

CASE NOS. A10-1242, A10-1243, A10-1246, and A10-1247

State of Minnesota
In Court of Appeals

RICK GLORVIGEN, as Trustee for the Next-of-Kin of Decedent JAMES KOSAK,
Respondent (A10-1242, A10-1246);

and

THOMAS M. GARTLAND, as Trustee for the Next-of-Kin of Decedent GARY R. PROKOP,
Respondent (A10-1243, A10-1247),

vs.

CIRRUS DESIGN CORPORATION,
Appellant (A10-1246, A10-1247),

ESTATE OF GARY PROKOP, by and through KATHERINE PROKOP
as Personal Representative,
Respondent (A10-1242, A10-1246),

and

UNIVERSITY OF NORTH DAKOTA AEROSPACE FOUNDATION,
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 THE CASE

Introduction

The trial court decision in this case creates a new cause of action. Specifically, the trial court's decision creates a new exception to the general bar against claims of educational malpractice. The exception created in this case expands the exposure of flight training providers (and other educational institutions) to actions for negligent performance of contract.

AOPA opposes the trial court's expansion of the exception created in Alsides v. Brown Inst., Ltd., 592 N.W. 2d 468 (Minn. App. 1999). Beyond arguments presented by the parties on the issue of educational malpractice, AOPA wishes to use this *amicus* brief to apprise the court of legal and policy implications this case has for flight training providers. It is AOPA's intention to provide a voice for members who are not parties to this case but who may be affected by the decision. This case presents a real potential for unintended consequences that could impact our members—especially those providing (or receiving) flight training and education.

The Aircraft Owners and Pilots Association¹ (“AOPA”) agrees with the statement of the first legal issue in the Brief of Appellant Cirrus Design Corporation (“Cirrus”), as well as the most apposite cases cited, and with its statement of the applicable legal standard of review on this issue. AOPA takes no position on the remaining issues

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

identified by Cirrus for review. AOPA agrees with the statement of the first legal issue in the Brief of Appellant University of North Dakota Aerospace Foundation (“UNDAF”), as well as the cases cited, and with its statement of the applicable legal standard of review on this issue. AOPA takes no position on the remaining issues identified by UNDAF for review.

Identification of Amici

AOPA is a nationwide, non-profit, membership organization, incorporated under the laws of the State of New Jersey. Founded in 1939, AOPA has long represented the interests of its members in the field of general aviation, including their interests as they relate to aviation safety and pilot training. Membership in AOPA includes over 400,000 pilots and 60,000 flight instructors. AOPA’s membership includes a substantial majority of all pilots and flight instructors with U.S. certification. The latest data available indicates a total of 594,285 pilot certificates and 94,863 flight instructor certificates held (see Table 1, Estimated Active Airman Certificates Held, December 31, 2000-2009 at www.faa.gov/data-research/aviation_data_statistics/civil_airmen_statistics/2009/). AOPA, its membership, its history, its mission, and its activities, are described in detail on the Internet at www.aopa.org.

Summary of Argument

One of AOPA’s primary concerns is aviation safety. Aviation is a heavily regulated industry with virtually every aspect of operations and training being addressed

in the Federal Aviation Regulations (FARs). In view of this, AOPA addresses the following legal and policy matters in this brief:

1. Federal preemption of flight training standards;
2. The unintended consequences of reducing necessary flexibility and discretion exercised by flight instructors and schools; and
3. The adverse impact of creating an interminably open ended duty for flight training providers.

Argument

I. FEDERAL LAW PREEMPTS FLIGHT TRAINING STANDARDS

As stated above, AOPA supports the arguments of Cirrus and UNDAF regarding the trial court's flawed interpretation of the Alsides case. However, AOPA wishes to point out to this Court that the trial court compounded its error by failing to recognize that federal law preempts state (or any other) standards of care in the field of aviation safety.

A. The FARs Govern Flight Training Standards

A pervasive scheme of federal law and regulations dominate aviation safety in the U.S. This domination of federal law is purposeful. The clear legislative intent is to create a "...single and uniform system of control over aviation safety." See French v. Pan Am Express, Inc. 869 F.2d 1, 6-7 (1st Cir. 1989) ("The intricate web of statutory provisions affords no room for the imposition of state law criteria vis-à-vis pilot suitability. We therefore conclude, without serious question, that preemption is implied by the

comprehensive legal scheme which imposes on the [Administrator] to duty of qualifying pilots for air service.”). *Id.* at 4.

The power of Congress to preempt state law derives from the U.S. Const. art. VI, cl. 2 Supremacy Clause. The Supremacy Clause provides that the laws of the United States are the supreme Law of the Land.

Congress’ intent to preempt state law may be expressly stated in a statute’s language. If not, the intent to preempt may be inferred where the pervasiveness of federal regulation precludes modification or supplementation by the states or state courts. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, 36 L.Ed. 2d 547, 93 S. Ct. 1854 (1973) (noting that “a uniform and exclusive system of federal regulation” is required “if the congressional objectives underlying the [FAA] are to be fulfilled”).

The trial court’s response (to post-trial motions) focused on the syllabus used for high performance training in the Cirrus SR22 aircraft. The clear implication from the trial court is that the syllabus utilized by the flight instructor and pilot in this case created a contract (although it was never the basis of any bargained for exchange). More importantly, the trial court reached further and treated the syllabus as creating a standard of care for high-performance transition training.

This emphasis by the trial court on the syllabus is misguided. As detailed below, aviation is one of the most highly regulated activities in the United States. From the time a neophyte pilot begins training to the time she flies her last flight as an airline captain,

the Federal Aviation Regulations (FARs) (14 C.F.R. et seq.) play a hand in every aspect of training and virtually every decision and every subsequent action in operations.

A brief overview of the regulatory framework for private pilot flight training and high performance training (both relevant in this case) follows.

B. The Extensive Regulatory Scheme for Pilot Training Requires Application of Federal (FAA) Standards

1. Regulatory Framework for Private Pilot Training

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

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

When evaluating flight proficiency, the FARs provide a high level of detail in 14 C.F.R. §61.107. This section refers to twelve (12) specific areas of operation, including basic instrument maneuvers, where a private pilot must demonstrate competency in performance. See 14 C.F.R. §61.107(b)(1) (for airplane category rating with a single-engine class rating).

C.F.R. §61.109 includes detailed regulatory requirements for aeronautical experience. The requirements include cross-country flight hours. A specified ten (10)

hours of solo flight time. Perhaps most relevant to this case, the rules require three (3) hours of flight training in a single-engine airplane where the pilot operates solely by reference to instruments. See 14 C.F.R. §61.109(a)(3).

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

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

The private pilot training regimen is very carefully detailed in the regulations and the PTS. Similarly, detailed regulations and PTS standards exist for commercial (see 14 C.F.R. §61.121 et seq. and FAA-S-8081-12B), airline transport pilot certificates (see 14 C.F.R. §61.151 et seq. and FAA-S-8081-5F), and instrument ratings (see C.F.R. §61.65 and FAA-S-8081-4E).

There is nothing to stop a flight school from adapting its own syllabus or curriculum to train private pilots (or for other training purposes). However, the pilot will only be able to earn certification if they meet the specific requirements of the FARs. The

FARs offer the only definitive standard of training recognized by the FAA. There is no syllabus that can replace the detailed regulatory framework for flight training.

2. Additional Training for High-Performance Airplanes

When a pilot purchases a new high-performance aircraft like a Cirrus SR22, she may not be legally qualified to operate the aircraft. In order to become qualified, she may be required to obtain additional training in accordance with 14 C.F.R. §61.31(f)(1)(i). This regulation states that no person may act as pilot in command in a high-performance airplane (an airplane with an engine of more than 200 horsepower) unless that person (1) receives and logs ground and flight instruction from an authorized instructor in a high-performance aircraft and (2) is found proficient in the operation and systems of the aircraft. 14 C.F.R. §61.31(f)(1)(ii) requires that the pilot must receive a one-time endorsement in the pilot's logbook (certifying proficiency) in order to act as pilot in command of a high-performance airplane.

Note that the regulation does not require the pilot to receive training in a Cirrus SR22 aircraft. She will be legally qualified to fly a Cirrus SR22 and any other high-performance airplane as long as she had an appropriate logbook endorsement from an instructor. The instructor who provided flight and ground instruction must find the pilot proficient to operate a high-performance airplane.

Therefore, the real question to be addressed in cases of additional training for high performance aircraft is whether the standard set by 14 C.F.R. §61.31(f)(1)(i) and (ii) is

properly met. That is, *is the pilot in question proficient in the operations and systems of a high-performance airplane at the time she completed her additional training?*

The standards applied in determining a pilot's proficiency are FAA standards, not standards established through a state court applying common law negligence theory. This is a fatal flaw in the trial court's approach to this case. See Abdullah v. American Airlines, 181 F.3d 363 (3rd Cir. 1999), (noting that while state remedies are not preempted, "the standards of care for the safe operation of aircraft" are federally preempted) at 375 ; see also Greene v. B.F. Goodrich Avionics Systems, Inc., 409 F.3d 784 (6th Cir. 2005), (in a case involving a state-law failure to claim against a manufacturer, the court stated: "We agree with the Third Circuit in Abdullah that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation" at 795).²

In this case, the trial court improperly focuses on a syllabus that was not required by the FAA to accomplish the training undertaken (additional training in a high-performance airplane). The standards for such training are not found in a syllabus, they are found in the FARs, specifically in 14 C.F.R. §61.31(f)(1)(i) and (ii).

A syllabus may be useful as a means to an end—a safe, proficient pilot. However, a syllabus is not an end—it does not substitute for the definitive standards set by the FAA

² In a related case, *Glorigen v. Cirrus, et al.*, Case No., 06-2661, the Federal District of Minnesota Court rejected Cirrus' argument of "Complete preemption." AOPA's argument here concerns a more limited form of preemption, "standards preemption," regarding training standards set by the FAA as preempting inconsistent state law on that subject.

and, as discussed below, the judgment and discretion of a certificated flight instructor. The trial court erred when it failed to recognize that federal law preempts state law on the issue of aviation safety and pilot training.

II. THE TRIAL COURT’S DECISION MAY HAVE THE UNINTENDED CONSEQUENCE OF DEGRADING FLIGHT SAFETY

The standards promulgated for additional training in high-performance aircraft are broadly stated. However, that is for good reason—the high-performance endorsement permits a qualified pilot to operate any high performance aircraft. The endorsement is not limited to the aircraft utilized for the high-performance training.³

FAA advisory literature helps to articulate another important reason for the broadly stated goal of proficiency as it relates to high performance sign-offs. In FAA Advisory Circular 61-98A (“AC”): *Currency and Additional Qualification Requirements for Certificated Pilots*, the FAA presents advisory materials designed to provide information for certificated pilots and flight instructors for use in complying with FAR §61.31. (*AOPA Add.* 1-26).⁴ Specifically, in Chapter 4 (paragraph 11b.) of the AC, the FAA states: “In order to properly structure and record transition training in a high performance airplane, the CFI should plan a transition program tailored to the needs of the pilot requesting the training.” (*AOPA Add.* 15). The FAA goes on to provide a

³ The syllabus (Exhibit 4) notes that the endorsement is “Valid in Cirrus SR-22 only”. However, this is contrary to 14 C.F.R. §61.31(f)(1)(i) which states that a pilot must: receive “ground and flight instruction... in a high-performance airplane or flight training device that is representative of a high-performance airplane....”

⁴ “*AOPA Add.-*” refers to pages in the Addendum within this brief.

suggested format for developing a plan indicating that the intent is “[to incorporate elements in a referenced GAMA publication]... yet still provide the CFI with flexibility in developing an individual transition guide tailored to a specific pilot’s needs. The CFI may wish to retain the completed guide as a record of the scope and content of the transition training given, even though the record is not required by FAR § 61.189.”

(AOPA Add. 15.)

The AC’s suggested format for a sample training plan includes ground instruction and flight instruction. *(AOPA Add. 24 and 25.)* With reference to the case at hand, it is noteworthy that the FAA sample training plan suggests ground instruction with respect to: “Flight Instruments, Avionics, and Autopilot (if appropriate).” *(AOPA Add.24.)* However, there is no suggestion or requirement to carry over any training on autopilot operation to the flight instruction portion of the sample training plan. *(AOPA Add. 25.)* A careful review of the FAA’s sample training plan in the AC supports everything accomplished in the training program provided to the plaintiff in this case--including the ground training for autopilot operations.

It is important to note that the FAA’s AC guidance emphasizes the need for “individualized transition” and “flexibility.” *(AOPA Add. 15)* As stated earlier, one of AOPA’s primary misgivings regarding the trial court’s decision is the attention devoted to an allegedly skipped item or flight in a training syllabus (despite the fact that the syllabus itself contemplated skipped items--the top portion of every lesson indicates that “Skipped items should be left unchecked”). In the case of a high-performance check out,

an instructor may purposely or inadvertently omit a particular item on a checklist, but in the end, that instructor needs to make a judgment as to whether the pilot involved is proficient to operate a high-performance aircraft in accord with FAA standards.

Checklists and syllabi cannot replace the judgment of a flight instructor. Fallout from the trial court's decision might cause instructors to become slavishly attentive to checklists and syllabi instead of the appropriate standard to be met—proficiency in the aircraft's operations and systems by the end of the training program. It is conceivable that flight schools will do away with helpful checklists in an effort to avoid the liability exposure they would create for high-performance (or other types of) airplane training. It is also conceivable that aircraft manufacturers who provide the type of no-cost training provided in this case will simply terminate the service due to the liability exposure.

As argued above, questions regarding pilot proficiency are regulatory questions, not questions for the courts. A close look at the final evaluation flight checklist in Exhibit 4 indicates that the flight included a very thorough examination of pilot skills in the SR22. In fact, the flight included every item that is recommended by the FAA in its AC. Further, the ground topics listed as covered in Exhibit 4, covered all items suggested in the FAA AC. When FAA regulatory standards are substantially complied with, should courts be allowed to second-guess a flight instructor?

The standard laid out by the trial court in this case will degrade aviation safety. The court's rationale for the verdict encroaches on the flexibility and discretion that flight instructors should exercise in the course of their duties. Indeed, the FAA strongly

encourages the exercise of such judgment and discretion. It would be a setback for aviation safety if flight instructors and flight schools were more interested in checklists and syllabi than real-time evaluations of pilots and pilot training needs.

**III. AS A MATTER OF POLICY, FLIGHT TRAINING PROVIDERS
SHOULD NOT BE BURDENED WITH AN OPEN-ENDED DUTY AFTER
TRAINING IS COMPLETE**

Another troubling aspect of the trial court's judgment is the absence of a reasonable measure for terminating the liability of a flight instructor. After a student is endorsed for particular operations (such as a high-performance endorsement), when does the instructor's liability end? If a pilot completes or discontinues flight instruction with Instructor A and picks up training with Instructor B, when does Instructor A's liability terminate?

Leaving these types of questions unanswered will make flight instructors and flight schools easy targets in the aftermath of aircraft accidents. It is not difficult to imagine a scenario where individual flight instructors and flight schools make the rational business decision that open-ended liability exposure is too cumbersome. Loss of available flight training providers will ensue. The uncertainty will impact negatively on the aviation community with the loss of flight instructors and schools. With the uncertainty, costs are also likely to increase, thus reducing the availability of training.

In the real world of flight instruction, an instructor will need to determine that a pilot meets regulatory standards of proficiency and competency before the time of sign-off or endorsement. This is the judgment call of an instructor at the time the instructor

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

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

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

In Hubbard v. Pac. Flight Servs., Inc. 2005 Cal. App. Unpub. LEXIS 9678 (October 25, 2005), (*AOPA Add. 27-35*), the defendant rented an aircraft to a pilot who recently graduated from its flight school. The pilot (and three passengers) was killed in a crash two weeks after the pilot earned his private pilot certificate. In denying the plaintiff's claim of negligent training, the court reasoned that a "flight school, like a driving school, cannot anticipate and train for every possible hazardous situation. Having adequately trained [the pilot] to the point where he obtained his pilot's license, [the flight school's] duty to train should terminate at that point." Hubbard at *27-28. (*AOPA Add.33*).

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

CONCLUSION

The Court should reject the District Court’s extension of the exception to educational malpractice bar in this case. Flight training standards are the exclusive realm of the FAA, not courts. Decision after decision in the federal courts makes it abundantly clear that federal law preempts the field of standards for aviation safety and training. Allowing courts to second-guess flight instructors who endorse a student for operations based on demonstrated proficiency at the time of endorsement will only serve to lessen flight safety. Instructors may tend to either slavishly rely on checklists/syllabi or discard them altogether—with negative impacts on flight safety. Further, the unanswered question regarding when liability terminates will create substantial uncertainty in the flight training community. It is not a stretch to imagine that with the open-ended liability

tail created by the trial court's decision, schools and manufacturers will opt to abandon training programs. These are precisely the sort of unintended consequences—consequences foreseen in this Court's Alsides decision--that should be avoided.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. Hajek', written over a horizontal line.

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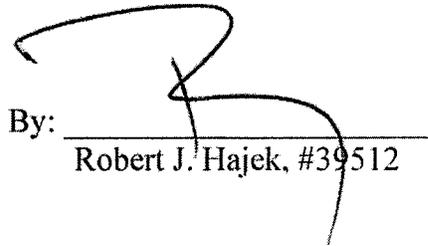
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Times New Roman 13 point or larger. The length of this brief is 3,987 words. This brief was prepared using Microsoft Word 2000.

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