

Affirmed and Memorandum Opinion filed May 6, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00843-CV

**TOMMIE FAY DARDEN, HENRY DARDEN, RONALD DARDEN, KIM K.
DARDEN, AND KLINT K. DARDEN, Appellants**

V.

UNION CARBIDE CORPORATION, Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2007-17832**

MEMORANDUM OPINION

Appellants, Tommie Fay Darden, Henry Darden, Ronald Darden, Kim K. Darden, and Klint K. Darden, appeal from the granting of a motion for summary judgment in favor of appellee, Union Carbide Corporation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1989 Henry H. Darden and Tommie Fay Darden, alleging that Mr. Darden was injured as a result of being exposed to asbestos while employed by appellee, filed suit

against numerous defendants.¹ Some of the defendants in this litigation were members of the Center for Claims Resolution (“CCR”), a nonprofit consortium of twenty-one asbestos exposure defendants formed in 1988 to act as agent for its member companies in asbestos related litigation. Appellee was a member of the CCR from its inception through 2001, when the CCR stopped handling the defense of claims for its members. In 1990, a year after Henry H. Darden retired from his employment with appellee, the Dardens’ attorney negotiated a payment from the CCR to the Dardens in settlement of their asbestos exposure lawsuit. While Union Carbide was not a party to the underlying asbestos exposure lawsuit, the CCR included Union Carbide as a party to the settlement and release (the “Release”).

The Release, in pertinent part, provides:

WHEREAS, Henry H. Darden and Tommie Faye Darden have agreed to settle and compromise their claim and cause of action asserted and which could be asserted in said suit, including, but not limited to, each and every cause of action for loss of consortium, personal injury, medical expenses, past and future, and any future claim for alleged wrongful death under the statutes and laws of the State of Texas, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration paid herewith, for and on behalf of the Releasees; and,

WHEREAS, . . . the Releasees and the Releasors . . . desire to enter into a final compromise and settlement of any and all claims which they have or may hereafter have against the Releasees, for injuries to Henry H. Darden, and any claim for injuries to Tommie Faye Darden, including loss of consortium, mental anguish, or for the future death of Henry H. Darden, arising directly or indirectly from such injuries;

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

¹ In this opinion, we will refer to Mr. and Mrs. Darden as “the Dardens” and the parties seeking relief in this appeal, i.e. Tommie Fay Darden (Henry H. Darden’s wife), Henry Darden, Ronald Darden, Kim K. Darden, and Klint K. Darden (Henry H. Darden’s surviving children), collectively as appellants.

THAT WE, the Releasors Henry H. Darden and wife, Tommie Faye Darden, . . . joined by our attorneys, . . . hereby fully and finally RELEASE, ACQUIT and FOREVER DISCHARGE the Releasees from all claims, demands, causes of action, including by example, but not limited to, express and implied warranties, strict liability, negligence, debt, damages, punitive damages that could be asserted for the death of Henry H. Darden, under any applicable Wrongful Death and Survival Statutes, Worker's Compensation liens, attorney's fees, judgment and expenses of any type whatsoever, in any manner arising out of, or in any way connected with, directly or indirectly, the exposure or occurrences of injuries to Henry H. Darden, above described, as well as any consequence thereof, as well as any cause of action for damages sustained or to be sustained by Tommie Faye Darden.

This Release shall be construed as broadly as possible with regard to the alleged injuries of Henry H. Darden and shall include, but not be limited to, asbestosis, mesothelioma, cancer and any disease of the body that could now or in the future may be alleged to be related to the exposure of Henry H. Darden to asbestos-containing products of any of the Releasees. . . .

We intend this Release to be as broad and comprehensive as possible so that the Releasees shall never be liable, directly or indirectly, to us or our beneficiaries, heirs, successors, or assigns, or any person, . . . claiming by, through, under or on behalf of us or them, for any claims, demands, actions or causes of action of whatsoever nature or character arising out of any illness of Henry H. Darden or damages to Tommie Faye Darden in any way connected with the use of or exposure to various materials and products manufactured, sold or distributed by the Releasees, their predecessors, successors, distributors or assigns.

It is the express intention of the parties to this Release that the consideration stated herein fully and completely compensates and satisfies the Releasors for all injuries, damages, expenses and all other claims released hereby. The Releasors expressly contract that no claim or cause of action of any type is reserved against any Releasees. If any other claims exist against Releasees, whether released herein or not, whether foreseeable or unforeseeable, the Releasors hereby assign those claims in full to the Releasees. . . .

In consideration for the payment of the aforesaid sum, Henry H. Darden and wife, Tommie Faye Darden, agree to indemnify and hold harmless Releasees from any further payment of damages, incurred by or on

behalf of the Releasees as a result of any further claim by Henry H. Darden and wife, Tommie Faye Darden, or their representatives, heirs or assigns. . . .

It is the intent and purpose of this agreement that at no time will the Releasees be called upon to pay any further expense by reason of any fact, matter or claim, directly or indirectly, or by way of any action for indemnity or contribution, arising out of or predicated upon any claim, demand, judgment or payment made by or to Henry H. Darden or Tommie Faye Darden, their beneficiaries, successors, heirs or assigns, arising out of the injuries to Henry H. Darden. . . .

[T]his agreement is and may be asserted by the Releasees as an absolute and final bar to any claim or proceeding now pending or hereafter brought. . . .

Additionally, for the above-described consideration, Releasors, individually, and on behalf of their heirs, executors, legal representatives and administrators, do hereby sell, transfer, convey and assign to the Releasees any and all causes of action that have occurred or may ever accrue to said claimants against the Releasees as result of or arising out of allegations set forth in paragraph two (2) of this Release.

By our signatures below we represent that we understand this Full and Final Release and Indemnity constitutes a final and complete release of all claims regardless of their kind or character, including any possible claim which might be discovered in the future. We acknowledge that we rely upon our own knowledge and information and the advice of our attorneys, as to the nature, extent and duration of the injuries, damages, and our legal rights, as well as the liability of the Releasees and freely acknowledge that we have not been influenced by Releasees. . . .

Following Mr. Darden's death, appellants filed suit against appellee asserting gross negligence claims and seeking to recover exemplary damages. Appellee answered the lawsuit and asserted release as an affirmative defense. In addition, appellee counterclaimed for indemnity. Appellee eventually moved for summary judgment on both its affirmative defense as well as its indemnity counterclaim. The trial court granted appellee's motion for summary judgment on both its affirmative defense of release and on its indemnity counterclaim. This appeal followed.

DISCUSSION

On appeal, appellants raise three issues in support of their contention that the trial court erred when it granted appellee's motion for summary judgment. In their first issue, citing this court's opinion in *Perez v. Todd Shipyards Corp.*, appellants assert that the Dardens could not validly settle, release, or assign the gross negligence cause of action because that cause of action is not based on any right held by Mr. Darden prior to his death but instead is an independent cause of action provided for in the Texas Constitution and Labor Code. *See Perez v. Todd Shipyards Corp.*, 999 S.W.2d 31 (Tex. App.—Houston [14th Dist.] 1999, pet denied) (overruled by *Ross v. Union Carbide Corp.*, 296 S.W.3d 206 (Tex. App.—Houston [14th Dist.] 2009, pet. filed.)). In their second issue, appellants contend the trial court erred when it granted appellee's motion for summary judgment because the Release is limited to product liability claims and does not cover the claims asserted by appellants. In their third and final issue, appellants suggest that if the Release is construed as broadly as proposed by appellee, then it is void and unenforceable because it covers work-related injuries.

These issues are not new. Recently, in *Ross v. Union Carbide Corp.*, an appeal filed by the same attorneys that currently represent appellants, we addressed, and rejected, each of the arguments made by appellants in this case. *Ross v. Union Carbide Corp.*, 296 S.W.3d 206 (Tex. App.—Houston [14th Dist.] 2009, pet. filed).² In addition, in *Ross*, we expressly overruled *Perez*, the primary case appellants' rely on to support their arguments on appeal. *Id.* at 214–16. Therefore, for the same reasons expressed in *Ross*, we overrule appellants' issues on appeal.

² The release at issue in *Ross* has language almost identical to that found in this case. *See Ross v. Union Carbide Corp.*, 296 S.W.3d 206, 209–11 (Tex. App.—Houston [14th Dist.] 2009, pet. filed.).

CONCLUSION

Having overruled each of appellants' issues on appeal, we affirm the trial court's granting of appellee's motion for summary judgment.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Sullivan.