Supreme Court No. S133894

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,	)	B159733
	)	
Plaintiff and Appellant,	)	L.A.S.C. No. BS056525
	)	L.A.S.C. No. BC233153
vs.	)	
	)	
TENET HEALTHSYSTEM, et al.,	)	
	)	
	)	
Defendants and Respondents	)	
	)	

APPEAL FROM ORDER OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
(HONORABLE LAWRENCE CRISPO, JUDGE)

REPLY TO ANSWER TO PETITION FOR REVIEW

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REPLY TO ANSWER TO PETITION FOR REVIEW

I

INTRODUCTION

On April 6, 2005 the Court of Appeal filed its published opinion in this case, 128 Cal.App.4th 262, 26 Cal.Rptr.3d 831 (2005). On May 4, 2005 the Court of Appeal modified its opinion and then denied a Petition for Rehearing.

On May 13, 2005 Dr. Gil N. Mileikowsky, M.D. (hereinafter "Mileikowsky") filed his Petition for Review with this Court to obtain review of Mileikowsky v. Tenet Healthsystem, 128 Cal.App. 4th 262, 26 Cal.Rptr.3d 831 (2005). His Petition advised this

Court of a second, related decision filed by the Court of Appeal on April 18, 2005, Mileikowsky v. Tenet Healthsystem, 128 Cal.App.4th 531, 27 Cal.Rptr.3d 171 (2005). Mileikowsky told this Court that he would file a Petition for Review in that case and he did on May 27, 2005 (Supreme Court No. S134269). The two Petitions for Review involve three related Superior Court actions. The first two Superior Court actions, BS056525 and BC233153, comprise the decision below which are the subject of this case (No. S133894).

In his Petition for Review in this case Mileikowsky clearly and properly outlined the significant legal issues worthy of this Court's review. The major issue is whether terminating sanctions may be imposed without a violation of a court order. This issue is significant because the relevant statutes and court decisions require court orders to have been violated before the ultimate sanction, termination, maybe rendered. The second major issue is can a stipulation substitute for the otherwise required court order when an attorney stipulates to terminating sanctions (i.e., dismissal of the case) without the consent, authority, or knowledge of his client.

II

STATEMENT OF FACTS

The essential facts necessary for this Court to resolve these significant legal issues are presented in the opinion of the Court of Appeal below and were accurately summarized by Mileikowsky in his Petition for Review filed with this Court.

These important legal issues are squarely presented by the Petition because the Court of Appeal below conceded, as it had to, that there was no underlying court order that was

ever violated in this case. To justify the terminating sanctions the Court of Appeal "legislated" by essentially rewriting the statutes to provide for terminating sanctions if a stipulation is violated. This is unprecedented and does justify this Court's consideration. If a stipulation can supplement the requirement of the statute that there be an order before a terminating sanction may be imposed, then the second issue, assuming that a stipulation can substitute for the required order, is whether the attorney can bind the client with respect to such a stipulation without the client's authority (i.e. informed consent). It is with respect to this second issue that Respondent Tenet Healthsystem has seen fit to engage in character assassination in an attempt to prejudice this Court against Mileikowsky.

Tenet Healthsystem makes assertions in its Answer to Petition for Review filed June 1,2005 that are not supported by the record and, indeed, contain no reference to the record. The assertion is false and irrelevant to the issue presented in the Petition. The Court of Appeal did not deal with these false allegations because they were not true and were not necessary for the Court of Appeal's decision.

Mileikowsky is concerned that this Court might be deterred from granting the Petition for Review in this case by the unsupported and erroneous attacks on the character of Mileikowsky, an non attorney physician who battled Tenet Healthsystem for a number of years and who was buried with discovery requests while at the same time representing himself in pro per in a lengthy peer review hearing which is the subject of the second Petition in Supreme Court No. S134269.

At paragraph 3 of the Answer to Petition for Review Tenet Healthsystem states that

Mileikowsky falsely stated that he forbid his attorney from entering into the stipulation in the first instance. Tenet Healthsystem states that Mileikowsky made this "remarkable argument" for the first time in this Court.

To understand the contention being made by Tenet Healthsystem in its Answer to Petition for Review it is important for this Court to review the briefs filed with the Court of Appeal and the Opinion of the Court of Appeal.

First, with respect to the Opening Brief filed by Mileikowsky in the Court of Appeal below, the issue of whether an attorney could sign a stipulation on behalf of, and without the knowledge of the client, was not an issue presented in the Opening Brief. That is so because the order imposing sanctions was not based upon the right of an attorney to bind a client in this manner. The issue was not litigated in the trial court. The naked authority of an attorney to bind a client by signing a stipulation authorizing terminating sanctions without the knowledge, approval, or authority of the client was not raised in the trial court.

Accordingly, in his Opening Brief filed with the Court of Appeal Mileikowsky did not discuss the issue of whether an attorney could bind a client by executing a stipulation without the client's permission, knowledge, or authority.

In response to Mileikowsky's Opening Brief, which argued only the fact that no court order was ever made compelling discovery and therefore terminating sanctions were not permissible as a matter of law, Tenet Healthsystem stated at page 22 -23 of its Respondent's Brief,

> "To the extent the Stipulated Order never became a signed Order of the court, it is entirely the result

> of Mileikowsky's own underhanded conduct. On December 19, 2001, Mileikowsky and his attorney both attended a hearing and stipulated, on the record, that in exchange for Respondents' agreement to take their motions to compel and requests for sanctions off calendar (they were scheduled for hearing on January 14, 2002 before the Discovery Referee), Mileikowsky would provide the discovery responses and documents identified in the motions to compel. (RT at 134-135). It is indisputable that this stipulation became the court's Order." (Respondent's Brief at p. 22).

What is quoted above at the bottom of page 22 of Respondent's Brief filed with the Court of Appeal is false and misleading.

The Reporter's Transcript of December 19, 2001 is part of the Record on Appeal in this case. At the beginning of the session on December 19, 2001 Superior Court Judge Lawrence W. Crispo addresses the parties. Attorney Kevin Mirch appeared on behalf of Mileikowsky. Attorneys Mark Kawa and Steven Auer appeared on behalf of Tenet Healthsystem. Judge Crispo then referred to informal discussions regarding a proposed stipulation which Judge Crispo stated Mr. Kawa had written out. Judge Crispo then invited attorney Kawa to read his own writing into the record to reflect the stipulation of the parties. Beginning at page 130 of the Reporter's Transcript on Appeal Mark Kawa then reads the stipulation in the presence of Mileikowsky and Mileikowsky's attorney, Kevin Mirch. Kawa refers to a number of items and then at page 134 of the Reporter's Transcript Kawa arrives at the stipulation regarding the relevant discovery motions. The transcript of December 19, 2001 (pp. 134-135) reflects the following exchange:

> "MR. KAWA: Your Honor, we have met and conferred. There are four pending motions before Judge Wisot, all of them brought by my clients seeking further discovery responses from plaintiff.
>
> Plaintiff's counsel has agreed to provide further responses and production of documents. We have not worked out a schedule yet as to when those responses will be due and the documents will be produced.
>
> We are in agreement to take off our pending motions provided that we have a stipulated order which can be enforced by way of contempt of court or issue sanctions should the plaintiff not provide the responses, as he has agreed to do.
>
> THE COURT: Is that a correct statement?
>
> MR. MIRCH: That is an absolute correct statement."

Mileikowsky was present in the audience section of the Courtroom during this exchange.

The Court of Appeal mentioned the December 19, 2001 proceeding at page 13 of its Opinion. The Court of Appeal stated at page 13,

> ". . . On December 19, 2001, counsel informed the court that the parties had entered into stipulations concerning a number of matters, including out-standing discovery disputes. . . ."

At this point in the Opinion of the Court of Appeal the Court of Appeal did not describe in detail the precise nature of the stipulation recited by Mr. Kawa at the hearing on December 19,2001 in the presence of Mileikowsky. It is clear, however, from the December 19, 2001 transcript, that there was no agreement for terminating sanctions.

Later in the Opinion of the Court of Appeal, at page 22, the Court of Appeal described the written stipulation signed by Mileikowsky's attorney. The Court of Appeal stated the following at page 22 of its Opinion:

> "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 it 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].'"[1]

The stipulation quoted above was signed by Mileikowsky's attorney and counsel for Tenet Healthsystem on January 10, 2002. See page 13 of Opinion of Court of Appeal.

It is clear from the foregoing that although Mileikowsky was present on December 19, 2001 to hear the opposing attorney recite the stipulation that was made at that time, the written stipulation signed by Mileikowsky's attorney on January 10, 2002 contained a provision that was **NOT** recited by Kawa on December 19, 2001, mainly **THE AGREEMENT FOR TERMINATING SANCTIONS!**

At page 4 of Appellant's Reply Brief, Appellant Mileikowsky referred to the allegation by Tenet that Mileikowsky somehow tricked Tenet into not presenting a proposed order for the referee and for the court to sign. Mileikowsky stated at page 4 that

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[1] Mileikowsky disputes that the requests were "simple." The discovery requests were voluminous and tortuous, but the characterization "simple" is not relevant to the significant legal issues presented by this case.

the contention was "absolutely false." Mileikowsky further pointed out in his Reply Brief that it was Tenet which was being deceptive because it kept referring to a "stipulation order" when there was no "stipulation order" because there was **NO ORDER.** Mileikowsky repeated his argument that without an order there can be no terminating sanction.

In its Respondent's Brief filed with the Court of Appeal, Tenet stated that Mileikowsky engaged in dirty play because Mileikowsky instructed his attorney to retain the stipulated order. There is no admissible evidence in the record that Mileikowsky ever instructed his attorney to withhold the "stipulated order." Continuing on at page 24 of its Brief filed with the Court of Appeal, Tenet speculated that Mileikowsky justified his alleged conduct (instructing his attorney to withhold the "stipulated order") because his request for continuance was denied. Tenet contended at page 24 of its Respondent's Brief filed with the Court of Appeal that Mileikowsky never communicated his purported "recission" to anyone.

The record does not support any of this speculation and neither the trial court nor the Court of Appeal made any findings on these allegations not supported by the record.

The Court of Appeal did state in its Opinion at footnote 11 at the bottom of page 15 that the December 19, 2001 stipulation recited by Kawa only mentioned contempt or issues sanctions should Mileikowsky not provide responses. The Court of Appeal acknowledged that the written stipulation went beyond the December 19, 2001 stipulation recited on the record by Mr. Kawa. The Court of Appeal noted at footnote 11 that the written stipulation

referred to "terminating sanctions. . ."

Based upon the foregoing, the Court of Appeal provided footnote 12 as follows:

> "Respondents presented hearsay evidence that prior counsel had blamed Dr. Mileikowsky for the failure to have the stipulated order signed and filed by the court, telling counsel for Respondents that Dr. Mileikowsky had 'specifically prohibited' prior counsel from giving the court the written stipulation."

It was with reference to footnote 12 at the bottom of page 16 of the Opinion of the Court of Appeal that Mileikowsky stated at page 7 of his Petition for Review filed with this Court that Mileikowsky's attorney did not have Mileikowsky's authority to sign the stipulation. Then, in referring to the hearsay statement at footnote 12 at the bottom of page 16 of the Opinion of the Court of Appeal, Mileikowsky also stated in his Petition for Review filed with this Court,

> "Mileikowsky prohibited his attorney from signing the stipulation, who obviously signed it over his client's objection. . . ."

The basis for this statement included in the Petition for Review was footnote 12 by the Court of Appeal, which the Court of Appeal said was based on hearsay.

The reality is there is no evidence in the record to explain why the referee or trial court did not sign or approve the stipulation. Mileikowsky respects the judicial process and therefore does not speculate nor present hearsay evidence. Mileikowsky based his Petition on the facts set forth in the Court of Appeal's Opinion. What is in the record is a written stipulation not approved by Mileikowsky that clearly exceeded what Kawa recited

in open court on December 19, 2001, when Mileikowsky was in the audience. The stipulation clearly went beyond what Kawa recited in open court in the presence of Mileikowsky.

This entire discussion is essentially irrelevant to the legal issues presented by the Petition in this case. The Court of Appeal below did not find in accordance with Tenet's contention that Mileikowsky somehow tricked Tenet or engaged in dirty play. The basis for the Court of Appeal's decision below has nothing to do with Mileikowsky's conduct with respect to the stipulation. The Court of Appeal did not buy Tenet's argument that Mileikowsky should be estopped to dispute the stipulation because of his own conduct. Mileikowsky's conduct with respect to the stipulation was not the subject of the Opinion of the Court of Appeal.

The irony of all this is that it was Tenet that presented "hearsay evidence" regarding the alleged conduct of Mileikowsky. The Court of Appeal should not have included hearsay evidence in footnote 12. However since the Court of Appeal did so at the request of Tenet, Mileikowsky referred to it in his recitation of facts at the bottom of page 7 of his Petition for Review filed with this Court. However, as stated earlier and repeatedly, whether Mileikowsky prohibited his attorney from signing a particular stipulation, whether he never authorized his attorney to sign any stipulation regarding terminating sanctions, or whether he "rescinded" the stipulation because it exceeded the stipulation recited by Kawa, the issues presented in the Opinion of the Court of Appeal are worthy of this Court's review. As stated earlier the Court of Appeal did not rely upon any of these "facts" when it

rendered its decision.

As far as the Court of Appeal is concerned the facts are very simple: the attorneys signed a stipulation and that stipulation was the basis for the terminating sanctions. The Court of Appeal never stated that Mileikowsky was aware of the stipulation signed by his attorney. Indeed, the entire basis of the Opinion of the Court of Appeal is that an attorney, without the knowledge or consent of a client, can enter into such a stipulation. Mileikowsky agrees with the factual premise of the Court of Appeal's Opinion – that he did not authorize the stipulation. The Court of Appeal's Opinion is not contrary to this factual premise.

As stated herein, the Opinion of the Court of Appeal below squarely presents the question of whether an attorney can sign a stipulation and bind his client to terminating sanctions. The Court of Appeal never stated that Mileikowsky was aware of the written stipulation signed by his attorney. Indeed, the entire theory of the opinion of the Court of Appeal is that the attorney for a client can do this without the client's knowledge or consent.

It would indeed be unfortunate if Tenet persuaded this Honorable Court not to take this case because it has muddied the waters with respect to the factual record and has engaged in character assassination against Mileikowsky.

It is unfortunate that the Court of Appeal's Opinion went out its way to paint Mileikowsky as some sort of obstreperous litigant. The Court of Appeal's Opinion does prejudice Mileikowsky by describing unadjudicated conduct alleged against Mileikowsky when he in fact acted in the best interest of his patient in surgery and his alleged conduct at

the office of Tenet when Tenet refused to provide Mileikowsky with the reappointment application form. See pages 4 and 5 of the Opinion of the Court of Appeal. This unadjudicated conduct for which no findings were ever made was really inappropriate but was apparently designed by the Court of Appeal to create some sort of prejudice against Mileikowsky. It is obvious that the terminating sanction issue presented by this case has nothing to do with the conduct attributed to Mileikowsky at pages 4 and 5 of the Opinion of the Court of Appeal. The question as to whether Mileikowsky ever engaged in such conduct was supposed to be the subject of peer review (Case No. S134269), but Mileikowsky was denied peer review when Tenet's "puppet" (the hearing officer) terminated the hearing prematurely.

Having said this Mileikowsky respectfully asserts that even if his conduct (or any client's conduct) with respect to discovery was improper, terminating sanctions were not permissible under the law. We will now proceed to discuss his conduct in comparison with the conduct attributed to the Plaintiff in Ruvalcaba v. Government Employees Insurance Co., 222 Cal.App.3d 1579 (1990).

III

ARGUMENT

Even assuming for the purpose of discussion that Mileikowsky should have responded to discovery sooner, his conduct was no different, even if true, than the conduct of the plaintiff in Ruvalcaba v. Government Employees Insurance Co., 222 Cal.App.3d 1579 (1990).

According to the Opinion of the Court of Appeal in the Ruvalcaba case, the plaintiff failed to respond to requests for inspections even though he was given two extensions to respond. Furthermore, the plaintiff in Ruvalcaba had failed to respond to other discovery requests, and that previously the trial court had ordered sanctions against him. Not only did the plaintiff in the Ruvalcaba case repeatedly fail to respond to discovery and violated earlier court orders, when the defense filed the written motion for sanctions, including terminating sanctions, for willful refusals to respond to discovery requests, the plaintiff did not even file written opposition to the motion. Moreover, he did not even appear at the hearing on the motion to terminate the case. In view of that, the trial court granted the defense motion to dismiss. Notwithstanding the foregoing, the Court of Appeal reversed the dismissal order on the ground that the Court lacked the authority to dismiss the case absent a violation of a court order.

Compared to the conduct of the plaintiff in the Ruvalcaba case, Mileikowsky's conduct is trivial. Moreover, unlike the Ruvalcaba case, here there were certain instances of misconduct by Tenet with respect to discovery. Even the Court of Appeal noted them. For example, at the top of page 11 of the Opinion of the Court of Appeal the Court of Appeal referred to the trial court and made the following comment,

> ". . . The court was therefore 'not positively certain that this discovery request was not motivated more by the desire to harass [Dr. Mileikowsky] than by the need of relevant information."

There was no similar reference to the conduct of the defense in the Ruvalcaba case.

Moreover, and quite significant, unlike the Ruvalcaba case, Mileikowsky did eventually provide the discovery requested by Tenet . Here the Court of Appeal acknowledged at the bottom of page 22 that Mileikowsky did eventually provide the responses. That does not appear anywhere in the Ruvalcaba case. Thus, we have persistent harassment by Tenet and we have Mileikowsky eventually providing the responses. Even the trial court noted and recognized Tenet's harassment. See Opinion, p.11. Under these circumstances terminating sanctions should not have been imposed. The Court of Appeal in the Ruvalcaba case would not allow it even when the plaintiff failed to respond to the motion to dismiss.

It is clear that the decision of the Court of Appeal below conflicts with the holding of Ruvalcaba v. Government Employees Insurance Co., supra. Accordingly, it would be extremely appropriate for this Court to grant review to resolve the issues.

Tenet argues that the case below is simply an extension of Ruvalcaba. Mileikowsky respectfully submits that it is a contradiction. If a court order is necessary for there to be a terminating sanction and there is no order there can be no terminating sanction according to Ruvalcaba and according to the statutes. The Court of Appeal below has simply rewritten the statute. This is not permissible.

Tenet and the Court of Appeal below justify the conclusion of the trial court by pointing out that here, unlike Ruvalcaba, there was a stipulation signed providing for terminating sanctions. However, the stipulation was not authorized by the client, Mileikowsky, and there is no evidence or any finding to the contrary and there was no court

order. One might have a different case if Mileikowsky himself had signed the stipulation. What we have here is a trick by Kawa. He recited a stipulation on December 19, 2001 on the record in front of Mileikowsky which provided for **no terminating sanction**.

Later, unknown to Mileikowsky, his attorney, Mr. Mirch, signed a stipulation that included a terminating sanction, something Mileikowsky never would have authorized and did not authorize. Therefore, even assuming a stipulation can override the requirement for a court order, the stipulation must be agreed to by the client when the stipulation can lead to, as it did here, to the dismissal of the entire case.

Obviously during the course of lengthy litigation attorneys must be able to enter into certain agreements where they do not need express client approval each time. Attorneys obviously are free to discuss among themselves the setting of deposition dates, extensions of time to file responses to interrogatories, extensions of time to file responsive pleadings, and so forth.

However, with respect to the question of whether the case itself can be dismissed obviously that is not a simple procedural question that the attorneys have the right to decide for themselves. The entire dismissal of a case is not a mere procedural point that the attorneys can pursue by themselves.

Imagine if the tables were turned and a lawyer was about to undergo surgery by a physician. Clearly the physician would need written consent from the attorney/patient before his gall bladder or spleen could be removed. Without informed written consent a patient can sue the doctor for battery and for malpractice. See AAPS Amicus Letter brief in

support of petition.

Review is crucial for this Court because the issues are important and they do need to be handled by this Court in a definitive opinion. As matters now stand the clash between the Ruvalcaba case on the one hand and the instant case on the other creates uncertainty in the litigation world. If a case can be terminated without a court order pursuant to a stipulation clearly the stipulation must be a stipulation approved by the client. Thus, the decision below also conflicts with Blanton v. Womancare, Inc., 38 Cal.3d 396 (1985). In the absence of the client's approval, the judiciary must honor the Legislative directive in the Code of Civil Procedure, which requires the violation of a court order before a case can be dismissed. What is especially troubling about this case is that Mark Kawa expressly recited the stipulation on December 19, 2001 in the presence of Mileikowsky and that stipulation did not include terminating sanctions.

Kawa attributes the dirty trick to Mileikowsky when in fact it was Kawa who played the dirty trick on Mileikowsky. How much more dirty can an attorney play than to recite one stipulation in front of the opposing client and then obtain a different written stipulation from that client's attorney without the client's knowledge or authority?

All one need do to determine whether Mileikowsky was treated fairly in this case is to compare the oral statement of Kawa on December 19, 2001 in the presence of Mileikowsky with the written stipulation that Kawa secured from Mileikowsky's attorney without Mileikowsky's knowledge or consent.

///

IV

CONCLUSION

For the foregoing reasons and for the reasons expressed in Petitioner's Petition for Review filed May 13, 2005 Petitioner respectfully asks this Court to grant his Petition for Review to give further consideration to these important issues.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Plaintiff & Appellant
Gil N. Mileikowsky, M.D.

Supreme Court No. S133894

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vs.	)	
	)	
TENET HEALTHSYSTEM, et al.,	)	
	)	
	)	
Defendants and Respondents	)	
	)	

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 28.1(d)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 4,195 words which is less than the 4,200 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 9, 2005

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Plaintiff-Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as: Mark T. **REPLY TO ANSWER TO PETITION FOR REVIEW** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on June 10, 2005

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 10th day of June 2005.

JUDITH A. BURGDORF