4-7) (expert Walters acknowledging "it is possible" that Prokop intended his sharp descent).

Here, as in Gerster, Plaintiffs' failure to offer evidence as to these questions leaves a critical gap on the issue of causation.

B. Plaintiffs' Causation Theory Rests on Speculation About What Prokop Had Learned and Would Have Learned, and About What He Would Have Done Differently

Even beyond these questions, Plaintiffs encounter the causation problem inherent in educational malpractice cases: what evidence supports Plaintiffs' assumption that even if Prokop *had* received Lesson 4a in addition to his ground training, he would have learned enough to prevent the crash? Many factors other than the quality of instruction can affect a student's subsequent performance. See, e.g., Donohue v. Copiague Union Free School District, 391 N.E.2d 1352, 1355 (N.Y. 1979) ("Factors such as the student's attitude, motivation, temperament, past

experience and home environment may all play an essential and immeasurable role in learning.”) (Wachtler, J., concurring). These factors render any finding that a particular educator caused the injuries resulting from a student’s conduct inherently speculative and uncertain. See, e.g., Dallas Airmotive, 277 S.W.3d at 701 (“[M]any factors contribute to the quality of a student’s education and the quality of his later performance. The recognition of liability, of course, would be a great invitation to speculation as to causation.”); Sheesley, 2006 WL 1084103, at *17; Donohue, 391 N.E.2d at 1353-54 (“this element [causation] might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process”).

These student-specific factors may bear on causation in several ways, including whether the student would have adequately learned the promised task and whether the student’s lack of knowledge concerning the task actually caused the injury in question. Here, for example, the evidence showed many factors specific to Prokop that bore on the issue of causation, including his prior training in escaping IMC conditions without autopilot, CA-30-31, -38-39, -54-55(Tr. 1201:22-1202:15; 440:14-444:17; 702:3-704:12), his experience in handling emergency conditions, CA-48, -51(Tr. 987:23-988:24; 1179:9-1180:25), the autopilot training he received in ground classes and in Lesson 1A, A-155; CA-

21(Tr. 387:6-23), and his strong motivation to get to his son's hockey game, CA-14-16(Tr. 302:21-303:23; 329:10-20).

Prokop's Estate asserts that "there is no reason to conclude that, had the emergency procedure Recovery from VFR into IMC (auto-pilot assisted) been taught to proficiency as promised, Prokop would not have learned it." Estate Br. at 25. But this only speculation; the absence of proof of a negative is not proof of the affirmative. As the State of Minnesota's amicus brief notes, there is a "practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student." State Br. at 7 (citing Donohue, 391 N.E.2d at 1355).

And of course Cirrus had provided Prokop with complete and accurate information about how to use the autopilot to recover from VFR-into-IMC conditions in its ground instruction and its manuals and other written materials. These alternative sources of information make Plaintiffs' evidence of causation even more speculative. Assuming that Walters was correct that use of the autopilot would have prevented the accident, then:

- if Prokop had done what the pilot's manual told him to do, the accident would not have happened; and
- if Prokop had done what his ground instruction told him to do, the accident would not have happened.

Any suggestion that the omission of Lesson 4a caused the crash, rather than Prokop's failure to use the information he already had, is entirely speculative. See Nalepa, 525 N.W.2d at 904 ("The ultimate responsibility for what is learned, however, remains with the student, and many considerations, beyond teacher misfeasance, can factor into whether a student receives the intended message.").

In sum, Plaintiffs' causation evidence fails as a matter of law to support the jury's finding of causation, providing this Court with an alternative ground to affirm the Court of Appeals decision.

CONCLUSION

For the reasons discussed above, Defendant Cirrus Design Corporation urges this Court to affirm the decision of the Minnesota Court of Appeals.

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IN SUPREME COURT

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Thomas M. Gartland, as Trustee for the
Next-of-Kin of Decedent Gary R
Prokop,

Appellants/Cross-Respondents,

v.

Cirrus Design Corporation,
Respondent,

The University of North Dakota
Aerospace Foundation,
Respondent/Cross-Appellant, and

and

the Estate of Gary Prokop, Appellant/
Cross-Respondent.

Rick Glorvigen, as Trustee for the
Next-of-Kin of decedent James Kosak,

Appellant/Cross-Respondent,

vs.

Cirrus Design Corporation,

Respondent.

Appellate Court
Case Numbers:

A10-1242

A10-1243

A10-1246

A10-1247

**CERTIFICATION OF
BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131.01, subd. 7(B), for a brief produced with a proportional font. The length of this brief is 16,475 words. This brief was prepared using Microsoft Word 2003 software.

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