PHILADELPHIA COURT OF COMMON PLEAS PETITION/MOTION COVER SHEET

FOR COURT USE ONLY			
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:		
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CONTROL NUMBER:

09111466

(RESPONDING PARTIES MUST INCLUDE THIS

ASSIGNED TO JUDGE:	ANSWER/RESPONS	E DATE:	NUMBER ON	ALL FILINGS)	
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NEVYAS ETAL NEVYAS ETAL INDICATE NATURE OF DOCUME □ Petition (Attach Rule to Show Cause)	NT FILED: Motion onse to Motion Verse side) ERLOC APPL	Has another pet Is another petit If the answer to THE HONOR	NoName of Filing Part ANITA NEVYA HERBERT J N NEVYAS EYE tition/motion been deci ion/motion pending? either question is yes, yee RABLE PETER RO	ty: S-WALLACE-HEVYAS-PLF ASDSOCIATES ded in this case? ou must identify the OGERS PETITION/MOTION (see list on reverse MTCIA	PLF S-PLF X Yes No yes No e judge(s):
I. CASE PROGRAM NON JURY PROGRAM		(Name, unrepress of record JEFFI 48 CARL DII CEI PHI PETEI ECH LIH FLO LEON 230 PHI HERBI	CTIES (required for proof of address and telephone in the parties. Attach a stammand unrepresented party.) REY B ALBERT OAKWOOD DRIVE HANZELIK LWORTH PAXSON I NTER 1735 MARKE LLADELPHIA PA 1 R J HOFFMAN CERT SEAMANS CH BERTY PLACE 50 DOR , PHILADELE W SILVERMAN O S. BROAD STRE LLADELPHIA PA 1 ERT J NEVYAS 28 WALNUT ST , 102	number of all couped addressed envelor , DRESHER 1 LLP 3200 MET STREET , .9103 HERIN MELLO' SOUTH 16TH PHIA PA 1910 ET 17TH FLO	PA 19025 LLON BANK TT TWO ST 22ND 02 OOR ,
III. OTHER					
By filing this document and signing below, t upon all counsel and unrepresented parties as the answers made herein are true and correct and the street and correct and the street are true are true and the street are true are true are true and the street are true are t	required by rules of Cour and understands that sanct	t (see PA. R.C.P. 206	6.6, Note to 208.2(a), and 44 for inaccurate or incomplete	40). Furthermore, mo	
(Attorney Signature/Unrepresented F		(Date)	(Print Name)		(Attorney I.D. No.)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date. No extension of the Answer/Response Date will be granted even if the parties so stipulate.

ANITA NEVYAS-WALLAC

1528 WALNUT ST , PHILADELPHIA PA 19102

NEVYAS EYE ASSOCIATES

1528 WALNUT ST , PHILADELPHIA PA 19102

DOMINIC J MORGAN

PO BOX 1011 , MARLTON NJ 08053

12 NOV 2009 04:37 pm

Civil Administration

A. LEBRON

STEIN & SILVERMAN, P.C.

BY: Allison S. Lapat, Esquire

I.D. No. 74789

230 South Broad Street, 17th Floor

Philadelphia, PA. 19102

(215) 985-0255

Attorney for Plaintiffs

Dr. Herbert Nevyas and

Dr. Anita Nevyas-Wallace

HERBERT J. NEVYAS, M.D. : COURT OF COMMON PLEAS

ANITA NEVYAS-WALLACE, M.D. : Philadelphia County

and

NEVYAS EYE ASSOCIATES, P.C. : NOVEMBER TERM, 2003

Plaintiffs : NO.: 946

).

DOMINIC MORGAN,

STEVEN FRIEDMAN

Defendants.

PLAINTIFFS' MOTION TO AMEND ORDER TO CERTIFY FOR PURPOSES OF TAKING AN INTERLOCUTORY APPEAL

Plaintiffs. By and through their undersigned counsel, hereby request this Honorable Court to amend it's Order of October 14, 2009 to add a certification pursuant to 42 Pa C.S.A. §702(b), permitting Plaintiffs to take an interlocutory appeal. In support of this Motion, plaintiffs aver as follows:

- 1. Plainitffs, two physicians and their practice brought this defamation action against defendants who published false and defamatory statements about them on the internet and to various organizations.
- 2. Defendants' defamatory statements include accusing plaintiffs of criminal conduct requiring urgent attention and accusing plaintiffs of unethical conduct.
- On October 14, 2009, following a motion by Defendant Friedman, this Court entered an Order finding that "plaintiffs were limited purpose public figures relative to the instant defamation case." A true and correct copy of this Order is attached as Exhibit 1.

- 4. This Order substantially alters the burden of proof in this matter, as well as expanding the issues that must now be determined at the trial in this matter.
- 5. Most significantly, as a result of the Court's finding plaintiffs to be limited purpose public figures, the plaintiffs must now prove that Defendants acted with malice. <u>Blackwell v. Eskin</u>, 916 A.2d 1123 (Pa. Super. 2006.)
- 6. To prove actual malice, plaintiffs must prove that defendants either knew that the statements they made were false or that they acted with reckless disregard of falsity. <u>Id.</u>
- 7. Further, actual malice must be shown by clear and convincing evidence.
- 8. The Pennsylvania Superior Court has recognized that "[t]he actual malice standard is a rigorous if not impossible burden to meet in most circumstances." <u>Bartlett v. Bradford Publishing Co.</u>, 885 A.2d 562 (Pa. Super. 2005.)
- 9. Thus this Court's determination that plaintiffs are limited purpose public figures is a controlling question of law.
- 10. Moreover, the finding that plaintiffs are limited purpose public figures changes the burden of proof, requiring that plaintiffs prove that defendant's statements are false, rather than requiring defendants to prove as an affirmative defense that their statements were true.
- This sea-change in the burden of proof may require additional issues to be decided at trial.

 For example, it may re-open issues which were litigated in the underlying malpractice action upon which plaintiffs prevailed. The court's ruling may give plaintiffs a second bite at the apple.
- 12. The case law in this area as briefed by the parties allows a substantial ground for difference of opinion. The amount and quality of advertising which is sufficient to make a private individual into a public figure is a close question, especially in light of <u>Computer</u>

Aid, Inc. v. Hewlett Packard Company, 56 F.Supp.2d 526 (E.D.Pa. 1999), in which the Court held that Hewlett Packard was not a limited purpose public figure despite adverting widely and nationally.

- 13. Further, a close question exists as to whether a public controversy existed which was not created by defendants themselves.
- 14. Although the Court's Order is interlocutory in nature, permitting plaintiffs to appeal it at this time would be in the interest of justice in that the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this matter.

WHEREFORE, the plaintiffs request the Court to amend its Order pursuant to <u>42</u>

Pa.C.S.A. § 702(b), to state that "the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this matter" thereby permitting plaintiffs to take an immediate appeal therefrom.

Respectfully submitted,	
By:	/s/
ALLISON S. LAPA	T, ESQUIRE

12 NOV 2009 04:37 pm

Civil Administration

A. LEBRON

STEIN & SILVERMAN, P.C.

BY: Allison S. Lapat, Esquire

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Attorney for Plaintiffs

Philadelphia County

Dr. Herbert Nevyas and

Dr. Anita Nevyas-Wallace

HERBERT J. NEVYAS, M.D. : COURT OF COMMON PLEAS

ANITA NEVYAS-WALLACE, M.D. :

and :

NEVYAS EYE ASSOCIATES, P.C. : NOVEMBER TERM, 2003

Plaintiffs : NO.: 946

VS.

DOMINIC MORGAN,

STEVEN FRIEDMAN

:

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND ORDER TO CERTIFY FOR PURPOSES OF TAKING AN INTERLOCUTORY APPEAL

Plaintiffs, two physicians and their practice brought this defamation action against defendants who published false and defamatory statements about them on the internet and to various organizations.

Defendants' defamatory statements include accusing plaintiffs of criminal conduct requiring urgent attention and accusing plaintiffs of unethical conduct.

On October 14, 2009, following a motion by Defendant Friedman, this Court entered an Order finding that "plaintiffs were limited purpose public figures relative to the instant defamation case." A true and correct copy of this Order is attached as Exhibit 1.

This Order substantially alters the burden of proof in this matter, as well as expanding the issues that must now be determined at the trial in this matter.

Case ID: 031100946

Most significantly, as a result of the Court's finding plaintiffs to be limited purpose public figures, the plaintiffs must now prove that Defendants acted with malice. <u>Blackwell v. Eskin</u>, 916 A.2d 1123 (Pa. Super. 2006.)

To prove actual malice, plaintiffs must prove that defendants either knew that the statements they made were false or that they acted with reckless disregard of falsity. <u>Id.</u>

Further, actual malice must be shown by clear and convincing evidence.

The Pennsylvania Superior Court has recognized that "[t]he actual malice standard is a rigorous if not impossible burden to meet in most circumstances." <u>Bartlett v. Bradford Publishing</u>

<u>Co.</u>, 885 A.2d 562 (Pa. Super. 2005.)

Thus this Court's determination that plaintiffs are limited purpose public figures is a controlling question of law.

Moreover, the finding that plaintiffs are limited purpose public figures changes the burden of proof, requiring that plaintiffs prove that defendant's statements are false, rather than requiring defendants to prove as an affirmative defense that their statements were true.

This sea-change in the burden of proof may require additional issues to be decided at trial. For example, it may re-open issues which were litigated in the underlying malpractice action upon which plaintiffs prevailed. The court's ruling may give plaintiffs a second bite at the apple.

The case law in this area as briefed by the parties allows a substantial ground for difference of opinion. The amount and quality of advertising which is sufficient to make a private individual into a public figure is a close question, especially in light of Computer Aid, Inc. v. Hewlett Packard Company, 56 F. Supp. 2d 526 (E.D.Pa. 1999), in which the Court held that Hewlett Packard was not a limited purpose public figure despite adverting widely and nationally.

Further, a close question exists as to whether a public controversy existed which was not

created by defendants themselves.

Although the Court's Order is interlocutory in nature, permitting plaintiffs to appeal it at this time would be in the interest of justice in that the order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this matter.

Res	pectfully submitted,	
By:		/s/
	ALLISON S. LAPAT,	ESQUIRE

Case ID: 031100946

FILED

12 NOV 2009 04:37 pm

Civil Administration

A. LEBRON

HERBERT J. NEVYAS, M.D.	:	COURT OF COMMON PLEAS

ANITA NEVYAS-WALLACE, M.D. : Philadelphia County

and

NEVYAS EYE ASSOCIATES, P.C. : NOVEMBER TERM, 2003

Plaintiffs : NO.: 946

VS.

DOMINIC MORGAN,

STEVEN FRIEDMAN

Defendants.

ORDER

ONDER			
AND NOW, this	day of	, 2009, the Court, having found	
that plaintiffs are limited purpo	se public figures relativ	re to the instant defamation case,	
acknowledges that the Order in	nvolves a controlling qu	nestion of law as to which there is substantial	
ground for difference of opinion	on and that an immediat	e appeal from the order may materially	
advance the ultimate termination	on of this matter.		
	E	BY THE COURT:	
	Ī	Rogers, J.	

Case ID: 031100946

12 NOV 2009 04:37 pm Civil Administration A. LEBRON

VERIFICATION

I, Allison S. Lapat, Esquire, state that I am the attorney for the Plaintiffs in the foregoing matter and am authorized to make this verification on their behalf. I state that the facts set forth in the foregoing pleading are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

ALLISON S. LAPAT, ESQUIRE

DATE: 11 12 2009

Case ID: 031100946

12 NOV 2009 04:37 pm Civil Administration

A. LEBRON

COMMON PLEAS COURTS OF PHILADELPHIA CIVIL LISTING SECTION TRIAL WORK SHEET

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The Court finds to limited purpose pur the instant dope	hat plaintiffs blic figures rel mation case	COPIES SENT COPIES	P.250(D) 19 21CT OF PA
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(CONTINUED NEXT PAGE)

12 NOV 2009 04:37 pm Civil Administration A. LEBRON

CERTIFICATE OF SERVICE

I, Allison S. Lapat, Esquire, hereby certify that, on November 12, 2009, the within Plaintiffs' Motion to Amend Order to Certify for Purposes of Taking an Interlocutory Appeal was filed with the Court *via* the Electronic Case Filing System and a true and correct copy was served in accordance with Pa.R.C.P. No. 205.4 upon the following counsel:

Maureen P. Fitzgerald, Esquire Eckert, Seamans, Cherin & Mellott Two Liberty Place 50 S. 16th Street, 22nd Floor Philadelphia, PA 19102

Dominic J. Morgan P.O. Box 1001 Marlton, NJ 08053

> By: /s/ ALLISON S. LAPAT, ESQUIRE