November 1, 2006

Karen Reid Bramblett, Esquire
Office of the Prothonotary
530 Walnut Street
Philadelphia, Pennsylvania 19106

Re: *Nevyas v. Morgan*, No. 3084 - EDA 2005

Dear Ms. Bramblett:

Pursuant to the Court's October 19, 2006 order, I write to address appellant Morgan's entitlement to proceed in forma pauperis ("IFP") under the Pennsylvania Rules of Appellate Procedure in light of certain erroneous assertions about the record below made at oral argument by counsel for the Nevyases as appellees. To summarize, although the questions posed by the Court understandably accept at face value the representations by appellees' counsel, we show that:

(1) appellees' account of the facts and proceedings below on the IFP issue was wrong;

(2) Morgan filed his own affidavit in the form provided by the Pennsylvania Rules, as well as the affidavit of his former counsel, Mr. Friedman, to support his IFP status;

(3) although Morgan's IFP status below was revoked after he appealed, the appellate rules provide separate and independent methods for securing IFP status in the appellate court;

(4) Morgan secured IFP status in Superior Court in accordance with the appellate rules; and

(5) there is no basis in fact or law to deprive Morgan of his IFP status on appeal.

FACTS

Morgan applied for IFP status through a motion filed in the Court of Common Pleas on January 10, 2005. Appellees knew at that time that, pursuant to a high-low arbitration of Morgan's malpractice claim for having been left legally blind after lasik surgery by appellees, they had sent a $100,000 check to Morgan's then counsel, defendant Friedman, made payable jointly to Friedman and Morgan, eighteen months earlier. Nevertheless, appellees did not oppose the motion, and on February 16, 2005, it was granted.

After the trial in July 2005, Judge Maier ruled against Morgan. Morgan filed a post-trial motion on August 5, which included a request for the trial transcript. On August 23, Judge Maier held an informal meeting with all counsel and stated that he had to satisfy himself that Morgan was still IFP before he would allow the transcript to be provided, and that an affidavit from Morgan would suffice for that purpose. Morgan then filed an affidavit dated August 30, confirming that he could still not afford the cost of defending himself, or the costs of appeal, and specifically stated that there had been no substantial change in his financial condition. The affidavit, which expressly invoked Rule 551 of the Pennsylvania Rules of Appellate Procedure and recited that two copies were being filed, is attached as Exhibit A. Friedman submitted this affidavit three times – September 2, October 5, and October 6. (The affidavit does not appear on the docket on such dates, even though Exhibit A shows the Prothonotary's receipt stamp. However, along with the stated facts above about the August 23 conference with Judge Maier, and submission cover letters, they appear in the certified record because they were noted in the Affidavit of Steven Friedman, ¶¶ 24-27 and Exhibits 2-4, that was filed with Morgan's motion for renewed IFP status on December 12. The Friedman affidavit

was also attached as Exhibit B to Morgan's opposition to the Motion to Quash filed in this Court.)

On October 19, Mr. Friedman, Morgan's pro bono attorney below, withdrew. Unable to afford an attorney and legally blind, Morgan was thereafter pro se below. On October 25, Judge Maier's secretary sent a letter to Morgan (Exhibit B) telling him that a hearing had been scheduled on November 23 that he was required to attend. The letter did not state the purpose of the hearing.

Morgan attended the November 23 hearing unrepresented by counsel. According to the November 23 transcript, which also was never placed on the docket, but which is now attached as Exhibit C, Judge Maier stated that the purpose of the hearing was to determine whether Morgan was entitled to remain IFP in light of the $100,000 that he had allegedly received after the arbitration. *Id.* at 4. Morgan stated that he could show exactly what happened to the funds but did not have the facts at hand because he had not been told the purpose of the hearing. *Id.* at 4-5. Judge Maier then stated that he had reconsidered and was revoking the February 16 order granting Morgan IFP status, but that Morgan could get his information together and "then you have to schedule a hearing." *Id.* at 5. He did not, as the Court was told by the Nevyases' counsel, order Morgan to file a verified statement showing how the alleged payment of Morgan of $100,000 was dissipated. Appellees' counsel repeatedly represented that "Morgan" had been paid $100,000, *id.* at 7-8 (erroneous statements because the payment was to Morgan and Friedman jointly, and Morgan received only a third of the money after costs and contingent attorney fees). No evidence was presented with respect to this payment. Judge Maier then repeated, "I will enter an order indicating that Mr. Morgan is not permitted to proceed [IFP] until such time as he indicates to the Court that he **presents such evidence that he is, in fact, [IFP].**" *Id.* at 8 (emphasis added); *see also id.* at 5, 7.

On December 12, Morgan filed a renewed petition for IFP status in the trial court. With that application he filed his own sworn affidavit, in the form provided by the First Judicial District of Pennsylvania, Common Pleas Civil Trial Division, enumerating his assets, his income, and his expenses, and he attached his federal and state tax returns. He also attached a sworn affidavit from Mr. Friedman that the $100,000 check had been made payable to himself and Morgan jointly and that Morgan's share was $33,900; the affidavit recounted in detail what had happened to the $33,900. A copy of that petition and accompanying affidavits are attached as Exhibit D.

The Nevyases opposed the petition on December 22, and Morgan filed his **verified** reply brief on January 11, 2006 (attached as Exhibit E). Morgan averred of his own personal knowledge that everything in Friedman's December 12 affidavit about Morgan's finances was true. *Id.* at 3-4. Morgan also attached the $100,000 check, showing that it had been made to Morgan and Friedman jointly. By order dated January 17, Judge Manfredi transferred the IFP petition to Judge Maier, and on January 20, 2006, Judge Maier denied the petition, using the form of order that the Nevyases had provided but hand-writing in the following: "as defendant Morgan has failed and refused to present any evidence concerning funds available to him as required by the Court." The January 20, 2006 order does not appear on the docket below. However, a copy is attached as Exhibit F.

On January 13, 2006, Morgan's appellate counsel filed in the lower court, pursuant to Appellate Rule 552(d), certifications of Morgan's indigence and of their pro bono representation, and praecipes for the Prothonotary to enter an order allowing Morgan to proceed IFP on appeal. A copy of the praecipes and certifications are attached as Exhibit G. On January 13, the Prothonotary signed an order pursuant to Appellate Rule 552(d) granting Morgan leave to proceed IFP on appeal.

The order also is not reflected in the docket below, but is attached here as Exhibit H.

Finally, on February 7, Morgan moved to reconsider the January 20 denial of his petition for IFP status below. His motion pointed out, contrary to the statement in the order that he had "failed and refused to present any evidence concerning fund available to him," that he **had** presented his own and Mr. Friedman's affidavits. Morgan's reconsideration petition is not reflected on the docket below, but Judge Maier's denial of the motion is docketed as entered March 2.

ARGUMENT

Morgan has been and remains entitled to proceed IFP in this Court because he was fully qualified for appellate IFP status at the time he filed the appeal. Moreover, even though the Appellate Rules do not provide for appellate IFP status to be affected by subsequent actions in the lower court, after Judge Maier terminated Morgan's right to proceed IFP in the court below, Morgan, in an over-abundance of caution, qualified for independent IFP status under the Appellate Rules.

Appellate Rule 551 allows persons who have been granted IFP status in the lower court to continue that status on appeal. Morgan obtained that continuing status by filing his August 30 affidavit of indigence (Exhibit A). Thus, when Morgan filed his appeal on October 28, he already had IFP status on appeal under Rule 551, and hence, pursuant to Rule 554, he was entitled to proceed without the payment of any fees. Once the appeal is filed, Appellate Rule 1701 bars any action by the trial court not expressly authorized by the Appellate Rules, and nothing in the Appellate Rules allows a trial judge to interfere with the jurisdiction of an appellate court by stripping a party of his appellate IFP status **after** that status has been obtained properly and **after** the appeal has been filed.

Although Judge Maier, *sua sponte*, removed Morgan's trial court IFP status pending a further showing of indigence, he did not act until November 23, nearly a month after the appeal was filed. Nevertheless, out of an overabundance of caution, Morgan established a second and independent basis for his IFP status on appeal by invoking Rule 552(d), which provides for "automatic approval in certain cases." Specifically, if the appellant's counsel certifies (1) that the applicant is indigent, and (2) that counsel is providing free legal services, approval of IFP status becomes "automatic." The rule provides in no uncertain terms that, once those conditions are met, the clerk of the lower court **"shall forthwith enter an order granting the application."** (emphasis added). That is the procedure invoked here, Exhibit G, and the prothonotary entered the required order. Exhibit H.

Rule 553 provides for the circumstance in which IFP status **on appeal** is denied by the lower court. In that case, the applicant may apply directly to the Superior Court for leave to proceed on appeal IFP, filing an application in this Court. Had the Prothonotary below declined to enter the order required by Rule 552(d), or had Morgan sought and been denied appellate IFP status under Rule 552(a), Rule 553 would have been the proper procedure to be followed. However, Rule 553 does not apply because Judge Maier only rescinded Morgan's IFP status in the court below, Morgan did not apply under Rule 552(a), and the Prothonotary did issue the order required by Rule 552(d).

At the October 17 oral argument, the Nevyases, in addition to misrepresenting that Morgan never filed his own affidavit of continued indigence supporting IFP status below, argued that Morgan cannot have IFP status in this Court because he did not appeal either Judge Maier's revocation of his IFP status in the lower court, or the subsequent denial of his renewed application for IFP status below. That argument is seriously flawed.

First, Morgan was qualified for IFP status at the time he filed his appeal, no Appellate Rule gives a trial judge the power to revoke such status, and Judge Maier's order did not purport to revoke Morgan's IFP status in **this** Court. Second, even if Judge Maier's revocation of IFP status below had any effect on his status in this Court, Morgan obtained IFP status in this Court under the independent avenue of a Rule 552(d) certification. Hence, there was no need to appeal Judge Maier's IFP rulings to protect Morgan's right to proceed IFP in this Court.

Moreover, Judge Maier's orders were not immediately appealable. An order denying IFP status is not a "final order" under Rule 341, and it is not an interlocutory order appealable of right under Rule 311. Like any other interlocutory order, ordinarily the denial of leave to proceed IFP is merged into the final order and can be appealed only when a final order is entered that disposes of all claims. Here, no final order has been entered because both the Nevyases' claims against Mr. Friedman, and Morgan's counterclaims against the Nevyases, remain to be decided below. This appeal from a prior restraint of Morgan's free speech was filed as of right under Rule 311(a)(4).

Thus, if the Nevyases' rule were followed, even an IFP party who was wrongly stripped of IFP status after he filed an interlocutory appeal as of right would be deprived of his ability to pursue an interlocutory appeal from an injunction imposing an unconstitutional prior restraint. The IFP defendant would have to wait for a final order ending the case before he could vindicate his constitutional rights on appeal. That is not and should not be the law. An appellate court must be able to control its own jurisdiction and protect the litigants who come before it, and to prevent any interference by a trial judge who might wish to prevent his orders from being appealed, so that appeals remain available to all who have legitimate grievances regardless of their ability to pay filing fees or other costs of appeal.

The Appellate Rules are deliberately structured to ensure that a party with a sound claim to IFP status can get his case before the Superior Court. Unrepresented parties can present independent applications to the appellate court under Rule 553, while parties represented by pro bono counsel can achieve IFP status by certification under Rule 552(d). When such certification is made, the language of the Rules is mandatory – the lower court clerk "shall" issue an order authorizing IFP status on appeal. In effect, courts rely on the professionalism and certifications of attorneys who come before them as an alternate screening process, as well as Appellate Rule 555, which requires advising the courts of any change in the IFP party's finances. Moreover, the certifications filed by Morgan's pro bono appellate counsel are confirmed by the multiple verified statements both by Morgan himself, and by Mr. Friedman, which plainly show that Morgan is subsisting on Social Security Disability payments, that he has virtually no assets, and that the money paid to him more than three years ago was long ago completely expended, and thus provides him no ability to pay the costs of his appeal.

In sum, Morgan has and is entitled to appellate IFP status. But if the Court concludes, contrary to our arguments, that his status was not preserved by actions taken to date, the Court should treat this letter as a Rule 553 application for IFP status, and consider the Morgan and Friedman affidavits that have already been filed as the supporting materials required by Rules 553(b) and 561.

Respectfully submitted,

cc: Leon Silverman, Esquire

Paul Alan Levy