

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

**STATE OF MINNESOTA  
IN SUPREME COURT**

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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),

v.

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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## ARGUMENT

### **PLAINTIFFS DID NOT AS A MATTER OF LAW ESTABLISH THE ELEMENT OF CAUSATION.**

Cirrus urges this Court to affirm the decision on the alternative ground that the evidence at trial failed as a matter of law to establish causation.<sup>1</sup> The arguments in Plaintiffs' responsive briefs<sup>2</sup> do not cure and cannot avoid the fundamental problems with Plaintiffs' causation evidence:

- The failure of Plaintiffs' expert to provide any factual foundation for linking the omission of Lesson 4a with the airplane crash;
- The absence of any evidence that Prokop's failure to engage the autopilot more likely resulted from the omission of Lesson 4a than from any of several alternative causes; and
- Plaintiffs' abandonment on appeal of several improper theories of causation they offered at trial, a decision that prevents this Court from

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<sup>1</sup> Consistent with the Court's Orders of June 28, 2011 and July 21, 2011, Cirrus presents this reply in support of its alternative argument for affirmance based on causation in the posture of a cross-appellant. As noted in its original brief, Cirrus takes no position on the other cross-appeal issue, whether judgment was properly entered against respondent UNDAF. See Gartland Resp. Br. at 17-22, Glorvigen Resp. Br. at 30, Estate Resp. Br. at 11.

<sup>2</sup> As in Cirrus's original brief, unless otherwise stated or indicated by context, Cirrus uses the word "Plaintiffs" to refer both to Plaintiffs Gartland and Glorvigen and to defendant the Estate of Gary Prokop, which is aligned with Plaintiffs on this appeal.

determining whether the jury's causation finding rested on a legally tenable ground.

In addition, Plaintiffs' attempted disavowal in this Court of their repeated claim below that Cirrus had a duty to train Prokop "to proficiency" would (if accepted) necessarily foreclose any claim of causation as a matter of law. If Defendants had no duty to train Prokop to proficiency in use of the autopilot, then Prokop's lack of proficiency with the autopilot could not possibly have been the result of any breach of duty by Defendants.

Cirrus is entitled to judgment as a matter of law based on Plaintiffs' failure to establish causation, and this Court should affirm.

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

Plaintiffs' responsive briefs fail to point to any evidence that fills the critical gaps in causation identified in Defendants' initial briefs; indeed, if anything, their briefs highlight those gaps. As Cirrus anticipated in its original brief, Plaintiffs focus almost entirely on just three facts as justifying the causation finding:

- Prokop did not receive lesson 4a, which involved flight training on VMC-into-IMC conditions;
- Prokop did not engage the autopilot during his final flight;
- Had Prokop engaged the autopilot, the crash would not have occurred.

Gartland Resp. Br. at 12-14; Estate Resp. Br. at 8-9. These three facts, however, are not sufficient to permit a reasonable finding of causation.

Most prominently, Plaintiffs fail to identify any evidence suggesting that Prokop's failure to engage the autopilot more likely resulted from the omission of Lesson 4a rather than from any of several other perfectly reasonable alternative causes. On the contrary, Plaintiffs' expert readily acknowledged that he did not know what events had actually led to the crash. See CA-12 ("The airplane rapidly descended to the ground, and I don't think anybody can tell you exactly how that happened because we just don't know."); CA-31 (Plaintiffs' expert's admission that he cannot tell whether Prokop tried to or even wanted to use the autopilot). As a result, the jury could only speculate concerning whether Prokop failed to engage the autopilot because of the omission of Lesson 4a or because:

- he didn't know he was in trouble,
- he didn't have time to engage the auto pilot, or
- he chose to try to get out of trouble without the autopilot.

Absent some evidentiary basis to exclude these alternative causes, the record fails as a matter of law to present a jury issue on the element of causation. See McDonough v. Allina Health Sys., 685 N.W.2d 688, 695 (Minn. App. 2004) (granting summary judgment on issue of causation where defense experts pointed to plausible alternative causes for plaintiff's stroke and plaintiff's expert failed to

offer basis for excluding those other potential causes); see also Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1209 (8th Cir. 2000) (excluding treating physician's causation opinion because differential diagnosis did not properly rule out all other possible causes).

Plaintiffs seek to divert attention from these deficiencies by arguing that Cirrus's argument amounts to an attack on the trial court's admission of expert Walters' testimony, Gartland Resp. Br. at 13-14, but this argument misses the point. The problem here is not the admission of Walters' testimony but the gaps in the testimony itself: the evidence fails to complete a chain causally linking the omission of lesson 4a with Prokop's failure to engage the autopilot. See Gerster v. Estate of Wedin, 199 N.W.2d 633, 636 (Minn. 1972) (affirming JNOV based on lack of evidence to support plaintiff's expert's opinion on causation, notwithstanding absence of evidentiary objection).

Plaintiffs seek to distinguish Gerster and Huseby v. Carlson, 306 Minn. 559, 561, 238 N.W.2d 589, 590 (1975) (per curiam), by pointing to expert Walters' testimony that the crash would not have occurred if Prokop had engaged the autopilot. Gartland Resp. Br. at 14-15; Estate Resp. Br. at 9-10. But again, this misses the core of the argument: the gap in the causal chain here is *not* between Prokop's failure to engage the autopilot and the crash, but rather between the omission of lesson 4a and Prokop's failure to engage the autopilot.

Plaintiffs' only attempt to address this gap head-on is their argument that because of the omission of Lesson 4a, Prokop "did not know how and when he should use the autopilot," necessarily preventing him from knowing anything about how to handle the situation when he got into trouble. Gartland Resp. Br. at 14. But neither the outline for Lesson 4a nor the transcript passage Plaintiffs cite for this argument suggests that Lesson 4a focused on when or under what conditions a pilot should use the autopilot. A-156, Tr. 696. Moreover, the undisputed evidence shows that Cirrus provided Prokop with extensive information about recognizing and handling emergency situations, including VFR-into-IMC conditions, in the Cirrus Training Manual (A-290-91, 295), the Pilot Operating Handbook (A-355-56), and the training Powerpoint slides (A-461, 464). These materials included "quick reference profiles" for "emergencies that require immediate corrective actions," A-291, including VFR-into-IMC, A-295, A-464, and recommended that these procedures "should be memorized." A-291. Having provided Prokop with this information (the sufficiency and accuracy of which are not disputed), Cirrus necessarily left the safe operation of the plane in Prokop's hands. Page v. Klein Tools, Inc., 461 Mich. 703, 712, 610 N.W.2d 900, 906 (2000) (noting defendant "certainly was not in a position to ensure that plaintiff would make proper use of the instruction he received").

Plaintiffs' reliance on this Court's decision in Tayam v. Exec. Aero, Inc., 166 N.W.2d 584 (Minn. 1970), see Gartland Resp. Br. at 9-10; Estate Resp. Br. at 14, is misplaced for several reasons. First, the issue in Tayam was whether the trial court had properly admitted the testimony of plaintiff's expert concerning the cause of the crash, not the sufficiency of the evidence of causation to sustain the verdict. See 166 N.W.2d at 585. The passage that Glorvigen and the Estate cite are thus simply dictum. Second, contrary to the suggestion in the Estate's parenthetical comment, the Tayam court did not address—even in dictum—the sufficiency of the evidence concerning the manufacturer's failure to communicate a warning to the plaintiff concerning the danger of engine failure in icing conditions. The question of whether the manufacturer had communicated a warning to the pilot was not at issue on the appeal; as the passage the Gartland brief quotes shows, the only causation issue raised in the appeal concerned whether the icing conditions had actually caused the engine failure. Gartland Resp. Br. at 10 (quoting Tayam, 166 N.W.2d at 587-88).

Third, even if the defendant's failure to warn had been at issue in Tayam, the circumstances there were far different from those presented to the jury here. The key difference turns on an aspect of Minnesota product liability law that Plaintiffs refuse to confront: a manufacturer's duty is to provide the purchaser with full and accurate *information* concerning safety, not to assure that the purchaser uses or

applies that information effectively or competently. See Restatement (Third) of Torts: Products Liability § 2 cmt. i (1998) (“Instructions inform persons how to use and consume products safely.”). Applying this analysis to Tayam, the causation issue focused on the manufacturer’s provision of information and rested on the following reasoning:

- The manufacturer knew or should have known of the danger of engine failure while employing the plane’s Power Boost in icing conditions, 166 N.W.2d at 586;
- The pilot did not know of that danger, id.;
- The manufacturer failed to communicate information about the danger to the pilot, id.;
- The pilot flew into a snowstorm while using the Power Boost, resulting in engine failure and a crash, id.;
- Ergo, the manufacturer’s failure to communicate the danger caused the crash.

This same syllogism does not work here. The reasoning in the present case would go thus:

- Manufacturer Cirrus knew how to operate the autopilot in the Cirrus SR-22 to safely escape from VFR-into-IMC conditions;

- Cirrus communicated that information to Prokop through written materials, A-164-360; CA-3-9; CA-22-23, and ground instruction, CA-21; A-153, 155-156; A-461, 464-475;
- Cirrus’s communication of that information was not deficient. 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));
- Despite being provided with information about how to operate the autopilot in the Cirrus SR-22 to safely escape from VFR-into-IMC conditions, Prokop failed to engage the autopilot and the plane crashed.

Given that Plaintiffs now disavow seeking to impose on Cirrus any “duty to train,” Glorvigen Resp. Br. at 9-13, the record provides no support for any conclusion that Cirrus’s breach of any tort duty in any way caused the crash.

Plaintiffs’ argument that circumstantial evidence can support a finding of causation, Gartland Resp. Br. at 11-15, Estate Resp. Br. at 10-11, is a straw man. Defendants do not argue and have never argued that causation must be proved by direct rather than circumstantial evidence. Defendants’ point is that *some* evidence

of some kind is necessary to support each link in the chain of causation, and that is what Plaintiffs lack here.

Finally, although Plaintiffs are correct that an appellate court should affirm a jury verdict on “any reasonable theory of the evidence,” Gartland Resp. Br. at 15 (citing Hughes v. Sinclair Mktg, Inc., 389 N.W.2d 194 (Minn. 1986)), such a verdict may not rest on *speculation*. E.g., Lubbers v. Anderson, 539 N.W.2d 398, 402 (Minn. 1995) (“In order for us to conclude that [third-party defendant’s] actions proximately caused Lubbers’ injuries, we would have to engage in speculation and conjecture. That, we will not do.”). Here, the record contains no evidence on which the jury could *reasonably* infer that the plane crash resulted from the omission of lesson 4a rather than any of the other alternatives that could just as easily have accounted for the accident. See Gerster, 199 N.W.2d at 636 (affirming JNOV despite possibility that defendant had been smoking because no evidence supported conclusion that he actually *was* smoking); compare Majerus v. Guelsow, 113 N.W.2d 450, 452 (Minn. 1962) (upholding verdict based on finding that decedent fell down stairs despite other possibilities where wealth of evidence, including autopsy, supported fall as cause of death). Here, the problem is not that the link between the omission of Lesson 4a with Prokop’s failure to engage the autopilot rests on circumstantial rather than direct evidence; the problem is that no evidence—direct or circumstantial—supports such a link.

This is not turning the burden of proof “on its head,” as the Estate suggests. Estate Resp. Br. at 7. It is simply insisting that Plaintiffs point to some evidence supporting each of the critical links in the causal chain they propose. Here, they cannot do so. Absent such evidence, the jury’s causation finding and the judgment that rest on it cannot stand.

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

In addition to the gaps in the causal chain discussed above, Plaintiffs’ response fails to confront the fundamental causation problem that arises in virtually every case claiming negligent training or educational malpractice. The jury could only speculate about Prokop’s conduct; even if Prokop had received lesson 4a:

- would he have learned the VFR-into-IMC using-autopilot material adequately?
- would he have used that knowledge to decide to engage the autopilot?
- would he have engaged the autopilot effectively?

Plaintiffs cannot logically blame the plane crash on the omission of Lesson 4a unless each of these questions is answered “yes,” yet Plaintiffs point to no record evidence that would support any of these necessary findings. Indeed, it is difficult to imagine what form such evidence could take; courts have described “the practical impossibility of proving that the alleged malpractice of the teacher

proximately causes the learning deficiency of the plaintiff student.” Helm v. Prof'l Children's Sch., 103 Misc. 2d 1053, 431 N.Y.S.2d 246 (Sup. Ct. 1980).

The evidence cited by the Estate that one of Prokop's instructors thought Prokop was a good student, Estate Resp. Br. at 10, does not fill this gap. Even a “good student”—however that is defined—may or may not learn or retain specific information from a particular lesson depending on a variety of factors. Courts have repeatedly recognized that “the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment.” Page, 461 Mich. at 712, 610 N.W.2d at 903 (citing Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 472 (Minn. App., 1999); Helm, 103 Misc.2d at 1054, 431 N.Y.S.2d at 246-47 (“Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.”)).

In sum, Plaintiffs' causation argument unavoidably leads this Court into the very causation problem inherent in educational malpractice cases like this one: the speculation inherent in trying to judge how well a particular student would have learned—and later would have performed—if the teaching had been different. See, e.g., Dallas Airmotive, Inc. v. FlightSafety Int'l, Inc., 277 S.W.3d 696, 701 (Mo. App. 2008) (“[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.”).

**C. Plaintiffs’ Presentation and then Abandonment of Impermissible Causation Theories (Other Than Lesson 4a) Means that the Jury’s Finding of Causation Cannot Stand.**

In addition, even assuming *arguendo* that the evidence were sufficient to support a causal link between Lesson 4a and the accident, the jury’s verdict here nevertheless could not stand because the Court cannot tell whether the jury based its causation finding on the omission of Lesson 4a or one of the different, improper grounds that Plaintiffs urged to the jury.

As detailed in Cirrus’s opening brief, Plaintiffs at trial offered evidence and arguments that Defendants were negligent in several ways other than omitting Lesson 4a, including the failure to include risk-assessment training and scenario-based training in the course curriculum. See Cirrus Br. at 14, 53. Such attacks on course curriculum are among the purest forms of prohibited educational malpractice claims. See Moore v. Vanderloo, 386 N.W.2d 108, 115 (Iowa 1986) (“In essence, plaintiffs are asking this court to pass judgment on the curriculum of Palmer. We decline to do so.”). Nevertheless, Plaintiffs at trial offered expert testimony and argument that both the lack of risk-assessment training and the lack of scenario-based training caused the fatal accident. See C-ADD-11(Tr.277:10-281:19) (Defendants’ failure to include risk assessment in training was “casually

related” to crash);C-ADD-13-14(Tr. 288:17-291:15) (Defendants’ failure to include scenario-based training was “causally related” to crash).

Based on this testimony and the arguments of Plaintiffs, the issue of causation was submitted to the jury based not only on Defendants’ failure to give Lesson 4a but *also* on the impermissible educational malpractice theories that Defendants had failed to include risk assessment and scenario-based training in their curriculum. Unfortunately, the simple causation questions on the special verdict form (ADD-0050) do not permit the Court to determine whether the jury based its causation decision on the omission of Lesson 4a, as Plaintiffs now urge, or on the other prohibited and now-abandoned liability theories that Plaintiffs urged at trial. Where an appellate court cannot tell whether a jury’s decision is based on a permissible ground or an impermissible ground, the verdict cannot stand. See Schroht v. Voll, 245 Minn. 114, 118, 71 N.W.2d 843, 846 (Minn. 1955) (holding that where trial court submits several issues of fact to jury and one or more of them cannot legally sustain the verdict, the defendant is entitled to a new trial).

Plaintiffs’ responses do not adequately address the problem created by the multiple theories of causation they presented at trial. Plaintiffs make no attempt in this Court to defend either their lack-of-risk-assessment training theory or their lack-of-scenario-based-training theory as a viable ground for recovery, essentially

conceding that the educational malpractice doctrine bars those theories of liability. Indeed, Plaintiffs' response briefs do not mention their "risk assessment" theory at all. As to scenario-based training, Plaintiffs' only acknowledgement that they urged this theory of liability appears in a footnote in which Plaintiffs suggest (contrary to the position they took in the Court of Appeals) that the lack of scenario-based training was really just the same thing as the omission of Lesson 4a. See Glorvigen Resp. Br. at 29 n.12.<sup>3</sup> The record, however, does not support Plaintiffs' argument. Both the transcript pages Plaintiffs cite and other testimony of their expert makes clear that his objection was *not* (as Plaintiffs now urge) that scenario-based training was omitted because lesson 4a was not given; his objection was that the Defendants' training curriculum *did not include scenario-based training at all*. See C-ADD-13(Tr. 290:1-15) (Plaintiffs expert's testimony that neither syllabus nor training manual nor power points made any provision for "scenario-based training"); see also CA-14(Tr. 300:1-3) ("Scenario based training...should be part of this program.").

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<sup>3</sup> In the Court of Appeals, Plaintiffs tried to deal with the problems created by their scenario-based-training theory of recovery, not by *equating* scenario-based training and the course syllabus's Lesson 4a, but by *distinguishing* scenario-based training from the training listed in the syllabus and then trying to minimize the significance of the trial evidence concerning scenario-based training. See Glorvigen COA Br. at 31 n.8; Gartland COA Br. at 31 n.15.

Neither Plaintiffs nor their expert have ever claimed that Defendants promised to provide Prokop with risk-assessment or scenario-based training and then failed to provide it, either as part of Lesson 4a or otherwise. They objected *only* to Defendants' pedagogical decision to adopt a teaching method that did not employ those types of training. This is a claim of educational malpractice, e.g., Andre v. Pace Univ., 170 Misc. 2d 893, 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996) (claim for educational malpractice "necessarily entails an evaluation of...the effectiveness of the pedagogical method chosen"), and Plaintiffs cannot avoid their reliance on it on the issue of causation by trying to recharacterize it.

In sum, Plaintiffs cannot avoid the fact that they submitted the issue of to the jury on at least two grounds that unavoidably and improperly rested on educational malpractice. For that reason, even assuming evidence sufficient to permit the jury to find a causal link between the omission of Lesson 4a and the plane crash, this Court cannot tell whether the jury based its answers to the causation questions on Lesson 4a or on one of the improper educational malpractice theories. The judgment thus cannot stand, and Defendants are entitled at the very least to a new trial on the issue of causation.

**D. Plaintiffs' New Disavowal of Any Duty by Cirrus to Train Prokop "to Proficiency" Renders Their Claim of Causation Entirely Speculative**

Finally, even assuming Plaintiffs' claim of causation were otherwise tenable, Plaintiffs' abandonment of their claim that Cirrus had a duty to train Mr. Prokop "to proficiency" forecloses Plaintiffs' theory of causation as a matter of law and unavoidably makes any finding of causation here wholly speculative.

In their briefs to this Court, Plaintiffs now take the position that Cirrus did *not* have a duty to train Prokop to proficiency on the autopilot, but merely a duty to give Lesson 4a to Prokop, regardless of whether the lesson was effective. As Plaintiff Glorvigen put it in his brief to this Court:

The claim here is that Defendants breached their duty to instruct in the safe use of the product, because the instruction necessary for that safe use-Flight Lesson 4a-was not given *at all*. This is underscored by the fact that, had Flight Lesson 4a been **given** to Mr. Prokop (as promised), Defendants' duty would have been discharged even if Mr. Prokop had nonetheless failed to properly perform the maneuver and crashed the airplane.

Glorvigen Br. at 27-28 (all emphasis in original, footnote omitted); see also Gartland Resp. Br. at 26; Glorvigen Resp. Br. at 9-11; Estate Resp. Br. at 13. As noted in Cirrus's opening brief, this position directly contradicts the arguments Plaintiffs made to the jury and to the Court of Appeals,<sup>4</sup> and Cirrus has urged the

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<sup>4</sup> See, e.g., CA-72(Tr. 1969:5-8) (Gartland closing: "In this case [if] Gary [Prokop] had been trained to proficiency if he was competent, confident the way that they said, he would not have had trouble."); Glorvigen COA Br. at 10 ("[T]he weight of

Court to reject it on that ground. Cirrus Br. at 37-39. Even assuming *arguendo* that the Court were to accept Plaintiffs' new position, however, the Court must nonetheless affirm the Court of Appeals' reversal of the district court judgment because Plaintiffs' new position wholly undercuts any claim of causation.

If Defendants' only duty was to give Prokop Lesson 4a, regardless of the effectiveness of that lesson, how can Defendants' claimed breach of that duty possibly have caused the crash? According to Plaintiffs' current position, Defendants had no obligation to assure that Lesson 4a effectively taught Prokop to use the autopilot, or to assure that Prokop was able to use the autopilot competently at the conclusion of the lesson. All Defendants needed to do was make sure that the lesson was given. But this argument destroys any possible causal link between Cirrus's duty and the plane crash. Even assuming that Prokop's lack of proficiency with the autopilot caused the crash, that lack of proficiency cannot make Cirrus liable for the consequences of the crash, because Cirrus had no duty to make Prokop proficient.

Put conversely, if Cirrus had no duty to train Prokop to proficiency in use of the autopilot (as Plaintiffs now argue), then Prokop's lack of proficiency with the autopilot could not possibly have resulted from any breach of duty by Defendants.

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the evidence... supports the jury's finding...that Prokop was not trained to proficiency in the use of the SR-22's autopilot . . . .”).

Any failure by Cirrus to provide a lesson that Plaintiffs concede did not have to train Prokop to proficiency provides no basis for imposing liability on Cirrus for Prokop's lack of proficiency. If Prokop *had* received Lesson 4a (in addition to the written materials and ground instruction), he *might* have become proficient in the use of the autopilot, and he *might* have used the autopilot to avoid the crash. But he also might not have; as Plaintiffs acknowledge, Prokop might have received Lesson 4a and might still have been unable to prevent the crash. See Glorvigen Br. at 27-28. Neither the jury nor this Court has any way of telling, and causation cannot rest on mere possibilities. See Lubbers, 539 N.W.2d at 402. Indeed, that is why Plaintiffs' expert Walters admitted he could not state whether Prokop tried to or even wanted to engage the autopilot. CA-31.

Again, this problem reflects one of the primary reasons courts have cited in rejecting educational malpractice claims like Plaintiffs' here: the near impossibility of proving that a particular act or omission in the educational context actually caused an injury somewhere down the line. E.g., Hunter v. Bd. of Educ., 292 Md. 481, 487-88, 439 A.2d 582, 585 (1982). As the Iowa Supreme Court observed:

This reason is particularly persuasive in the present case involving a third party claim against an institution for what it allegedly did *not* teach a student, four years after that student graduated. We agree with the New York Court of Appeals' observation that although it may assume too much to conclude that proximate causation could *never* be established, that "this element might indeed be difficult, if not impossible to prove." Donohue [v.

Copiague Union Free School District], 47 N.Y.2d [440,] 443, 418 N.Y.S.2d [375,] 377, 391 N.E.2d [1352,] 1353-54 [(1979)].

Moore v. Vanderloo, 386 N.W.2d at 114.

So here, Plaintiffs ask the Court to permit the jury to take a great leap and conclude that if Prokop had received Lesson 4a, the accident would not have occurred. Such a leap requires the jury to assume that if Lesson 4a had simply been given—regardless of the method employed by the instructor or the level of skill, patience, or attentiveness of the student—Prokop necessarily would have had the time, skill, judgment, and inclination to successfully employ the autopilot to avoid the crash. No evidence in the record supports this leap; it is sheer speculation. Page, 461 Mich. at 713, 610 N.W.2d at 904 (“[T]he existence of such outside factors as a student's attitude and abilities render it impossible to establish any quality or curriculum deficiencies as a proximate cause to any injuries” (quoting Tolman v. CenCor Career Coll., Inc., 851 P.2d 203, 205 (Colo. App. 1992))).

## CONCLUSION

For the reasons set forth above and in Cirrus's original brief, 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. Defendant Cirrus Design Corporation urges the Court to affirm that decision, either on the grounds set forth in Cirrus's original brief or on the grounds set forth above.

Dated: October 17, 2011

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STATE OF MINNESOTA  
IN SUPREME COURT

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

and

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.

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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) and Minn. R. Civ. App. P. 132.01, subd. 3(b) for a brief produced with a proportional font. The length of this brief is 4,464 words. This brief was prepared using Microsoft Word 2003 software.

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