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NEVYAS EYE ASSOCIATES

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DOMINIC J MORGAN

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STEIN & SILVERMAN, P.C.
BY: Allison S. Lapat, Esquire
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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
vs.	:	
DOMINIC MORGAN,	:	
STEVEN FRIEDMAN	:	
<u>Defendants.</u>	:	

**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. 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.
2. Defendants' defamatory statements include accusing plaintiffs of criminal conduct requiring urgent attention and accusing plaintiffs of unethical conduct.
3. 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. Blackwell v. Eskin, 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. Id.
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." Bartlett v. Bradford Publishing Co., 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.
11. 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 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 advertng 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 42 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. LAPAT, ESQUIRE

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Attorney for Plaintiffs
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<u>Defendants.</u>	:	

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.

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. Blackwell v. Eskin, 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. Id.

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." Bartlett v. Bradford Publishing Co., 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 advertng 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.

Respectfully submitted,

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

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ANITA NEVYAS-WALLACE, M.D.	:	Philadelphia County
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Plaintiffs	:	NO.: 946
vs.	:	
DOMINIC MORGAN,	:	
STEVEN FRIEDMAN	:	
<u>Defendants.</u>	:	

ORDER

AND NOW, this day of , 2009, the Court, having found that plaintiffs are limited purpose public figures relative to the instant defamation case, acknowledges 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.

BY THE COURT:

Rogers, J.

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

FILED

12 NOV 2009 04:37 pm

Civil Administration

A. LEBRON
COMMON PLEAS COURTS OF PHILADELPHIA
CIVIL LISTING SECTION
TRIAL WORK SHEET

Event: _____ at _____ in _____
 Scheduled: _____, NON-JURY MN - MAJOR NON JURY

Judge's Name: Peter F. Rogers Signature: [Signature]
 X

Caption: NEVYAS ETAL VS MORGAN Case Type: E3 - EQUITY - NO REAL ESTATE TRO)

Term and Number: #0311-00946 If Consolidated: Term and Number(s)

TRIAL DATE:	ACTUAL: () JURY () NON-JURY	TOTAL AMOUNT	NUMBER OF DAYS	DATE SHEET PREPARED

Disposition Date: _____

FULL DESCRIPTION OF DISPOSITION (To Be Entered VERBATIM On The Docket):

The Court finds that plaintiffs are limited purpose public figures relative to the instant defamation case

COPIES SENT PURSUANT TO Pa.R.C.P.290(b) OCT 14 2009 FIRST JUDICIAL DISTRICT OF PA HON. PETER F. ROGERS

- () DEFAULT JUDGMENT/COURT ORDERED
- () DISPOSITIVE MOTION GRANTED
- () DIRECTED VERDICT
- () DISCONTINUANCE ORDERED
- () DISCONTINUE/TRANSFER BINDING ARB
- () FINDING FOR DEFENDANT
- () FINDING FOR PLAINTIFF
- () DAMAGES ASSESSED
- () JUDGMENT ENTERED BY AGREEMENT
- () JUDGMENT ENTERED
- () JURY VERDICT FOR PLAINTIFF
- () JURY VERDICT FOR DEFENDANT
- () MISTRIAL
- () HUNG JURY
- () NON-PROS ENTERED
- () NON-SUIT ENTERED
- () SETTLED PRIOR TO ASSIGNMENT FOR TRIAL (TEAM LEADERS, only)
- () SETTLED AFTER ASSIGNMENT FOR TRIAL
- () TRANSFERRED TO OTHER JURISDICTION
- () OTHER (EXPLAIN) Finding

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FILED

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:

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P.O. Box 1001
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By: _____/s/
ALLISON S. LAPAT, ESQUIRE