

Torts—Strict Products Liability—Loss to Other Property or Personal Injury Is Necessary for Strict Liability Recovery for the Product Itself. *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978), and *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308 (Tex. 1978).

The similarity of issues and importance to Texas law require that *Signal Oil & Gas Co. v. Universal Oil Products*¹ be conjunctively discussed with *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*²

Universal Oil Products (UOP), the owner of the patent rights to an oil refining process, granted Signal Oil & Gas (Signal) a license to use the process in its Houston refinery.³ Two months after construction the unit ruptured and caught fire.⁴

Signal sued UOP for property damage and economic loss resulting from the fire.⁵ Signal claimed that inferior bolts failed to hold certain guides in place causing the oil tubes to bow inward and rupture, and it alternatively alleged that coke accumulation within the tubes caused them to rupture.⁶ Signal developed these theories in its causes of action based on negligence, strict liability, and breach of implied warranty.⁷ The trial court denied relief to Signal as to all three defendants.⁸ The Beaumont Court of Civil Appeals affirmed the decision.⁹ The Texas Supreme Court affirmed in part and reversed in part and held that the requirement of producing cause in a strict liability action based on one set of facts did not necessarily mirror the requirement of proximate cause in a negligence action based on another set of closely related facts.¹⁰ The court

1. 572 S.W.2d 320 (Tex. 1978).

2. 572 S.W.2d 308 (Tex. 1978).

3. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 572 S.W.2d 320, 322 (Tex. 1978). Signal then contracted with Procon Inc. (Procon), a subsidiary of UOP, to erect and install a reactor charge heater as a part of the process. Procon contracted with Alcorn Combustion Co. (Alcorn) to provide the reactor charge heater.

4. *Id.* at 323.

5. *Id.* at 322. Procon and Alcorn were joined as third party defendants.¹

6. *Id.* at 323.

7. *Id.*

8. *Id.* at 322. The trial court barred recovery on the negligence action due to Signal's contributory negligence. The case was decided before the enactment of TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

9. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 545 S.W.2d 907 (Tex. Civ. App.—Beaumont 1977, writ granted).

10. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 572 S.W.2d 320, 322 (Tex. 1978). The Supreme Court also held that recovery for consequential damages under section 2.715 of the Texas Business and Commerce Code can be mitigated by fault of the plaintiff. *Id.* at 328.

also noted that when a product was found unreasonably dangerous and a defect caused damage to other or collateral property, the product itself became a part of the risk of loss governed by strict liability.¹¹

The Texas Supreme Court's discussion of *Signal Oil* centered on the claim for strict liability.¹² The jury had found the shipped product was defective, Signal Oil incurred damages, and the defective condition did not constitute the producing cause of the fire.¹³ Signal contended that because the defendants already had been found negligent and proximate cause had been proved, the causation element of strict liability was in fact proved.¹⁴ The court distinguished the causation elements of negligence and strict liability by stating that the different theories were presented on different sets of facts and, therefore, the causation elements could not be compared.¹⁵ Thus, the court disallowed the strict liability cause of action.¹⁶

The supreme court, however, stated that *Signal Oil* was a case in which a strict liability action was proper because property damage resulting from an unreasonably dangerous product was recoverable under the strict liability doctrine.¹⁷ Distinguishing between economic loss and property damage, the court noted that economic loss was not a proper category of recovery under strict liability.¹⁸ Although damage to the product itself was pure economic loss, the damage to other or collateral property changed the risk of harm and the product became part of the recoverable tort damage.¹⁹

Second, in discussing the implied warranty cause of action, the court considered the buyer's assumption of risk as a complete bar to warranty recovery.²⁰ In contemplating a tort defense to a contract action, the court expressed the desire to separate these two areas of law and stated that the traditional tort defense of assumption of risk should not be used to block an action in warranty.²¹ After review of

11. *Id.* at 325.

12. *Id.* at 323. The negligence action discussed first was denied upon the finding of contributory negligence of Signal Oil.

13. *Id.* at 323-24.

14. *Id.* at 324. Signal contended that the proximate causation of the negligence action includes the lesser element of producing cause in strict liability.

15. *Id.* at 324-26.

16. *Id.* at 326.

17. *Id.* at 325.

18. *Id.* See *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

19. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 572 S.W.2d 320, 325 (Tex. 1978).

20. *Id.* at 326.

21. *Id.* at 327-28.

section 2.715 of the Texas Business and Commerce Code, the court concluded that a buyer's recovery for breach of an implied warranty should be diminished by the buyer's fault when it is a concurring proximate cause.²²

Justice Pope, in a concurring opinion, stated that recovery under products liability law would always be a combination of tort and contract, and he felt it was futile to try to separate the theories and their respective defenses.²³ Pope agreed with the holding because the product was found unreasonably dangerous, which was the only criteria established for determining recovery under section 402A.²⁴ *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*,²⁵ decided the same day as *Signal Oil*, must be considered to understand further the holding of *Signal Oil*.

Defendant Mid Continent sold a reconditioned spray plane to plaintiff Curry County.²⁶ The transaction between Mid Continent and Curry County included a contract of sale that was subject to the terms and conditions of an "as is" sale.²⁷ The reconditioning process included complete fusealage repair and engine overhaul.²⁸ During the engine overhaul, the mechanic failed to install an essential engine part, and the plane subsequently failed in flight.²⁹ The pilot landed the aircraft causing extensive damage to the plane but no physical harm to himself or any other property in the area.³⁰

Curry County sued Mid Continent under alternative theories of negligence, breach of warranty, and strict liability.³¹ The trial court found the defendants jointly and severally liable for the damage to the aircraft and for its loss of use.³² The Amarillo Court of Civil

22. *Id.* at 328. The court stated that the fault of Signal was in no way the sole cause of the damage and that the action must be returned to the trial court for a jury determination of relative fault. *Id.* at 329.

23. *Id.* at 331.

24. *Id.* at 332-33.

25. 572 S.W.2d 308 (Tex. 1978).

26. *Id.* at 309.

27. *Id.*

28. *Id.* Bobby Shivers repaired the airframe. Robert Hawkins, F.A.A. licensed engine mechanic, overhauled the engine. Both men were joined as third-party defendants. Neither appealed the decision of the trial court, and, therefore, its determination concerning them was final. *Id.* at 310.

29. *Id.*

30. *Id.* The accident occurred twenty one days after purchase; the engine had thirty hours of use at the time it failed.

31. *Id.*

32. *Id.* The trial court found the defendant liable for \$4,658.49 for loss to the aircraft, and \$3,690.00 for loss of use. Mechanic Hawkins was found negligent in failing to install the lock plate. Shivers and Mid Continent were found liable under strict liability in tort as sellers

Appeals affirmed the finding of the trial court³³ and held that damage to the product itself was recoverable under the theory of strict products liability.³⁴ The Texas Supreme Court reversed and held that damage to the product itself was an economic loss that must be recovered under the contract theory of warranty.³⁵

The Texas Supreme Court separated its consideration of Mid Continent's liability into two issues. First, the court discussed the competing theories of contract and tort.³⁶ Second, the court recognized the identification of the type of loss as a critical factor in determining who bore the risk of loss.³⁷

Identification of the type of loss was the critical issue discussed in determining Mid Continent's liability. Damage recovery for physical injury to a consumer's person³⁸ and to his other property³⁹ have been held recoverable under strict liability while economic loss to a consumer was actionable only under a warranty theory.⁴⁰ The majority adopted Mid Continent's argument that there was no difference between a product that was unusable because of defects and one that caused physical harm to itself because of a defect considered unreasonably dangerous.⁴¹ In support for its adoption of this argument, the court analyzed the underlying purposes of both contract theory and strict products liability.⁴² The court stated that the Texas Business and Commerce Code was a "comprehensive and integrated act designed to facilitate the continual expansion of com-

of the airplane, in the business of selling such products, with a defect that rendered it unreasonably dangerous. *Id.*

33. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977, writ granted).

34. *Id.* at 940. The court also held that parties of equal bargaining position can expressly waive their tort liability to the product itself with express language. However, the contractual language of "as is" is insufficient to waive strict liability in tort. *Id.*

35. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 313 (Tex. 1978).

36. *Id.* at 310-11. The Supreme Court stated that the competing theories of warranty and strict liability produced some entanglement because strict liability resulted from a combination of tort and contract. Because Texas had adopted the Uniform Commercial Code and section 402A of the *Restatement (Second) of Torts*, the court felt there was no competition between the two theories and that the differences were firmly established. *Id.* See *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1978).

37. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 311 (Tex. 1978).

38. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

39. *C.A. Hoover & Son v. O.M. Franklin Serum Co.*, 444 S.W.2d 596 (Tex. 1969).

40. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

41. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 311 (Tex. 1978).

42. *Id.* at 312-13.

mercial practices."⁴³ To preserve the framework of rights and duties established in the code, the court stated that the policy of consumer protection through strict liability must not be imposed over existing sales law remedies.⁴⁴ The court concluded that in transactions between a commercial buyer and a commercial seller, when no physical injury had occurred to persons or other property, injury to the defective product itself was an economic loss governed by the Texas Business and Commerce Code, and damages for the injury could not be recovered under a strict liability theory.⁴⁵

Justice Pope's dissent rejected the holding that damage to the product itself was always an economic loss and that consumer protection needs were insufficient to allow recovery of Curry County's loss.⁴⁶ Justice Pope also claimed the the majority had rejected the rule of *Nobility Homes of Texas, Inc. v. Shivers*⁴⁷ by requiring consideration of the type of loss in addition to the dangerousness of the product.⁴⁸ Justice Pope stated that the court should hold fast to the dangerousness criteria established by section 402A as the only criteria in deciding the liability of the sellers of dangerous products.⁴⁹

The impact of *Signal Oil* and *Mid Continent* raises fundamental questions concerning the area of strict products liability and the future of these actions in Texas. First, according to section 402A of the Restatement, the crucial determination for a strict liability recovery is whether the product is dangerous.⁵⁰ Since the adoption of section 402A in Texas, the courts have utilized this dichotomy.⁵¹ Second, the Restatement requires the recovery be for physical harm

43. *Id.* at 312.

44. *Id.*

45. *Id.* at 313. As a final note, the court affirmed the proposition that a seller and buyer completely aware of the purchase situation can effectively bar all implied warranty actions by "as is" language. The court stated this language would not bar strict liability action. *Id.*

46. *Id.* at 313-14.

47. 557 S.W.2d 77 (Tex. 1977).

48. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 314-15 (Tex. 1978). In *Nobility Homes* the Texas Supreme Court stated that because of the adoption of the Texas Business and Commerce Code and section 402A of the *Restatement (Second) of Torts*, there was no longer a need to confuse the elements of tort and contract. Specifically concerning types of losses and the corresponding theory of recovery, the court stated that economic loss required a warranty action and physical harm or property damage required a tort action. See *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

49. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 319 (Tex. 1978).

50. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

51. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

or damage to consumer property.⁵² Neither the Restatement nor the case law provide any other crucial consideration in providing a remedy under strict liability. In *Mid Continent* the court determined that the aircraft was unreasonably dangerous; therefore, it satisfied the dichotomy required for strict liability recovery.⁵³ In making its decision, however, the court characterized the loss of the aircraft to Curry County as an economic loss.⁵⁴ The rule stated in *Nobility Homes* precluded recovery of an economic loss in a strict liability action.⁵⁵ Thus, the loss of the airplane, damaged because of an unreasonably dangerous defect, was considered an economic loss and denied recovery under strict liability.⁵⁶ In *Signal Oil* the court also indicated the product was unreasonably dangerous.⁵⁷ Recovery, denied because no producing cause was shown, would have included damage to the product itself.⁵⁸ The court specifically stated that when the harm done by an unreasonably dangerous product included collateral or other property, the harm done to the product itself became a part of the strict liability tort.⁵⁹ Thus, when damage to the unreasonably dangerous product itself occurs, it must be accompanied by physical harm or damage to collateral property before the remedy of strict liability is available. If collateral property is not damaged or physical harm incurred, the resulting loss to the product itself must be recovered under warranty.⁶⁰

Justice Traynor, whose California Supreme Court has handed down a number of decisive strict liability cases,⁶¹ said:

The distinction that the law had drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather,

52. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

53. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 310 (Tex. 1978).

54. *Id.* at 312.

55. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

56. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 312-13 (Tex. 1978).

57. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 572 S.W.2d 320, 324 (Tex. 1978).

58. *Id.* at 325.

59. *Id.*

60. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 313 (Tex. 1978).

61. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.⁶²

The Texas Supreme Court has established by its decisions in *Mid Continent* and *Signal Oil* that recovery for property damage in a tort action rests squarely on the "luck" of suffering extensive property damage or physical harm. Without this other loss, the plaintiff must seek redress under a warranty action. In an arms-length transaction this avenue of redress may be sufficient, but at the retail level the buyer has so little control over his warranty that recovery based on his negotiated bargain is limited.⁶³ Clearly these recent decisions reveal that loss to other property not only represents an additional consideration to the dichotomy of dangerousness but also is mandatory for recovery of the product itself.

The most crucial question raised by *Mid Continent* and *Signal Oil* was whether the finding of economic loss when only the product itself was damaged is a sound determination based on the recovery theories of strict liability and contract. The loss suffered in *Nobility Homes* was to the product itself.⁶⁴ In deciding that case the court did not declare that damage to the product itself was not recoverable under strict liability, but it denied the strict liability action upon no showing of dangerousness.⁶⁵ In another Texas case the damages again were to the product itself, but the court denied the strict liability action on no showing of defect and not on the fact that the damage was to the product itself.⁶⁶ Justice Traynor stated that in an appropriate case, strict liability applied to the product itself.⁶⁷ The court in *Signal Oil* denied the strict liability action on a failure to show cause but in dicta stated that the damage to the product itself was recoverable if collateral property was damaged.⁶⁸ Thus, loss of the product itself is an economic loss until such time as that same product causes some additional harm. Until the additional harm occurs, any loss is a loss of bargain. After the additional loss, there is a tort involved that allows for recovery of the damage to the product itself under strict liability. A finding of dangerousness

62. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

63. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1133 (1960).

64. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

65. *Id.* at 80.

66. *Melody Home Mfg. Co. v. Morrison*, 455 S.W.2d 825 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

67. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

68. *Signal Oil & Gas Co. v. Universal Oil Prod.*, 572 S.W.2d 320, 325 (Tex. 1978).

should be sufficient for a strict liability recovery; it should not be dependent upon the type of loss caused by the unreasonably dangerous product.

These two cases also raise the question of what exactly will be considered as other property. In *Mid Continent* valuable agricultural chemicals on board the aircraft were completely lost. The court must have found either the dollar amount lost in these chemicals too insignificant to be considered other property or possibility that the chemicals were a part of the aircraft. In *Signal Oil* the damages to surrounding property were greater than \$350,000, and the court was careful to point out that upon proper finding of cause the product itself would be recoverable.⁶⁹ Therefore, current Texas law provides a problem of definition concerning what constitutes damaged collateral property. The supreme court has indicated in *Mid Continent* and *Signal Oil* that the definition may revolve around a money valuation. Future findings must provide the answer.

The future cases concerning strict liability will indicate whether the court can separate the tort and contract theories. In *Nobility Homes* the court laid the foundation for dividing tort and contract theories,⁷⁰ and *Signal Oil* provided added support. For example, in *Signal Oil*, when the court considered the assumption of risk as a bar to the warranty claim, it stated that a tort defense was improper in a contract action. The holding of *Mid Continent* depended upon whether tort or contract was the proper form of recovery for the loss suffered. Recovery based on tort was improper because the loss was considered a contract loss. Future claimants must accurately separate the theories of tort and contract in order to receive support from these recent Texas Supreme Court decisions.

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69. *Id.*

70. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

