

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

CONTROL NUMBER: 09111466 (RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

FOR COURT USE ONLY	
ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:
<i>Do not send Judge courtesy copy of Petition/Motion/Answer/Response. Status may be obtained online at http://courts.phila.gov</i>	

November Term, 2003
 Month Year
 No. 00946

NEVYAS ETAL VS MORGAN

Name of Filing Party:
ANITA NEVYAS-WALLACE-PLF
HERBERT J NEVYAS-PLF
NEVYAS EYE ASDSOCIATES-PLF

INDICATE NATURE OF DOCUMENT FILED:

- Petition (*Attach Rule to Show Cause*) Motion
 Answer to Petition Response to Motion

Has another petition/motion been decided in this case? Yes No

Is another petition/motion pending? Yes No

If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION (<i>see list on reverse side</i>)	PETITION/MOTION CODE (<i>see list on reverse side</i>)
ANSWER (MOTION/PETITION) FILED	MTANS

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):
 MTCIA - MOT-CERTFY ORDER INTERLOC APPL

<p>I. CASE PROGRAM</p> <p>NON JURY PROGRAM</p>	<p>II. PARTIES (<i>required for proof of service</i>) (Name, address and telephone number of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)</p> <p>JEFFREY B ALBERT 48 OAKWOOD DRIVE , DRESHER PA 19025</p> <p>CARL HANZELIK DILWORTH PAXSON LLP 3200 MELLON BANK CENTER 1735 MARKET STREET , PHILADELPHIA PA 19103</p> <p>PETER J HOFFMAN ECKERT SEAMANS CHERIN MELLOTT TWO LIBERTY PLACE 50 SOUTH 16TH ST 22ND FLOOR , PHILADELPHIA PA 19102</p> <p>LEON W SILVERMAN 230 S. BROAD STREET 17TH FLOOR , PHILADELPHIA PA 19102</p> <p>HERBERT J NEVYAS 1528 WALNUT ST , PHILADELPHIA PA 19102</p>
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III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

_____ December 8, 2009 _____ LEON W. SILVERMAN
 (Attorney Signature/Unrepresented Party) (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

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

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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.	:	
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REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND ORDER TO CERTIFY FOR PURPOSES OF TAKING AN INTERLOCUTORY APPEAL

An interlocutory appeal is appropriate in this action because the question of whether Dr. Nevyas, Dr. Wallace and their medical practice are limited purpose public figures is the controlling question in this litigation. The Court's finding that plaintiffs are limited purpose public figures has a profound effect on this litigation. It requires Plaintiffs to prove actual malice. The 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, the impact of the Court's finding nearly approaches the impact of the grant of a motion for summary judgment, while still requiring the parties to go through the time and expense of litigating this matter.

At the conclusion of such litigation, should plaintiffs lose, plaintiffs will certainly appeal on the basis that the Court applied the wrong standard by incorrectly finding that plaintiffs were limited purpose public figures. Thus, the delay in the final resolution of

this matter will, in all likelihood, be greater if Plaintiff is not permitted to take this interlocutory appeal.

Pennsylvania Courts have allowed interlocutory appeals in similar circumstances where, although the underlying order did not dispose of the entire matter, the course of the litigation would be determined by the interlocutory order. See e.g. Larsen v. Philadelphia newspapers, Inc., 543 A.2d 1181 (Pa. Super. 1988) (granting permission for interlocutory appeal in defamation action where some but not all of the counts of the complaint were sustained); Jennings v. Cronin, 389 A.2d 1183 (Pa. Super. 1978) (granting an interlocutory appeal in a defamation action where the preliminary objections to the complaint were dismissed); Ford Motor Co. v. Buseman, 954 A.2d 580 (Pa. Super. 2008)(granting interlocutory appeal even after trial court refused to amend interlocutory order denying motion for summary judgment to include 702(b) statement); In re: Consolidation Coal Sales Co., 932 A.2d 341 (Pa. Commwlth 2007)(granting interlocutory appeal to determine “date of taking” in eminent domain proceeding); Mullin v. Com., Dept. of Transportation, 870 A.2d 773 (Pa. 2005)(granting interlocutory appeal from denial of motion for summary judgment.)

In the instant case, the Court’s finding that plaintiffs are limited purpose public figures is so likely to determine the outcome of the trial in this matter that allowing an interlocutory appeal is appropriate. All parties and the Court will benefit from having this dispute over the burden of proof determined before trial.

The cases cited by Friedman are inapposite. Stevenson v. General Motors Corp., 521 A.2d 413 (Pa. 1987) concerns if an order is a final order when an action has been bifurcated. Beasley v. Beasley, 501 A.2d 679 (Pa. Super 1985) concerns severance and

orders which are appealable as collateral orders. Neither case addresses the issue before this Court – whether the order at issue is so controlling of this matter going forward that an interlocutory appeal should be permitted.

The issue of whether Plaintiffs are limited purpose public figures is a close question. The American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389 (Pa. 2007) decision, upon which Friedman relies, must be read in conjunction with the United States Supreme Court’s decision in Gertz. Plaintiffs’ advertising did not form a close nexus with the subject matter of Friedman’s defamatory statements that Plaintiffs were involved in “outright criminal conduct” requiring “urgent” action. Nor did any public controversy exist over any allegedly “criminal” conduct by Plaintiffs.

Despite Friedman’s protestations to the contrary, American Future does not keep the question of whether Plaintiffs are limited purpose public figure from being a close one. The application of American Future to the facts of record in this action, and the relationship between American Future and Gertz are what render the question so difficult.

The issue of whether Plaintiffs should be considered limited purpose public figures for purposes of this litigation is a close question with an enormous impact on this litigation going forward. Permitting plaintiffs to appeal the Court's Order at this time would be in the interest of justice. 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.

/s/ ALLISON S. LAPAT

ALLISON S. LAPAT, ESQUIRE
*Attorney for Plaintiffs Dr. Herbert Nevyas
and Dr. Anita Nevyas-Wallace*

Dated: December 8, 2009

<hr/>	:	COURT OF COMMON PLEAS
HERBERT J. NEVYAS, M.D.	:	Philadelphia County
ANITA NEVYAS-WALLACE, M.D.	:	
and	:	
NEVYAS EYE ASSOCIATES, P.C.	:	NOVEMBER TERM, 2003
Plaintiffs	:	NO.: 946
vs.	:	
DOMINIC MORGAN,	:	
STEVEN FRIEDMAN	:	
Defendants.	:	
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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.

CERTIFICATE OF SERVICE

I, Allison S. Lapat, Esquire, hereby certify that I have caused a true and correct copy of the Reply Brief in Support of Plaintiffs' Motion to Amend Order to Certify for Purposes of Taking an Interlocutory Appeal, to be served via first class mail postage prepaid to the following individuals.

Dominic Morgan
1038 E 18th St
Chester, PA 19013

Maureen Fitzgerald, Esquire
McKissock & Hoffman, P.C.
1818 Market Street, Suite 13th floor
Philadelphia, PA 19103

/s/ ALLISON S. LAPAT

ALLISON S. LAPAT, ESQUIRE
*Attorney for Plaintiffs Dr. Herbert Nevyas
and Dr. Anita Nevyas-Wallace*

Dated: December 8, 2009