SUPERIOR COURT OF PENNSYLVANIA

No. 3084 EDA 2005

HERBERT NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D.,
and NEVYAS EYE ASSOCIATES, P.C.,

Plaintiffs-Appellees,

v.

DOMINIC MORGAN,

Defendant-Appellant,

and

STEVEN FRIEDMAN,

Defendant.

Appeal from an Injunction Issued by the Court of Common Pleas of
Philadelphia County, First Judicial District of Philadelphia,
on September 29, 2005, November Term 2003, Docket No. 00946

BRIEF FOR DEFENDANT-APPELLANT DOMINIC MORGAN

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TABLE OF CONTENTS

Table of Authorities iii

Jurisdiction 1

Order in Question 1

Scope and Standard of Review 2

Questions Presented 2

STATEMENT OF THE CASE 3

Summary of Proceedings and Rulings 3

Facts 4

Proceedings Below 10

Summary of Argument 13

ARGUMENT 15

A. Because First Amendment Principles Protect Free Speech on the Internet, Courts Presume That There Has Been No Waiver Absent Clear and Compelling Evidence.. 15

B. Morgan Did Not Waive His Right to Criticize Nevyas on the Internet. 18

1. Morgan Never Agreed to Any Limit on His Right to Place Any Content on His Lasiksucks4u.com Web Site. 18

2. At Most, Morgan Agreed Not to Restore the Identical Material He Had Taken Offline. 26

3. If There Was Any Contract It Was Limited to the Contents of Lasiksucks4u.com. 27

C. Any Further Proceedings in This Case Should Be Before a Different Trial Judge. 28

Conclusion 30

This is an appeal from an unconstitutional prior restraint of speech. A patient left legally blind by lasik surgery was enjoined from mentioning the name of his doctors on an Internet web site that the patient created after the surgery to discuss the perils of lasik surgery. The doctors had sued the patient for defamation, but the court did not find any of the accusations on the web site to be false. Instead, the court construed the patient's initial removal of his discussion of the doctor from the web site in response to a threat of libel litigation, coupled with an exchange of correspondence following the threat of litigation, to create a contract never to mention the surgeon's name on the site, even though such an agreement never appears in the correspondence. The injunction issued below flies in the face of the rule against prior restraints, including Pennsylvania precedent barring injunctions as a remedy for defamation. Moreover, the finding of a "contract" not only fails to comply with the rule that waivers of First Amendment rights must be strictly construed and cannot be found without evidence of a clear and knowing waiver, but also lacks any support in the record. Accordingly, the injunction should be reversed.

JURISDICTION

The Court has jurisdiction of this appeal from an injunction under Rule 311(a)(4) of the Pennsylvania Rules of Appellate Procedure.

ORDER IN QUESTION

Judge Edward J. Maier issued the following order on September 29, 2005, which was entered on the docket on October 19, 2005:

> It is ordered that, on Count Three of the Complaint in the above-referenced action, the Agreement which was entered into by defendant Morgan and the plaintiffs on or about the period July 30, 2003 through August 4, 2003 is hereby enforced and defendant Morgan will not mention Dr. Nevyas or his practice or anything concerning past items from Dr. Nevyas or his practice in defendant's website.

> Defendant Morgan is ordered to operate his website and any website in accordance with the August 4, 2003 Agreement.
>
> The defamation action by Dr. Nevyas against Mr. Morgan is hereby dismissed, as agreed to in the July 20, 2003 through August 4, 2003 agreement.

SCOPE AND STANDARD OF REVIEW

Morgan seeks review both of the findings about the existence and terms of the alleged "agreement" on which the prior restraint is based, and of the legal propriety of the prior restraint itself. Because the case implicates First Amendment rights, the Court is not limited by the normal deferential standard for the review of factual findings, but rather must conduct an independent examination of the entire record to ensure that free speech rights have not been infringed. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Commonwealth v. Lambert*, 723 A.2d 684, 689 (Pa. Super. 1998). The errors committed by the court below in applying legal standards are also subject to de novo review. *Hart v. Arnold*, 884 A.2d 316, 331 (Pa. Super. 2005).

QUESTIONS PRESENTED

1. Did Morgan's alteration of his web site in response to the Nevyases' threat to sue him for defamation, coupled with the exchange of correspondence about that threat and his response, constitute an agreement by Morgan never to mention the Nevyas name on any Internet web site?

The trial court found such an agreement.

2. May a court find a waiver of the First Amendment right to criticize a doctor who has allegedly botched a surgery, without clear and unmistakable evidence that the defendant knowingly and willingly waived his free speech rights?

The trial court declined to address this issue.

3. Does the injunction entered below constitute an impermissible prior restraint that exceeds

the scope of the purported contract, as read pursuant to the rule that a purported waiver of First Amendment rights must be narrowly construed?

The trial court declined to address this issue.

4. Did the court below abuse its discretion and effectively deprive defendant of his counsel by telling defendant's lawyer, Steven Friedman, that if defendant refrained from appealing the injunction, the court would dismiss plaintiffs' complaint against the lawyer?

The trial court declined to address this issue.

STATEMENT OF THE CASE

Summary of Proceedings and Rulings

The amended complaint alleged three counts. Count One alleged claims for defamation against Dominic Morgan, based on statements on the web site www.lasiksucks4u.com, and also against his lawyer, Steven Friedman ("Friedman") , based on Morgan's having posted on that web site a letter from Friedman to the Food and Drug Administration. Counts Two and Three were against Morgan alone, alleging respectively breach of contract and specific performance based on the theory that Morgan had agreed not to mention the Nevyas medical practice on the lasiksuck4u website. On July 26, 2005, the trial court (Judge Edward Maier) held a non-jury trial limited to the specific performance claim. It ruled that, in return for the plaintiffs' promise not to sue him for defamation, Morgan agreed never to mention them on his lasiksucks4u web site. Pursuant to that ruling, Judge Maier orally ordered Morgan "to operate his website in accordance with his agreement and he's not to mention Dr. Nevyas in there for any past items. In addition to that, the defamation action against him is dismissed. . . ." Trial Transcript ("Tr.) at 93. Judge Maier accommodated a request by plaintiffs' counsel for a broader order as follows: "Mr. Morgan is ordered to operate his

website, or any website, in accordance with this agreement and the 8/4 website, meaning, he will not mention Dr. Nevyas in it." Also on July 26, Judge Maier told Mr. Friedman that he would dismiss the defamation claim against Mr. Friedman if Morgan did not appeal the order. Friedman Praecipe to Withdraw, dated September 2, 2005, file-stamped September 27, 2005, and docketed October 19, 2005. On September 29, 2005, Judge Maier issued his written injunction, as set forth above, which was docketed on October 19, 2005. Morgan appealed on October 28, 2005. On November 21, 2005, Judge Maier ordered Morgan to file a statement of the issues on appeal, which Morgan filed on December 1, 2005. Morgan is proceeding in forma pauperis.

Facts

This case arose from unsuccessful lasik surgery on the eyes of defendant-appellant Dominic Morgan in April 1998. Plaintiff-appellee Anita Nevyas-Wallace performed the surgery, assisted by her father, plaintiff-appellee Herbert J. Nevyas. Amended Complaint ¶ 6. Following the surgery, Morgan was legally blind. Friedman Affidavit, December 8, 2005, in support of Morgan's in forma pauperis status, ¶ 18 n.1. In April, 2000, Morgan brought a malpractice action against Drs. Nevyas-Wallace and Nevyas and their professional practice (referenced in this brief generally as "Nevyases"). Amended Complaint ¶ 9. Morgan was represented by defendant Steven Friedman, a doctor and lawyer.

In 2002, to warn other prospective patients about the dangers of lasik surgery, Morgan created a web site at www.lasiksucks4u.com, where he recounted his own experiences in detail and posted documents and photographs pertaining to his own experience, information about the problems suffered by other patients, studies of effective and problematic lasik surgery, and other materials. Trial Tr. 74; Friedman Affidavit (filed in opposition to Motion to Quash Appeal) ¶ 35

and Exhibit 7. Morgan's web site was originally addressed to the general problems of lasik surgery, but at some later point he added criticisms of Dr. Nevyas and the Nevyas practice in particular. The web site contained some very sharp criticisms of the Nevyases. Trial Tr. 4-12, 45; Silverman Demand Letter of July 30, 2003, Addendum to this Brief ("Add.") 1-2.[1]

In the course of the discussions about arbitrating his malpractice claim, the Nevyases tried to obtain Morgan's agreement to keep his criticisms of them confidential, but Morgan refused. The Nevyases nevertheless agreed to arbitrate. Amended Complaint ¶ 13. Morgan's malpractice claim went to arbitration in June 2003, but both sides hedged their bets with a "high-low"agreement. Because the arbitrator ruled against Morgan, the Nevyases had to pay the agreed "low" amount, $100,000. *Id.* ¶ 12. After Friedman deducted his costs and attorney fees, Morgan received the balance, $33,900. Friedman Affidavit attached to Opposition to Motion to Quash Appeal, ¶ 6.

Nevyas first learned of Morgan's web site in early July, 2003, just after Morgan lost his malpractice case. Tr. 44. On July 30, 2003, the Nevyases, through their attorney Leon Silverman, sent a letter threatening to sue Morgan for defamation over his "lasiksucks4u.com" web site. Add. 1-2. The letter recited a number of statements on the web site that Mr. Silverman said were false and damaging to the Nevyases' reputation and business. Mr. Silverman stated that the statements "subject[] you to damages" and threatened that "injunctive relief will be sought to force you to cease and desist . . .." Add. 2. The letter closed, "You must immediately remove this web site and the falsehoods contained within that site or legal action will be instituted against you immediately. You

[1]Because the construction of the "contract" found by the court below rests largely on the exchange of letters, they are attached to this brief as an Addendum, Add. 1-9, along with the court's oral and written opinions. Add. 10-30.

will receive no further notice." *Id.*[2] On July 31, 2003, Mr. Silverman's associate, Andrew Lapat, sent a letter to Yahoo!, Inc., which then hosted the "lasiksucks4u.com" web site. Add. 3-4. The Yahoo! letter quoted several factual statements and opinions from the web site, claiming that Morgan's site violated Yahoo!'s Terms of Service because it was "defamatory, inciting and hate-filled." Add. 4. The letter threatened to hold Yahoo! liable as a joint tortfeasor unless it immediately closed the web site. The letter does not show a cc to Mr. Morgan, and Morgan testified that it was not until later that he learned that the Nevyases had complained directly to Yahoo!. Tr. 72.

Morgan received the Silverman letter on July 31, and immediately amended his web site by removing the portions of the web site that discussed the Nevyases. Tr. 69. Morgan testified that the changes that he made were the changes that put the web site back to its "original" state, before he had added a specific discussion of his personal experiences at the hands of the Nevyases, along with criticisms of the Nevyases. Tr. 74. He made no further changes to his web site from that time until the web site was shut down by Yahoo! a week later (discussed *infra*). Tr. 70.

After making these changes, Morgan sent a letter to Mr. Silverman dated August 1, 2003. Add. 5-6. The letter stated "I **have conformed** to your requests insofar as to remove any stated libelous references to the Nevyas' and their practice only. I will not remove the website in its entirety, and **will be updating this site** or others with facts of my care, treatment, history, all of the legal issues pertaining to my case, and all necessary documentation substantiating those facts [within my rights under] the First Amendment." Add. 5 (emphasis added). Morgan went on to claim that

[2]Although some of the cited statements were factual in nature, others simply noted Morgan's feelings about Nevyas (anger, hatred) or expressed opinions in highly rhetorical term ("disgrace to his profession") and hence are non-actionable opinion.

the Nevyases were not telling the truth and that, even though Mr. Silverman was threatening libel litigation, "**they still did this to me** and **no one** will stop me from telling the truth." *Id.* (emphasis in original). Morgan continued, "I . . . will expose and report the Nevyas' as to the damages they've inflicted on me, as well as the wrongdoings they've done regarding their investigational laser." *Id.* Morgan's purpose in sending the letter was to let the Nevyases know that he would be "updating my website as legally as possible." Tr. 69.

Mr. Friedman then wrote a letter dated August 4 to Messrs. Silverman and Lapat, in response to telephone conversations with each of them. Add. 7. According to the letter, in a telephone conversation on August 1, 2003, Mr. Silverman "stated that the contents of Mr. Morgan's web site as of that time were legally satisfactory to him." *Id.* Mr. Friedman enclosed a printout of the web site and asked Mr. Silverman to confirm "that all this material is legally satisfactory to you." *Id.* The letter made no statements about what might or might not be added to the web site in the future, and, like Morgan's August 1 letter, contains no offer to do anything or refrain from doing anything if the Nevyases would do or not do anything.

Despite being satisfied with the contents of Morgan's web site as of August 1, neither the Nevyases nor their counsel informed Yahoo! of this fact. Tr. 59. According to Dr. Nevyas' trial testimony, he assumed that the letter to Yahoo! had become moot. However, he admitted that he knew that at some point thereafter, Yahoo! shut down Morgan's web site. Tr. 60-61. In fact, Yahoo! shut the web site down on August 7, 2003, at the behest of the Nevyases and their counsel, despite the fact that Morgan had made changes as requested. Tr. 69-70, 73.

On August 14, 2003 (after Yahoo! had shut down Morgan's site), Mr. Silverman wrote to Mr. Friedman that he had reviewed the printout "of Mr. Morgan's Web site Lasiksucks4u." Add.

8. He stated that although he believed "that this web site should be removed in its entirety," Dr. Nevyas "has agreed to take no legal action against Mr. Morgan provided that the changes and deletions made to the web site as shown on the printout which you sent me are not reinserted into the web site and provided further that Mr. Morgan makes no further attempts to defame my clients." *Id.* He reiterated his belief that the statements identified in his July 30 letter were defamatory "but agree[d] that if there are no further attempts at defaming my clients we will take no legal action against Mr. Morgan for his past defamatory statements." *Id.* Neither Morgan nor Friedman replied to this letter.

Dr. Nevyas and Morgan each testified to their understanding of what Morgan had or had not said he would do. Because Morgan had participated directly in the discussions, he was able to testify on personal knowledge. Morgan confirmed that he had never agreed to refrain from mentioning the Nevyas name, Tr. 70, and that, after making the changes on which Dr. Nevyas claimed to have relied, he wrote to Mr. Silverman that he intended to make additional changes to his web site to describe what the Nevyases had done to him "within the legal guidelines as allowed by the law and the First Amendment." Tr. 69.

> Q. When you put your website back to its original condition, had you promised anyone that you would not be updating it or changing it from that condition?
>
> A. I sent Mr. Silverman's law firm a letter stating that I would be updating it.
>
> Q. Did you ever promise anyone that you would not Dr. Nevyas' name on that website?
>
> A. No, I did not.

Tr. 75-76.

Dr. Nevyas, however, had not participated in any discussions with Morgan or with Mr. Friedman, and so was able only to say what he had heard from or said to his own lawyer, Mr.

Silverman. Thus, he testified that he had "learned" that Morgan agreed to remove all references to himself and his daughter and practice from the website and that he himself "agreed" not to sue Morgan for the statements listed in the July 30 letter so long as the website no longer contained any reference to them. Tr. 47. He also testified that he instructed Mr. Silverman not to institute any action as long as "the references" to himself, his daughter and his medical practice remained off the web site. Tr. 47-48. Finally, he testified that after he found out about additions to the web site, he believed that there was an agreement with Morgan "to the effect that if he removed all of the references to [me], [my] daughter and [my] practice," he would not sue, and that he had given up the right to sue in return for Morgan's promise "not to put your name, your daughter's name and your practice's name in his website." Tr. 48-49. In fact, nobody testified that Morgan, or Mr. Friedman on Morgan's behalf, ever stated that Morgan agreed not to mention the Nevyas name or describe his experiences with the Nevyases on a web site.

After Morgan found a new hosting company for his lasiksucks4u web site, he revised its text extensively and put it back up in late August. Tr. 69-71. He did not put on the new version of the web site any of the material about the Nevyases that was on the web site at the time of the July 30 letter, and that was removed as of August 1. Tr. 71. He added, instead, new discussions of the Nevyases. Tr. 71, 72. Although Dr. Nevyas testified on direct examination that the references to himself, his daughter and his practice on Morgan's new lasiksucks4u web site contained "everything of the previous [web site] and more," Tr. 48, on cross-examination he admitted that he had not compared the two web sites word for word. "I don't know whether the material is all not the same. It appears to me that some of it was quite the same, maybe in different words, but they were the same allegations and much more. . . . I didn't make a specific comparison." Tr. 54-55.

Proceedings Below

The Nevyases originally filed this action on November 7, 2003, against Morgan only, and moved at the outset for a preliminary injunction. Honorable Esther Sylvester instructed the parties to try to resolve their differences, and Morgan, although believing that his web site was entirely truthful, amended his site in several ways in order to reach an accommodation. Morgan's Verified Counterclaims ¶¶ 86-88, filed December 3, 2003. As reflected by the exchange of correspondence dated November 10, 11, and 12, 2003, attached to the Verified Counterclaims, *supra*, the Nevyases were unwilling to accept anything short of deletion of all references to themselves, as they claimed Morgan had promised. Judge Sylvester then denied the preliminary injunction motion on November 17, 2003. Morgan answered and raised his constitutional free speech rights as a defense.

On February 3, 2004, the Nevyases filed a second action against Morgan, with a renewed motion for a temporary restraining order, this time in federal court, and this time naming Mr. Friedman as a defendant. The action duplicated the allegations in this case, except that, in an effort to secure subject matter jurisdiction, the Nevyases added an allegation that the statements on the web site violated the Lanham Act. However, that action was dismissed for failure to state a federal claim. *Nevyas v. Morgan*, Case 2:04-cv-00421-JCJ, Document 16 (E.D. Pa., March 12, 2004).

The Nevyases then added Mr. Friedman as an additional defendant in this action. Docket Entries July 14, 2004. The Nevyases contended that his letters to the FDA, which were posted on Morgan's web site, were defamatory. After Mr. Friedman's preliminary objections were denied, plaintiffs moved to compel Mr. Friedman to withdraw as counsel for Morgan, and then to disqualify Mr. Friedman. Disqualification was denied on July 20, 2005, by the Honorable Matthew Carrafiello. The case came on for trial, limited to Count Three, on July 26, 2005.

Judge Maier ruled from the bench that Morgan and the Nevyases had formed a contract forbidding Morgan to mention the Nevyas name on the web site. (The oral opinion, and the colloquy with counsel that followed, is set forth at Add. 10-26.) Judge Maier acknowledged that Morgan's letter of August 1 had agreed only "to conform to plaintiff's request as to libelous statements," and had expressly reserved the right to make changes to discuss Nevyas – in Judge Maier's words, the letter "seemed to reserve part of it." Tr. 81, Add. 11. However, the court ruled that, after sending the August 1 letter, "the contract was further amended and clarified by defendant's actions and resurrecting or resuming what was his original site [and] by forwarding a copy of the web site . . . which is memorialized with the August 4 letter from defense counsel." *Id.* Therefore, the court decided that "defendant should be required to operate his website according to his agreement of August 1st and as amended on August 4th or sometime after he received that letter." In response to a question from counsel, the court restated its factual ruling yet again:

> I think the original agreement was they were going to remove any libelous statements and after that that was altered by the action of the defendant, and as he stated that was his understanding that he would act in accordance with the website which was published, in fact his original website which in fact did not mention Dr. Nevyas.
>
> Tr. 85, Add. 15.

However, the court did not say that Morgan had agreed not to alter the web site at all: "I think he can alter it all he wants. I don't think he can mention Dr. Nevyas in it." Tr. 86, Add.16. Accordingly, the Court ordered Morgan "to operate his web site in accordance with his agreement on 8/4 and he's not to mention Dr. Nevyas in there for any past items. In addition to that, the defamation action against him is dismissed." Tr. 93, Add. 23.

Mr. Silverman then stated to the court that, in addition to his lasiksucks4u web site, Morgan had an additional web site "where the same type of reference to Dr. Nevyas is made," Tr. 94, and

asked that the order extend to that web site and any others. The amended complaint and the testimony in the case had only related to the lasiksucks4u web site. Indeed, the court made no findings about other web sites being part of the agreement, and, to the contrary, stated "the agreement only covered that instant." *Id.* Nevertheless, the court went on to say, "Mr. Morgan is ordered to operate his website, **or any website**, in accordance with this agreement and the 8/4 website, meaning, he will not mention Dr. Nevyas in it." Tr. 94-95 (emphasis added).

The court noted on the record that the defamation claim against Mr. Friedman remained to be decided, Tr. 95, Add. 25, and called counsel into chambers for "informal" discussion. Tr. 96, Add. 26. During this discussion, the judge expressed concern about Morgan's possible appeal from his ruling, and promised Mr. Friedman that he would dismiss the defamation claim against Mr. Friedman if Morgan did not appeal the order. Friedman Praecipe to Withdraw, dated September 27, 2005, docketed October 19, 2005. To protect Morgan's rights, on August 5, 2005, Friedman filed on his behalf a motion for post-trial relief arguing that the agreement had been misstated and that the court's holding violated the First Amendment. At the same time Friedman recognized that the judge's promise to him (and the implicit threat to keep the claims against Mr. Friedman alive if Morgan appealed) created an unwaivable conflict of interest between himself and Morgan, and he withdrew from his representation of Morgan. Friedman Praecipe to Withdraw, dated September 2, 2005.[3] On September 29, 2006, Judge Maier issued his written injunction, explicitly ordering that "defendant Morgan will not mention Dr. Nevyas or his practice or anything concerning past items from Dr. Nevyas or his practice in defendant's website," and extending the prohibition beyond

[3]The filing was dated September 2, 2005, time-stamped by the Prothonotary September 27, 2005, and entered on the docket October 18, 2005.

lasiksucks4u.com to include "any website." The court dismissed the defamation claims against Morgan.

Morgan promptly appealed, and the court issued a Rule 1925(d) order directing Morgan to state concisely his grounds for appeal so that the court could issue a more complete explanation of its ruling. In that filing, Morgan cited not only his First Amendment arguments but his contention that the order extended beyond the scope of the alleged agreement and that Judge Maier had abused his discretion by forcing Morgan's counsel off the case. Judge Maier ignored these issues in his Rule 1925(d) opinion (set forth in the Addendum at Add. 27-30). If anything, the Rule 1925(d) opinion is even less illuminating than his oral ruling. Judge Maier again recited that "a contract existed," but his written ruling does not distinguish between an original agreement and an amended agreement:

> Specifically, the Court found that the parties had agreed that in exchange for the Nevyas' agreement to refrain from filing a lawsuit against Morgan for Defamation, Morgan would remove all defamatory statements from the site and refrain from doing so in the future. The Court found that Morgan agreed to this . . ..
>
> Essentially, the Court found an offer, acceptance, including Morgan's compliance with the agreement to alter the web site, removing the Nevyas name, and consideration.
>
> Order at page 3, Add. 29.

Unlike the oral ruling, the written opinion makes no reference to Morgan's having **agreed** not to mention the Nevyas name in the future.

SUMMARY OF ARGUMENT

This case comes before the court in the guise of a simple dispute between a dissatisfied patient and his former doctors about whether the patient effectively agreed to a non-disparagement contract. However, the case typifies a common problem for Internet speakers, and the solution to

the problem adopted by the court below poses a serious threat to the free speech rights of consumers who use the Internet to complain about companies. Companies that are criticized online often threaten to sue on some theory, whether it be defamation, trademark, or intentional interference with business, and state a very short deadline for compliance. Consumers who receive those threats often react by taking down the criticisms while they evaluate their chances of defending a lawsuit (and of finding a lawyer they can afford to defend a lawsuit). If the mere temporary removal of the criticisms on a website, despite a letter explicitly reserving the right to restore the criticisms once First Amendment guidelines have been analyzed, can be construed as an "agreement" not to say anything about the company in the future, an accommodating albeit temporary response to a demand letter becomes a dangerous trap for the unwary, by which even meritless threats can be bootstrapped into permanent relief against criticism.

The decision below is wrong both as a matter of state law and under the First Amendment. As a matter of First Amendment law, the decision wrongly imposes a prior restraint that ignores the established principle that purported waivers of First Amendment rights must be found to have been clearly and knowingly made, and even then must be construed narrowly. Moreover, in deciding whether there was a waiver, this Court is required to review the findings below de novo, based on an independent consideration of the record as a whole. As a matter of Pennsylvania contract law, the court erred because Morgan said nothing that could be construed as an agreement, let alone a waiver of his free speech right to make non-actionable criticisms of the Nevyases. Indeed, not only did Morgan say nothing that committed him not to make **any** criticisms; he expressly stated his intention and reserved his right to make criticisms of the Nevyases. His attorney simply followed up by asking whether the changes made to his web site for the time being were enough to avoid

being sued.

Indeed, the court used a baseless contract theory as a vehicle to grant the Nevyases relief that they could never have obtained on a libel theory. Under Pennsylvania law, even if plaintiffs had sued Morgan for defamation, and even if the evidence had shown that specific statements on Morgan's web site were false statements of fact that were made negligently or with actual malice, equity cannot enjoin a defamation without running afoul of the rule against prior restraints.

To find a waiver of Morgan's First Amendment right to criticize the Nevyases, the court below not only found that a contract had been made without an iota of supporting evidence, but then inferred what characteristics of the revised web site Morgan had promised to retain. In so ruling, the court read into the purported "contract" a term – that Morgan would not mention the Nevyases – that was never articulated between the parties, and that no one testified was ever said or agreed to by Morgan. It was only in private conversations between Dr. Nevyas and his own attorney, to which Dr. Nevyas testified at trial, that such a term appears. Even then the court's order – which applies to any web site – extends beyond the allegations in the complaint, beyond the testimony at trial**,** and beyond the court's findings about Morgan's purported agreement, all of which referred only to Morgan's lasiksucks4u.com web site. A finding of waiver of free speech and the imposition of a restraint on free speech cannot properly be based on such vague inferences from such a bare record.

ARGUMENT

A. Because First Amendment Principles Protect Free Speech on the Internet, Courts Presume That There Has Been No Waiver Absent Clear and Compelling Evidence.

The Internet is a democratic institution in the fullest sense. It serves as the modern

equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to read them. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

> From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer.

The Court held, therefore, that full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it,

> [defendant] is free to shout "Taubman Sucks!" from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and Mishkoff has a First Amendment right to express his opinion about Taubman.
>
> *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

The Pennsylvania Supreme Court has, likewise, recognized that full First Amendment protection applies to the Internet. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (Pa. 2003).

Because the First Amendment protects online speech (along with Article I, Section 7 of the Pennsylvania Constitution), several fundamental First Amendment principles come into play when analyzing the decision below. First, an injunction against speech constitutes a prior restraint, which cannot be imposed absent an urgent and compelling justification. *New York Times Co. v. United States*, 403 U.S. 713 (1971). The fact that Morgan's criticisms might, if believed, have a tendency to injure the Nevyases by discouraging prospective patients from employing their services is not a proper basis for a prior restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets

warrants use of the injunctive power of a court." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). The Pennsylvania Supreme Court has specifically applied that principle in the defamation context, holding that even when statements are false, and the speaker is indigent and, as a practical matter, immune to the deterrent effect of the threat of a damages award, the doctrine of prior restraint forbids the issuance of an injunction against repetition of defamatory expression. *Willing v. Mazzocone*, 482 Pa. 377, 381-382, 393 A.2d 1155, 1157-1168 (1978). The *Willing* Court rested squarely on Article I, Section 7 of the Pennsylvania Constitution, holding that "the equity court violated appellant's state constitutional right to freely speak her opinion regardless of whether that opinion is based on fact or fantasy regarding appellees' professional integrity." *Id.* at 382.

To be sure, rights under the First Amendment, like other constitutional rights, are subject to waiver, but "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege and must be the product of a free and meaningful choice. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Pazden v. Maurer*, 424 F.3d 303, 313 (3d Cir. 2005); *Commonwealth v. Houtz*, 856 A.2d 119, 122 (Pa. Super. 2004). Although this principle has its roots in criminal procedure, it has expanded to regulate findings of waiver in the civil context, *e.g.*, *Erie Telecommunications v. City of Erie*, 853 F.2d 1084. 1094-1095 (3d Cir 1988), and governs claims that First Amendment rights have been waived. *Sambo's Restaurants v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981).

Furthermore, a voluntary and knowing waiver must be established by clear and compelling evidence, *Legal Aid Society of New York v. City of New York*, 114 F. Supp.2d 204, 206 (S.D.N.Y. 2000), and courts "must indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.; Erie Telecomm., supra*, 853 F.2d at 1095. "Implied waivers are

consistently construed narrowly." *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005); *National Polymer Prods v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981); *Ruzicka v. Conde Nast Publications*, 733 F. Supp. 1289, 1298 (D. Minn. 1990).[4]

"In cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free speech.'" *Brown v. Philadelphia Tribune Co.*, 447 Pa. Super. 52, 60, 668 A.2d 159, 163 (1995), quoting *Bose v. Consumers Union of the United States*, 466 U.S. 485, 499 (1984). *Accord In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 92 (3d Cir.1990); *Commonwealth v. Lambert*, 723 A.2d 684, 689 (Pa. Super. 1998). The standard of review in this case is also de novo with respect to the legal standards applicable to the case because errors of law are subject to de novo review. *Hart v. Arnold*, 884 A.2d 316, 331 (Pa. Super. 2005).

B. Morgan Did Not Waive His Right to Criticize Nevyas on the Internet.

The trial court's determination that Morgan entered into a binding agreement to surrender his preexisting right to criticize his former doctors and their practice on the Internet was erroneous

[4] Dr. Nevyas himself has advocated that this principle be applied to his own waivers of the First Amendment right to criticize other persons. In *Argus Group 1700 v. Nevyas,* No. 4303 PHL 97, Nevyas and another defendant settled a lawsuit brought by Argus, a company in which he was a limited partner, by agreeing to an injunction that forbade him from speaking negatively about Argus. After saying more negative things about Argus, Dr. Nevyas opposed a contempt motion by arguing both that the consent injunction was too vague to be enforced consistent with the First Amendment, and that the language in the injunction could not be construed as a waiver of his First Amendment rights because the circumstances supporting the waiver were not "clear and compelling." On appeal Nevyas, represented by attorney Leon Silverman among others, cited *Ruzicka*, *Borg Warner,* and similar cases in making this argument. (Dr. Nevyas lost his appeal on procedural grounds, because a consent judgment cannot be appealed. 718 A.2d 336 (Apr. 14, 1998)). Relevant pages of Dr. Nevyas' brief are set forth at Add. 31 *et seq.*

in several respects. As more fully explained in this section, (1) Morgan did not enter into **any** agreement, but simply ascertained whether the Nevyases would sue him in particular circumstances; (2) even assuming arguendo that Morgan could be found to have agreed to the Nevyases' request, because the Nevyases never requested a general non-disparagement or non-commentary agreement, but demanded only that specific defamatory statements be removed, Morgan cannot be understood to have agreed to anything more than that, and certainly never agreed not to make any future statements about the Nevyases; and (3) in any event, there was no discussion of limiting any web site other than lasiksucks4u.com, and insofar as the order below bars statements on any other web site, it goes far beyond anything the record in this case could even arguably support.

1. Morgan Never Agreed to Any Limit on His Right to Place Any Content on His Lasiksucks4u.com Web Site.

Judge Maier was wrong to find that Morgan agreed to place any limits on his free speech rights with respect to the current or future content of his lasiksucks4u.com web site. Morgan was never asked to make any agreements; he was simply threatened with retaliation in the form of a lawsuit if he did not take certain actions. Add. 1-2, 8. Morgan's attorney did no more than ascertain whether, **if** his web site remained in a certain condition, the Nevyases would in fact not sue him for defamation. Add. 7. Morgan did not promise to keep his web site in that condition; in fact, he said exactly the opposite. Add. 5-6. And when the Nevyases, a few months later, judged that Morgan's web site was no longer satisfactory, they filed the threatened suit for defamation.

The terms of the letters that were exchanged are clear. In his July 30 letter, Mr. Silverman told Morgan that the Nevyases considered some of the statements on the web site to be false and defamatory, asserted that publication of the statements would make Morgan liable for damages and

injunctive relief, and closed with this threat: "you must immediately remove this web site and the falsehoods contained within the web site, or legal action will be instituted immediately." Add. 2. This letter did not solicit Morgan's agreement to any contract. It simply threatened litigation unless the entire web site was removed.

Morgan responded to the letter by removing all parts of the web site that discussed his experiences with the Nevyases, and by writing the August 1 letter that described what he had done: he conformed to the demand in part **for the time being**, while insisting that he would not conform to the request entirely. Add. 3-4. Nowhere in that letter, however, did Morgan promise to leave his web site in that condition, or ask the Nevyases to agree to take any actions or refrain from any actions based on any future commitments regarding the content of the web site. Quite to the contrary, Morgan expressly warned Mr. Silverman that his elimination of the discussion of the Nevyases was **temporary**: "I will be updating this site or others with facts of my care, treatment, history, all of the legal issues pertaining to my case, and all necessary documentation substantiating those facts [within my rights under] the First Amendment." Add. 3. Moreover, he told Mr. Silverman that he refused to be intimidated by the fact that the Nevyases had hired a lawyer to file a lawsuit: "**they still did this to me** and **no one** will stop me from telling the truth." *Id.* (emphasis in original). And, still further, he said, "I . . . will expose and report the Nevyas' as to the damages they've inflicted on me, as well as the wrongdoings they've done regarding their investigational laser." *Id.* Even Judge Maier recognized that, in this letter, Morgan had made no commitments with respect to the future contents of the web site. As the court's oral ruling stated, Morgan "seemed to reserve part of it," Tr. 82, Add. 12, which is indeed an understatement of what the letter reserved the right to do.

Instead, the court stated that it was by **subsequent** conduct that Morgan waived his rights with respect to the future content of the web site. Tr. 81, 82, 85, Add. 11, 12, 15. Nothing in the record supports that conclusion. The only concrete action that was taken after August 1 is the Friedman letter dated August 4, 2003, which confirmed a statement that Mr. Silverman had made in a telephone conversation on August 1 (the date of Morgan's letter) – that as of that date the web site was satisfactory to the Nevyases – and attached a printout of the web site so that the parties would have a common understanding of what web site content was satisfactory to the Nevyases. The language used in the letter – "confirm that all this material is legally satisfactory to you" – can only be read as requesting confirmation that, **if** the web site remained in that condition, the Nevyases would refrain from filing suit. Nothing in that letter made any agreement or commitments with respect to the future content of the web site, or purported to revoke Morgan's statement that he was going to revise the web site in the future to complain (with better documentation) about the Nevyases' treatment of him. Nor does the August 4 Friedman letter (or the August 1 Morgan letter, for that matter), contain or mention any offer by Morgan to do or not do anything if the Nevyases would or would not do anything.

Indeed, the trial court's oral ruling does not appear to rely so much on the letter as upon an apparent misapprehension of the record, to the effect that it was Morgan's conduct after he wrote his letter on August 1 that waived his constitutional free speech rights to place material of his own choosing on the web site. Specifically, the trial judge stated at page 82 of the transcript, Add. 12, "but then by his alteration of it [sic] in which he did not mention it [sic] and went back to his original site" – and on page 85 of the transcript, Add. 15, "the original contract was that they **were going to remove** any libelous statements, **and after that that was altered by the action of the defendant."**

(emphasis added)

But the record shows nothing of the sort. The undisputed testimony about the sequence of actions was that **first** Morgan altered his web site by removing any references to the Nevyases, Tr. 69; **then** he wrote his August 1 letter stating what he had done but saying that he would revise the site in the future. *Id.* The web site remained as thus changed on August 7, when Yahoo! shut the site down entirely in response to Mr. Lapat's July 31 demand letter. Tr. 69-70. And although the site was resurrected after Morgan found a new hosting company, Dr. Nevyas admitted in his testimony that the new site was replete with criticism of the Nevyases, Tr. 48, "the same allegations and much more." Tr. 54-55. There is, therefore, no support in the record for the "facts" on which the court relied to find a change by conduct. There is certainly not any clear, compelling, and unambiguous basis for finding a contract to refrain from any specific action, which would be required to support Judge Maier's conclusion that Morgan waived his First Amendment right to put his experiences with the Nevyases on his web site. *See* cases cited at pages 17-18, *supra*.

Interestingly, the trial court ignored Mr. Silverman's August 14 letter in characterizing the alleged contract. That letter reflects an understanding of the import of the exchanges between counsel that is consistent with Morgan's contention that he did not waive his right to change his website by agreeing to keep any specific content off the site, and flatly inconsistent with what Mr. Silverman apparently told his client that Morgan had agreed to do (according to Dr. Nevyas' testimony about what his lawyers told him). The letter stated that **the Nevyases** "agreed" to take no legal action "provided that" two conditions continued to hold: (1) the changes and deletions reflected in the material accompanying the August 4 letter "are not reinserted into the web site," and (2) "Mr. Morgan makes no further attempts to defame my clients." The letter does not state that

there was any agreement by Morgan to those conditions, and certainly not to mention the Nevyas name. In fact, both cited sentences of the letter are premised on Mr. Silverman's recognition that Mr. Morgan did not **agree** to anything. Instead, it says that **the Nevyases** agreed that "if" Morgan made "no further attempts at defaming my clients," they would not file suit over Morgan's past defamatory statements. This language clearly contemplates the possibility that Morgan might do these things. In sum, clear evidence, reflected in the exchange of correspondence, shows that Morgan had made no agreement and hence no waiver of his constitutional free speech rights.

Yet another flaw in the trial court's analysis of the supposed contract is that the act of sending a printed out web site to the party threatening litigation is at best ambiguous with respect to whether the Internet speaker is promising not to add anything to the web site in the future, and, if so, what he is promising not to add. Is the speaker promising to make **no changes whatsoever** to the web site? That is one possible interpretation, but the trial judge rejected it by recognizing that Morgan retained the right to make **some** changes. Tr. 86, Add.16. But what changes did Morgan **agree** not to make? Did he agree not to advocate new and different opinions about lasik surgery with which the Nevyases disagreed? Did he agree not to report on new FDA investigations or actions? Did he agree not to write about Nevyas proteges or Nevyas relatives, without naming the Nevyases themselves? Did he agree only to refrain from reinserting the specific items taken off the web site? Or did he agree not to mention the Nevyases at all? Did he revoke his previous insistence that he was going to write extensively about the Nevyases and support his statements with documentary evidence?

The mere act of changing the web site is by itself ambiguous about future plans, and an ambiguous basis for finding a waiver of First Amendment rights is simply not sufficient under well-

settled precedent, as discussed in Part A, above. Judge Maier could define the aspects of the August 1 change that Morgan had allegedly agreed to perpetuate indefinitely only by picking and choosing among the various words used in the letters between Morgan and his counsel and Mr. Silverman, while ignoring Morgan's clear statement in his own letter that he retained the right to amend his web site to criticize the Nevyases because "they still did this to me and no one will stop me from telling the truth." Add. 3.

Once the trial judge acknowledged that Morgan reserved the right to make some changes to his web site as it then existed, it became pure judicial legerdemain for the judge then to conclude that Morgan waived his constitutional right to name the Nevyases again on his site. To find that Morgan had agreed not to name the Nevyases again on his web site was tantamount to finding that Morgan had revoked his previous insistence that he was going to write extensively about the Nevyases and support his statements with documentary evidence.

To be sure, Dr. Nevyas testified about his understanding of the contract (just as Morgan testified to a contrary understanding). But Dr. Nevyas' testimony was irrelevant because he had no contact with Morgan or with Mr. Friedman; his only contact was with Mr. Silverman, who had the actual discussions and exchanges of correspondence. (Cross-examination of Mr. Silverman was not permitted at trial. Tr. 66.) Perhaps the court was influenced by the complaints in Dr. Nevyas' testimony that he was prejudiced by what he thought to be Morgan's reneging on the commitment that he thought his lawyer had exacted from Morgan. But if so, the prejudice was entirely illusory. The Nevyases were able to use their lawyer's intimidation to procure the absence of criticism on Morgan's lasiksucks4u.com web site for a period of time, and when the criticisms were restored the Nevyases had no difficulty instituting suit immediately. The three months' delay did not harm the

Nevyases because Pennsylvania law allows only damages as a remedy for defamation – it does not authorize an injunction to prevent the defamation from continuing. *Willing v. Mazzocone*, 482 Pa. 377, 381-382, 393 A.2d 1155, 1157-1168 (1978). And the fact that three months' delay in instituting suit for damages did not prejudice the Nevyases is amply shown both by the fact that they did nothing to press their claim for damages for defamation at trial – indeed, they did not appeal the dismissal of the damages claim. Morever, Morgan is indigent, living on social security disability checks as a result of his legal blindness, so there would have been nothing on which to execute a damages award.

Although the Nevyases suffered nothing from the fact that they waited three months to bring damages claims based on their claimed misunderstanding that Morgan had agreed not to mention them online, enforcement of the supposed agreement in the face of Pennsylvania and federal constitutional law would have a dangerous chilling effect on Internet speech and would lay a dangerous trap for the unwary Internet speaker who responds to threats of suit pro se, or responds through a lawyer with limited experience in Internet free speech litigation. As in this case, those who are criticized online tend to react angrily when they learn that they have been criticized in that forum. A very common reaction is to retain counsel to identify possible theories on which they can threaten to file a lawsuit. The recipients of such threats very often remove the challenged material from the Internet while trying to find a lawyer or evaluate the danger of the threatened suit. Sending a demand letter is inexpensive, and it often has the effect of chilling the exercise of free speech regardless of whether the threatened litigation would be well supported. *See generally* Chilling Effects Clearinghouse, available at www.chillingeffects.org (collection of cease and desist letters); *'Cease and Desist!': A Guide to Assessing & Responding to Cease and Desist Letters*, available at

http://fairusenetwork.org/reference/cd.php. A study of cease and desist letters posted at the Chilling Effects web site showed that although some demand letters are justifiable, a large fraction of demand letters rest on questionable legal assumptions or are subject to legally devastating defenses. M. Heins & T. Beckles, *Will Fair Use Survive?* (2006), at 29-36, available at http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf. Yet most individuals who receive such letters do not have lawyers on call, and often cannot afford to defend themselves against suit. And because lawyers often worry about allowing clients to be exposed to potential damages, their first reaction is often to tell the client to take the criticism offline while the lawyer evaluates the liability concerns posed by the web site and discusses the matter with the lawyer sending the threatening letter.

If the very fact of taking all or a portion of a web site down while considering more carefully the risk of liability, the prospects for an affordable defense, and the possible changes to the web site to make it more defensible, can be construed as an agreement not to restore one's criticisms online, even if the pro se recipient of the threat **expressly** reserves the right to restore criticisms to the Internet, the result will be to allow the targets of criticism who have, in reality, no sound basis for filing suit against their critics to bootstrap the natural reaction to the receipt of such threats into a legal basis for enjoining criticism. The theory adopted below would be a particularly unfair bootstrap because, on the Nevyases' theory, it provides the basis for an order of specific performance that would be flatly forbidden as a prior restraint under Pennsylvania law if sought on the basis of the originally threatened lawsuit for defamation. *Willing v. Mazzocone*, 482 Pa. 377, 381-382, 393 A.2d 1155, 1157-1168 (1978). The form of the complaint or the label affixed to the legal theory should not be the basis for awarding a prior restraint.

By the same token, the impact of creating such a trap for the unwary is that the **well-counseled** defendant may simply refuse to engage in settlement discussions lest any temporary concession be treated after the fact as an agreement. Because the law should encourage the parties to engage in settlement discussions in a cooperative spirit, rather than threatening them with traps based on their conduct during negotiations, the ruling below is contrary not only to basic First Amendment principles, but also to sound public policy. Based on an independent examination of the record as a whole, and on consideration of the First Amendment principles at stake, the injunction should be reversed because there was no contract at all.

2. At Most, Morgan Agreed Not to Restore the Identical Material He Had Taken Offline.

If there were anything that could be treated as a commitment by Morgan, it would be the statement in his August 1 letter that he had removed "any stated libelous reference to the Nevyases and their practice only," coupled with the warning that he was going to update this site "or others" "with facts of my case, treatment, history, all of the legal issues pertaining to my case, and all necessary documentation substantiating those facts." Add. 3. By comparing what Morgan mentioned having removed with his statements about what he would add later, the most a court might infer is that Morgan was suggesting that what he would add to the web site would be different and more legally defensible, but still a continuation of the same subject matter.

Construing the alleged contract this way would have the added benefit of being consistent with Mr. Silverman's August 14 letter stating his understanding of the basis on which his clients would refrain from suing Morgan for his past defamatory statements. Specifically, he indicated that such suit would not be brought if Morgan did not "reinsert . . . the changes and deletions made to the web site" and Morgan "makes no further attempts to defame my clients." Add. 8. Assuming

that the term "attempt to defame" is not too vague to be meaningful, this language could be construed as agreeing not to sue so long as Morgan in good faith attempted to conform any further changes to his web site to the legal guidelines governing defamation.

The evidence shows, however, that Morgan complied with any such "agreement," assuming that it could be found to have been an agreement. Morgan testified that what he placed on the web site after he found a new hosting company was different from what he had removed, Tr. 72, and Dr. Nevyas testified that he had not done a specific comparison, Tr. 54: "I don't know whether the material is all not the same. It appears to me that some of it was quite the same, maybe in different words, but they were the same allegations and much more. . . . I didn't make a specific comparison." Tr. 54-55. And if an "agreement" to make statements that are "within the legal guidelines" for libel, Add. 5, is enforceable and not impermissibly vague, the Nevyases deliberately refrained from introducing any evidence to show that the new statements on the web site were either false or otherwise actionable. Accordingly, the undisputed evidence at trial was that Morgan complied with his "agreement," and hence there was no basis for an award of specific performance.

3. If There Was Any Contract It Was Limited to the Contents of Lasiksucks4u.com.

Even if the Court rejects Morgan's principal argument on appeal, that he did not in any respect waive his First Amendment right to criticize the Nevyases on his lasiksucks4u.com web site, the **only** agreement found by the court below was with respect to that web site. There was no testimony about any other web site; there was no finding about any other web site; the amended complaint was directed only to that web site; and all of the discussion in the case was directed to that web site. The existence of other web sites, and the possibility of enjoining Morgan's speech on such other web sites, did not even enter the case until after testimony and oral argument were complete,

and the court had stated its oral ruling. At that point, Mr. Silverman told Judge Maier about another web site that Morgan had called "flawedlasik," that Mr. Silverman alternately described as being "identical" and as containing "the same type of reference to Dr. Nevyas." Tr. 94. On the basis of this representation, which was unsupported by any evidence, Mr. Silverman asked the Court to extend his order to bar Morgan from mentioning the Nevyases "on that website or any other websites." *Id.* Despite the absence of any finding about agreements with respect to additional web sites, Judge Maier accommodated this request.

This aspect of his order should be reversed because our judicial system bases the outcome of a trial on the record of the case. The court made no finding that Morgan waived his right to speak about the Nevyases on any other web sites, the record contains no evidence of any **discussion** of such other web sites, and no testimony was offered about what was on the other web site. Argument of counsel is not testimony, and Morgan was deprived of any fair opportunity to litigate the contents of any other web sites. This aspect of the injunction extends far beyond the evidence of violation, and yet the law is clear that, in the First Amendment area, an injunction should be limited to that which is strictly necessary to remedy the violations that are found. *Madsen v. Women's Health Center*, 512 U.S. 753, 765 (1994); *Anheuser-Busch v. Balducci Publications*, 28 F.3d 769, 778 (8th Cir. 1994); *U-Haul Int'l. v. Jartran*, 793 F.2d 1034, 1042 (9th Cir. 1986); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982).

C. Any Further Proceedings in This Case Should Be Before a Different Trial Judge.

Finally, Judge Maier should be excused from hearing any issues remaining in this case following this appeal.

In addition to his casual acquiescence in a request to extend the order beyond the violation

and indeed beyond the issues litigated, Judge Maier has improperly interfered with Morgan's right to counsel and right to appeal in this case. After the Nevyases originally filed this case, they added claims against Morgan's lawyer Mr. Friedman, contending that because Morgan had posted on his web site letters sent by Friedman to the United States Food and Drug Administration about certain problems with the Nevyases' investigational uses of lasers for lasik surgery, Friedman was liable for the defamatory impact of the posting on Morgan's web site. Although these claims posed a potential conflict of interest for Mr. Friedman, he concluded that it was a waivable conflict and so he continued his representation of Morgan while retaining separate counsel to represent himself as a defendant. Indeed, a motion to disqualify him from representing Morgan was denied by Judge Matthew Carrafiello on July 20, 2005.

The trial court increased the conflict on July 26, 2005, after Morgan had refused to settle the case in chambers before trial, by actions taken immediately after trial. The trial transcript reveals that, after issuing his oral opinion, Judge Maier stated on the record that although he was dismissing the defamation claims against Morgan, the defamation claim against Friedman remained to be decided, and Mr. Friedman reminded Judge Maier that Morgan also had counterclaims to be decided. Tr. 95, Add. 25. At that point, Judge Maier called counsel into chambers to "talk informally." Tr. 96, Add. 26. Mr. Friedman asserts that, during that informal discussion, the court told Mr. Friedman that he would dismiss the Nevyases' defamation claim against Friedman if Morgan refrained from filing any appeal from the order censoring Morgan's web site, and Mr. Silverman has never asserted to the contrary. Friedman understandably concluded at this point that he had an irreconcilable conflict of interest with Morgan, and he withdrew from representing Morgan. Friedman Praecipe to Withdraw, dated September 2, 2005, file-stamped September 27,

2005, and docketed October 19, 2005. Because Friedman had been representing Morgan pro bono, and because Morgan is indigent, the result of this conflict was to deprive Morgan of **any** representation with respect to the remaining issues in the trial court.[5]

The threat to keep Friedman in the case as a defendant if his client did not appeal, but to let him out of the case if his client did appeal, can only be viewed as a gross abuse of discretion. Although judges are entitled to encourage parties to settle, they may not base rulings against one party on whether another party exercises his right to appeal**.**

CONCLUSION

The injunction on appeal should be reversed. Judge Maier should be disqualified from participating in any further proceedings in the case.

Respectfully submitted,

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