Supreme Court Case No. S133894

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GIL N. MILEIKOWSKY,

Plaintiff and Appellant,

vs.

TENET HEALTHSYSTEM, et al.

Defendants and Respondents.

Appellate Case No.B159733

L.A.S.C. Case No. BS056525
L.A.S.C. Case No. BC233253

Appeal from the Superior Court
of the State of California for the County of Los Angeles
Hon. Lawrence W. Crispo

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

To gain this Court's attention, Petitioner Gil Mileikowsky ("Mileikowsky") claims that this Court must grant review because the Court of Appeal's decision below somehow conflicts with *Ruvalcaba v. Government Employees Insurance Co. (1990) 222 Cal.App.3d 1579* and *Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396.* Mileikowsky's claim is baseless.

The Court of Appeal's decision below is entirely consistent with *Ruvalcaba*, which held that terminating sanctions must be based on the violation of a court order. Here, the Court of Appeal found that the Stipulation Mileikowsky's attorney executed "to avoid the trouble and expense of yet another hearing on Dr. Mileikowsky's failure to respond to simple discovery requests" was "tantamount to the requisite order." *Slip*

Opinion at 21-22. Thus, the Appellate Court's decision does not conflict with *Ruvalcaba's* holding, but instead expands it to its logical conclusion.

The decision below is also in full accord with *Blanton,* where this Court held that an attorney has the inherent authority "to enter into stipulations and agreements in all matters of procedure during the progress of the trial . . . which affect only the procedure or remedy as distinguished from the cause of action itself . . .." *Id. at 403-404.* The Stipulation here was clearly procedural in nature and did not, by itself, affect Mileikowsky's causes of action. Rather, Mileikowsky's substantive right was affected by his *subsequent independent conduct – i.e.,* ignoring the obligations required by the Stipulation that Mileikowsky authorized his attorney to sign.

Because the decision below does not create confusion or ambiguity in the existing law, there is no need to grant review.

II. RELEVANT FACTS

Mileikowsky's recitation of the "facts" bears little relation to what actually happened in the trial court, and what is reported in the Court of Appeal's decision below. For example, Mileikowsky conveniently ignores the Court of Appeal's accurate summation of the case:

> "Here the record is replete with evidence of Dr. Mileikowsky's failures to answer discovery requests despite numerous extensions sought and granted. Time and again, he refused to respond despite the issuance of court orders and monetary sanctions. Only the threat of terminating sanctions caused responses to be submitted. The court was not required to allow this pattern of abuse to continue *ad infinitum.*"

Slip Opinion at 22-23.[1] Mileikowsky also ignores that prior to terminating the entire

[1] It is important to note that three levels of judicial review (the Discovery Referee, the Superior Court and the Court of Appeal) have all concluded that Mileikowsky deserves precisely what he got – an order terminating his case.

action, the Superior Court sanctioned Mileikowsky on five separate occasions and adopted the Discovery Referee's express finding that "[m]onetary sanctions in the past have not successfully gained [Dr. Mileikowsky's] attension." *Slip Opinion at p. 8-11 and 14.*

More importantly, Mileikowsky does not just ignore – but affirmatively misrepresents – his approval of the Stipulation. Mileikowsky would have this Court believe that he forbid his attorney from entering into the Stipulation in the first instance. Mileikowsky makes this remarkable argument for the first time in this Court; Mileikowsky never made this recently invented claim to either the Superior Court or Court of Appeal because the contention is false.

The true fact is that Mileikowsky never objected to his attorney executing the Stipulation. Mileikowsky's attorney faxed the fully executed Stipulation to the Discovery Referee three days before a scheduled hearing, along with a letter stating that he (Mileikowsky's attorney) would hand-deliver the original to the Discovery Referee on the day of the hearing. Mileikowsky attended the hearing and did not disavow or repudiate the Stipulation. Instead, Mileikowsky requested through his attorney that the time parameters set forth in the Stipulation be modified to permit him more time to comply with his discovery obligations. When the Discovery Referee refused to grant the request because the Stipulation had already been fully negotiated and executed by both attorneys, Mileikowsky said nothing. Rather, he secretly instructed his attorney to withhold delivery of the original Stipulation, and not tell opposing counsel of this fact. Accordingly, the original executed Stipulation was never delivered to the Discovery Referee as promised, and opposing counsel never knew it was not.

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III. THE APPELLATE COURT'S DECISION BELOW CREATES NO CONFLICT OR AMBIGUITY IN THE LAW

A. The Stipulation Is A Substitute For The Requisite Court Order

Mileikowsky's contention notwithstanding, the Appellate Court's decision is not at odds with *Ruvalcaba*. Rather, the decision below acknowledges the *Ruvalcaba* holding, and takes it to its next logical step.

The Appellate Court below concluded that an express agreement between the parties to waive the requirement of a court order is enforceable, and that in such a case the parties' agreement – *i.e.*, the Stipulation – serves as a substitute for a court order:

> "Since there is no dispute that the stipulation of January 2002 was never submitted to the court for signature, we agree that there was no order requiring Dr. Mileikowsky to respond to the specific interrogatories and requests for production of documents that were the subject of the dispute. The issue becomes whether the stipulation can been seen as tantamount to the requisite order. We see no reason why it cannot."

Slip Opinion at 21.

The Appellate Court's rationale is solid, and must not be disturbed, especially given Mileikowsky's conduct and gamesmanship throughout the underlying litigation:

> "The stipulation signed by counsel for the parties here was designed to avoid the 'trouble and expense' of yet another hearing on Dr. Mileikowsky's failure to respond to simple discovery requests. Like the order that would have issued, the stipulation made clear that respondent 'may file a motion for sanctions, including but not limited to, issue, evidence or terminating sanctions, if they do not receive [Dr. Mileikowsky's] supplemental discovery responses by [February 15, 2002].' By signing the stipulation, counsel essentially waived Dr. Mileikowsky's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions. That the court or referee did not sign

the stipulation does not negate the fact that this was the parties' agreement. In view of the parties' stipulation, the referee and the court did not err in treating the stipulation as the order required by sections 2030 and 2031. [¶] A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction. [citation]."

Slip Opinion at 22.

Moreover, requiring an executed Court Order under the circumstances of this case would be especially inequitable. As set forth above, the only reason there is no Court Order is because Mileikowsky forbid his attorney from handing the original to the Discovery Referee, notwithstanding that the Mileikowsky's attorney promised to do so in writing three days before. Even considering a review of the Court of Appeal's decision in this case would reward Mileikowsky for the deceptive and obstreperous conduct he exhibited throughout the underlying litigation.

B. Mileikowsky's Attorney Had Both The Inherent Authority And Actual Authority To Execute The Stipulation And Bind His Client

Mileikowsky's attempt to create a conflict between the lower court's opinion and the *Blanton* decision is even more futile. Unlike the plaintiff in *Blanton* who was unaware of his attorney's agreement to waive his right to a trial, Mileikowsky here was well aware of his attorney's actions because he attended the hearing where the Stipulation was discussed in front of the Discovery Referee.

Also unlike the plaintiff in *Blanton,* Mileikowsky's substantive rights were not directly affected by the Stipulation. Indeed, the Stipulation only affected a procedural matter – *i.e.*, Mileikowsky's agreement to respond to discovery in exchange for Respondent's agreement to take its Motions to Compel off calendar. Accordingly, the Stipulation itself did not affect Mileikowsky's substantive rights; Mileikowsky's

subsequent conduct of ignoring its terms ultimately impacted his case. This independent causal factor distinguishes the Court of Appeal's decision in this case from this Court's prior decision in *Blanton*

Finally, in stark contrast to Mileikowsky's claim that the decision below conflicts with *Blanton,* the Court of Appeal *relied* on – and indeed quotes – *Blanton* to support its opinion:

> "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client."

Slip Opinion at p. 21. Given that the Stipulation at issue was "incidental to the management of the suit" and "affect[ed] only the procedure or remedy as distinguished from the cause of action itself," the Court of Appeal's decision is completely consistent with this Court's holding in *Blanton.*

IV. CONCLUSION

The Superior Court issued terminating sanctions against Mileikowsky because he repeatedly thumbed his nose at the rules. Now, he is trying to avail himself of a technicality which the Court of Appeal correctly saw through.

Through his attorney, Mileikowsky agreed to provide discovery responses by a date certain or be subject to terminating sanctions. Mileikowsky did this to avoid being sanctioned yet again for his failure to comply with the most basic of discovery obligations.

Mileikowsky failed to live up to his agreement, both in terms of responding to discovery as well as in terms of failing to deliver the Stipulation to the Discovery Referee for his signature and forwarding to the Superior Court. Mileikowsky therefore should not be permitted to profit by his own wrongdoing. The Court of Appeal was correct when it concluded that "[t]he [trial] court was not required to allow this pattern of [discovery] abuse to continue *ad infinitum*" and that it thus "did not abuse its discretion in ordering terminating sanctions." *Slip Opinion at 22-23.* It would be a travesty of justice for this Court to grant review of that finding.

DATED: May 29, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 28.1(d)(1) of the California Ruels of Court, the attached brief of Respondent contains approximately 1,846 words. Counsel relies on the word count program contained within the word processing program Microsoft "Word."

DATED: May 29, 2005

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 101 North Pacific Coast Highway, Suite 100, Redondo Beach, California 90277.

On June 1, 2005, I served the document described as **ANSWER TO PETITION FOR REVIEW** on counsel for the parties in this action, or on the parties in propia persona, addressed as stated on the attached service list:

[X] **BY MAIL:** By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[ ] **BY NEXT-DAY DELIVERY:** Via Federal Express. I am readily familiar with my employer's practice for the collection and processing of correspondence via Federal Express. In the ordinary course of business, this correspondence would be dropped off at the Federal Express office located at 1901 Avenue of the Stars, Los Angeles, California 90067.

[ ] **BY FACSIMILE:** I caused such document to be sent via facsimile to the names and facsimile numbers listed below and received confirmed transmission reports indicating that this document was successfully transmitted to the parties named above.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

[ ] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED on June 1, 2005, at Redondo Beach, California.

Lola Hongo

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