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NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TEX.R.APP.P. 47.7 UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Court of Appeals of Texas, Houston (1st Dist.).

Larry Victor BERGER and Lola Berger, Appellants,
v.
ISK BIOSCIENCES CORPORATION, Appellee.

No. 01-98-00726-CV.

Sept. 2, 1999.

On Appeal from the 157th District Court, Harris County, Texas, Trial Court Cause No. 93-59258.

Justices [MIRABAL](#), [WILSON](#), and [ANDELL](#).

OPINION

[ANDELL](#).

The trial court rendered summary judgment in favor of ISK Biosciences Corporation ("ISK") on the basis of a settlement agreement. In two points of error, the appellants complain the trial court erred in rendering the summary judgment because Larry Berger did not consent and did not have capacity to settle. We affirm.

FACTS

The appellants, Larry Berger and his wife Lola Berger, sued ISK alleging Larry Berger sustained damages as a result of exposure to toxic materials at ISK's chemical plant. At trial, after the parties had concluded voir dire, the appellants' attorney and the appellee's attorney told the trial court that a settlement had been reached. They then recited the terms into the record and the jury was dismissed. Four days later, ISK sent a check to the appellants in the agreed amount of \$150,000, along with a release, a motion to dismiss, and a proposed order of dismissal. Nearly four months later, the appellants

returned the settlement check to ISK and demanded \$1,800,000. ISK counterclaimed for breach of contract and moved for summary judgment [\[FN1\]](#) on the basis of its agreement with the appellants. The trial court rendered summary judgment in favor of ISK and awarded the appellants the settlement amount less a \$4525.50 deduction for ISK's attorney's fees.

[FN1](#). The parties stipulated, and we construe ISK's motion to enforce the settlement as a motion for summary judgment.

SETTLEMENT AGREEMENT

In points of error one and two, the appellants contend the trial court erred in enforcing the settlement agreement and rendering summary judgment in ISK's favor. [\[FN2\]](#)

[FN2](#). We apply the usual standard of review. See [Nixon v. Mr. Property Management Co.](#), 690 S.W.2d 546, 548-49 (Tex.1985); [State Farm Fire & Casualty Co. v. S.S.](#), 858 S.W.2d 374, 380 (Tex.1993); [Carr v. Brasher](#), 776 S.W.2d 567, 569 (Tex.1989); [Black v. Victoria Lloyds Ins. Co.](#), 797 S.W.2d 20, 27 (Tex.1990).

[Texas Rule of Civil Procedure 11](#) provides as follows:

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

[Tex.R.Civ.P. 11](#). A settlement agreement must comply with [Rule 11](#) to be enforceable. [Padilla v. LaFrance](#), 907 S.W.2d 454, 460 (Tex.1995).

ISK's motion for summary judgment stated, *inter alia*, that ISK is entitled to judgment because ISK entered into a valid settlement agreement. In support, ISK attached the portion of the reporter's record from trial where the parties stated:

[Appellants' attorney]: During the break, the parties have reached a settlement. The Plaintiffs have agreed to settle this case for the total sum of \$150,000, to be paid within ten days--Can we do it

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(Publication page references are not available for this document.)

in ten days?

[ISK's attorney]: How soon can we get the funds?

[Appellants' attorney]: Is 10 days okay?

[ISK's attorney]: That's fine.

[ISK's attorney]: Each party bears their own costs. And that's it.

[Appellants' attorney]: And [ISK's attorney] will prepare the settlement papers and the judgment.

[ISK's attorney]: That's fine.

[Court]: All right. Do you want to ask them any questions, or do you just want to leave it as is?

[Appellants' attorney]: I think we will leave it as is, Judge.

[Court]: I understand. All Right.

The parties came to terms and settled. Their agreement was made in open court and entered of record. Therefore, the parties entered into a binding settlement agreement that complied with [Rule 11, Delaup v. Delaup, 917 S.W.2d 411, 413-14 \(Tex.App.--Houston \[1st Dist.\] 1996, no writ\)](#).

The appellants argue that the settlement is unenforceable because they withdrew consent before judgment was rendered on the agreement. However, the Texas Supreme Court addressed this argument in [Padilla v. LaFrance, 907 S.W.2d 454, 461 \(Tex.1995\)](#), in stating:

The [appellees], however, confuse the requirements for an agreed judgment with those for an enforceable settlement agreement. Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with [Rule 11](#) even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.

Here, the trial court did not render an agreed judgment, but rather enforced a settlement agreement in favor of ISK. Therefore, an inquiry into whether the appellants withdrew consent before judgment was rendered is irrelevant.

The appellants also argue that there is no evidence that they were present in court or, in fact, heard the purported agreement. However, in Lola Berger's affidavit, which accompanied their response to ISK's motion for summary judgment, she states: "On July 7, 1997, myself and my husband Larry Victor Berger were present in court in Harris County, Texas, when a proposal to settle the case was conveyed to us by [our attorney]." The appellants are precluded from

arguing the contrary on appeal. [Gevinson v. Manhattan Construction Co. of Oklahoma, 449 S.W.2d 458, 467 \(Tex.1969\)](#) (judicial admissions conclusive upon party making it; bars admitting party from disputing it).

The appellants also contend that their attorney did not have the authority to settle, and Larry Berger did not have the capacity to authorize the settlement. The appellants have admitted that they were present in court, and their attorney conveyed the settlement offer to them. Their attorney was acting as their agent. Thus, even if their attorney did not have the actual authority to settle, he had the apparent authority to settle their case. [Crum & Forster, Inc. v. Monsanto Co., 887 S.W.2d 103, 124 \(Tex.App.--Texarkana 1994, no writ\)](#). We overrule points of error one and two.

We affirm the trial court's judgment.

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