

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:
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November 2003

 Month Term, Year
 No. 00946

NEVYAS ETAL VS MORGAN

Name of Filing Party:
STEVEN A FRIEDMAN-DFT

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>) ANSWER (MOTION/PETITION) FILED	PETITION/MOTION CODE (<i>see list on reverse side</i>) MTANS
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ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):
 MTCIA - MOT-CERTIFY 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.

_____ November 30, 2009 MAUREEN P. FITZGERALD
 (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.**

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

v.

DOMINIC MORGAN
STEVEN FRIEDMAN
Defendants.

:
: COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
:
: NOVEMBER TERM, 2003,
: No. 00946
:
:
:

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Plaintiffs' Motion to Amend Order to Certify for Purposes of Taking an Interlocutory Appeal, and Defendants' Response thereto, it is hereby ORDERED that Plaintiffs' Motion is DENIED.

J. Rogers

ECKERT SEAMANS CHERIN &
MELLOTT, LLC
BY: Maureen P. Fitzgerald
Two Liberty Place
50 South 16th Street, 22nd Floor
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(215) 851-8400

ATTORNEYS FOR DEFENDANT
Steven A. Friedman, M.D., J.D., LL.M.

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

v.

DOMINIC MORGAN
STEVEN FRIEDMAN

Defendants.

:
: COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
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**DEFENDANT STEVEN A. FRIEDMAN, M.D., J.D., LL.M.'S RESPONSE
TO PLAINTIFFS' MOTION TO AMEND ORDER TO CERTIFY FOR
PURPOSES OF TAKING AN INTERLOCUTORY APPEAL**

Defendant Steven A. Friedman, M.D., J.D., LL.M., [hereinafter "Friedman" or "Defendant"], by and through counsel, hereby submits this Response to Plaintiffs' Motion to Amend this Honorable Court's October 14, 2009 Order and Certify it for Purposes of Taking an Interlocutory Appeal. In support thereof, Defendant states as follows:

1. It is admitted only that Plaintiffs are physicians and have filed a lawsuit against Defendants, which includes a claim of defamation. All remaining allegations are denied. Plaintiffs' defamation claim against Friedman is predicated entirely upon letters to the Food & Drug Administration [hereinafter "FDA"] written by Friedman in his capacity as counsel for co-defendant Dominic Morgan ["Morgan"], and published on the internet by Morgan without Friedman's permission or knowledge.

2. Denied. The purported defamatory statements are set forth in letters, the contents of which speak for themselves.

3. Admitted. By way of further answer, this Court's Order came about as a result of a May 5, 2009 status conference, wherein counsel advised the Court that it needed to make a determination as to plaintiffs' public figure status, as such status would then clarify the burden of proof required at trial. The Court set a briefing schedule. After the matter was fully briefed, the Court issued a ruling, a copy of which is attached to Plaintiffs' Motion as Exhibit "1".

4. Denied. The Court's Order does not "alter" anything, nor does it "expand the issues that must be determined at trial." *From the very inception of this case*, Friedman has asserted that Plaintiffs are limited purpose public figures with regard to the defamation claim against him. Friedman asserted this position in his Answer with New Matter filed in April of 2005¹ and has pursued discovery for the purpose of establishing that Plaintiffs are limited purpose public figures. This Court's Order simply renders a ruling on a position advocated by Friedman all along in this litigation on a matter which the Court must decide as a threshold issue before any defamation case can proceed to trial. *Iafrate v. Hadesty*, 423 Pa. Super. 619, 621 A.2d 1005 (1993); *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389, 404 (Pa. 2007).

5. It is admitted that Plaintiffs must prove that Defendants acted with malice. By way of further answer, this Court's determination of Plaintiffs' public figure status is required as a threshold issue in all defamation cases. *Iafrate v. Hadesty*, *supra*; *American Future Systems, Inc.*, *supra*.

6-8. The averments of these paragraphs are conclusions of law to which no response is required.

9. Denied. Simply because this Court made the requisite threshold determination required in a defamation case as to the public figure status of the Plaintiffs, does not render this

¹ In New Matter #31, Friedman asserted that plaintiffs were public figures, or limited public figure, with no claim against him as he did not act with malice in making any statement concerning them.

determination into a “controlling question of law” under 42 Pa.S.C.A. §702(b). Indeed, if that was the case, then every defamation case in Pennsylvania which involved a public figure determination would then be immediately appealable. Plaintiffs cite no support for this position.

10. Denied. It is denied that this Court’s Order “changes” the burden of proof. To the contrary, up to this point, the respective burdens of proof had not been established. The Court had never ruled upon the Plaintiffs’ public figure status, and this is a threshold issue that any court must decide in a defamation case prior to the case proceeding to trial. Indeed, Plaintiffs’ counsel agreed at the May 5, 2009 status conference that this issue needed to be briefed and decided by the Court.

11. Denied. It is denied that the Court’s ruling is a “sea-change” or that it requires additional issues to be decided at trial. The Court’s ruling requires that Plaintiffs prove Friedman acted with malice, with regard to the alleged defamation. The subject matter of Friedman’s purported defamatory statements – i.e., Plaintiffs’ improper use of an unapproved laser device to perform LASIK surgery – will be the focus of the trial, regardless of the burden of proof.

12-13. Denied. It is denied that there is substantial ground for a difference of opinion as to the law applicable to a public figure determination. Plaintiffs cite to no conflicting rulings by Pennsylvania courts on facts similar to the case at bar. Plaintiffs also ignore the Pennsylvania Supreme Court’s recent decision in *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389, 404 (Pa. 2007), which clearly sets forth the applicable law. Although Plaintiffs assert that this Court’s ruling is a “close question” that is not the standard to allow certification of an interlocutory order. To the contrary, to obtain certification, a trial court must conclude that its order involves a “controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may

materially advance the ultimate termination of the matter.” See 42 Pa. C.S.A. § 702(b)(West 2006).

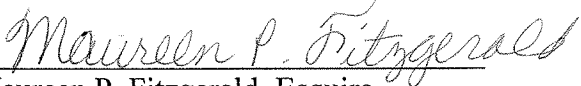
14. Denied. It is denied that the interests of justice would be served by certifying the Court’s Order as a interlocutory appeal. Such interlocutory appeals are strongly discouraged due to the desire to avoid piecemeal resolution of disputes. Suspending the case at this juncture for an interlocutory appeal would unnecessarily delay the termination of the matter. See 521 A.2d 413; *Beasley v. Beasley*, 348 Pa. Super. 124, 501 A.2d 679, 680 (Pa. Super. 1985) (the right of appeal has never been intended to vest in an appellate court the power to intervene in matters pending before the trial court).

Further, this matter does not involve novel questions of law, issues of first impression or concerns of a constitutional nature, which may in certain circumstances warrant immediate appellate review. See *Darlington, et al.*, *Pennsylvania Appellate Practice*, §1311:6. Nor is this a case where plaintiffs’ rights will be forever lost if this Court denied **immediate** appellate review. Instead, this is a case where the trial court properly entered an interlocutory order on a threshold issue, required before the case can proceed to trial, and not a case that warrants the extraordinary measure of immediate appellate review.

WHEREFORE, Defendant Friedman respectfully requests that this Court deny Plaintiffs' Motion to Amend its Order to Certify For Purposes of Taking an Interlocutory Appeal, as set forth in the proposed Order.

Respectfully submitted,

Eckert Seamans Cherin & Mellott, LLC


Maureen P. Fitzgerald, Esquire
Attorney for Defendant
Steven A. Friedman, M.D., JJM, LL.M.

Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

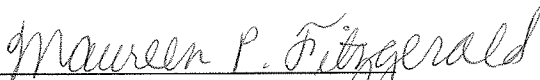
Dated: November 30, 2009

CERTIFICATE OF SERVICE

I, Maureen P. Fitzgerald, Esquire, do hereby certify that on this 30th day of November, 2009, I caused a true and correct copy of Defendant Steven A. Friedman, M.D., J.D., L.L.M.'s Response to Plaintiffs' Motion to Amend Order to Certify for Purposes of Taking an Interlocutory Appeal to be served upon the following:

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Dominic Morgan
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: COURT OF COMMON PLEAS
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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT STEVEN A. FRIEDMAN, M.D., J.D., LL.M.'S RESPONSE
TO PLAINTIFFS' MOTION TO AMEND ORDER TO CERTIFY FOR
PURPOSES OF TAKING AN INTERLOCUTORY APPEAL**

Defendant Steven A. Friedman, M.D., J.D., LL.M., [hereinafter "Friedman" or "Defendant"], by and through counsel, hereby submits this Memorandum of Law in Support of His Response to Plaintiffs' Motion to Amend this Honorable Court's October 14, 2009 Order and Certify it for Purposes of Taking an Interlocutory Appeal. In support thereof, Defendant states as follows:

I. Matter Before the Court

Plaintiffs' Motion to Amend Order to Certify for Purposes of Taking an Interlocutory Appeal

II. Statement of Question Involved

Whether this Court should certify its October 14, 2009 interlocutory Order to allow for immediate appeal, pursuant to 42 Pa.C.S.A. §702(b), where its Order ruled upon the threshold issue of Plaintiffs' limited public figure status in this defamation case.

III. Statement of Facts

This case arises from an underlying medical malpractice claim, wherein co-defendant Dominic Morgan, underwent LASIK eye surgery by Plaintiffs. Morgan was rendered legally blind as a result of the surgery, and thereafter filed suit against Plaintiffs for medical malpractice. He was represented by Friedman in that action. The case was submitted to arbitration and resolved through a high-low agreement.

Following the resolution of the underlying lawsuit, Morgan created a website wherein he discussed his personal experience with LASIK surgery, and his lawsuit. Morgan also, *without Friedman's knowledge or permission*, published letters Friedman had written to the FDA in his capacity of counsel for Morgan, citing Plaintiffs' improper use of an unapproved laser to perform LASIK eye surgery. Plaintiffs learned about this website, and thereafter filed suit against both Morgan and Friedman.

As against Defendant Friedman, Plaintiffs' Amended Complaint sets forth a claim of defamation. That claim is predicated entirely upon Friedman's letters written to the FDA which were subsequently published by Morgan on his website.

In response to Plaintiffs' Amended Complaint, in April of 2005, Friedman filed an Answer with New Matter, where in he asserted, among numerous other defenses¹, that Plaintiffs were public figures or limited purpose public figures, and as such, could not prove that Friedman

¹ Friedman also asserted other defenses such as privilege, statute of limitations, and his role as counsel to Morgan.

acted with malice with regard to the publication of these letters. Thereafter, through counsel, Friedman obtained discovery from Plaintiffs in the form of depositions, third party subpoenas and document requests, for the purpose of establishing that Plaintiffs were indeed limited purpose public figures.

At a May 5, 2009 Status Conference, both Plaintiffs' counsel and Friedman counsel advised this Court that the matter of Plaintiffs' public figure status needed to be resolved. Under Pennsylvania law, in any defamation case where the plaintiff is alleged to be a public figure, a court must first make a threshold determination as to the plaintiff's public figure status. That determination will clarify the parties' respective burdens of proof at any upcoming trial. This Court then set a briefing schedule and each side submitted briefs. By Order dated October 14, 2009, this Court ruled that Plaintiffs were "limited purpose public figures" for purposes of the defamation claim.

IV. Argument

Plaintiffs seek to have this Court certify its October 14, 2009 Order such that it may seek an immediate appeal. The standard for certification of an interlocutory order is set forth in 42 Pa.C.S.A. §702(b), which requires that a trial court must conclude that its order involves a "controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the matter." (emphasis added).

As a general matter, interlocutory appeals are strongly discouraged due to the desire to avoid piecemeal resolution of disputes. See *Stevenson v. General Motors Corp.*, 521 A.2d 413; 417 (Pa. 1987); *Beasley v. Beasley*, 348 Pa. Super. 124, 501 A.2d 679, 680 (Pa. Super. 1985) (the right of appeal has never been intended to vest in an appellate court the power to intervene in matters pending before the trial court).

In describing the requirements of §702(b), one court has stated:

The strict requirements imposed by this provision of the code demonstrate the legislature's intent to severely limit the number of cases that are certified. Only in exceptional circumstances may a trial court justify disrupting a case as it makes its way through the judicial system and suspending it while awaiting an answer from the appellate courts.

Wein v. Williamsport Hospital, 39 Pa.D.&C.4th 137, 1998 WL 1068973 *8 (C. C. P. Lyco. Co.

November 18, 1998). Typically, cases where an interlocutory appeal is permitted involve novel questions of law, issues of first impression or concerns of a constitutional nature. See

Darlington, et al., *Pennsylvania Appellate Practice*, §1311:6. This is not such a case and

Plaintiffs have failed to set forth adequate grounds to justify certifying the October 14, 2009 Order under §702(b).

Plaintiffs appear to argue that the October 14, 2009 Order somehow changed or altered the burdens of proof. This is simply not true. Up to this point, the respective burdens of proof had never been established. Plaintiffs contended that they were not public figures and need only prove that Friedman acted with negligence. From the inception of the case, Friedman contended otherwise, and alleged that plaintiffs were limited public figures, and consequently had to prove that he acted with malice. In every defamation case involving a possible public figure, a court must make this threshold determination as to the plaintiff's public figure status. A court's ruling on this issue is not grounds for certification of an interlocutory order. Indeed, if that were the case, then every defamation case involving alleged public figures, would proceed to appeal before being adjudicated on the merits by the trial court. Notably, Plaintiffs cite no caselaw wherein a court's threshold determination of a plaintiff's public figure status, was immediately appealable.

Plaintiffs simply fail to set forth any basis to meet the requirements under §702(b). This matter does not involve a controlling question of law as to which there is a substantial difference

of opinion. Plaintiffs claim that it is a “close question” but that is not the standard under §702(b). They offer no conflicting rulings by Pennsylvania court on facts similar to the case at bar, and wholly ignore the Pennsylvania Supreme Court’s recent decision in American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 404 (Pa. 2007), which clearly sets forth the applicable law.

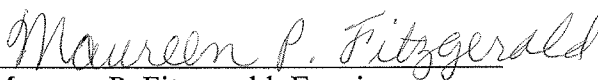
Further, this is not a case where plaintiffs’ rights will be forever lost if this Court denied **immediate** appellate review. Plaintiffs are free to challenge the Court’s determination of their public figure status at the conclusion of the trial. In short, this is simply a case where the trial court properly entered an interlocutory order on a threshold issue, which is required before a case can proceed to trial. As such, this is simply not the type of case that warrants the extraordinary measure of granting immediate appellate review of an interlocutory order.

V. Relief

Defendant Friedman respectfully requests that this Court deny Plaintiffs’ Motion to Amend its Order to Certify For Purposes of Taking an Interlocutory Appeal, as set forth in the proposed Order.

Respectfully submitted,

Eckert Seamans Cherin & Mellott, LLC



Maureen P. Fitzgerald, Esquire

Attorney for Defendant

Steven A. Friedman, M.D., JJM, LL.M.

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50 South 16th Street, 22nd Floor
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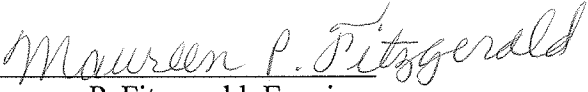
Dated: November 30, 2009

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