

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

HERBERT J. NEVYAS, M.D. and ANITA	:	
NEVYAS-WALLACE, M.D. and NEVYAS EYE	:	November Term, 2003
ASSOCIATES, P.C.,	:	No. 00946
Plaintiffs	:	
	:	
v.	:	
	:	
DOMINIC MORGAN and STEVEN A. FRIEDMAN,	:	
Defendants	:	
	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background and Findings of Fact

1. The findings of fact and conclusions of law in the above matter arise from a defamation suit brought by Herbert J. Nevyas, M.D., Anita Nevyas-Wallace, M.D., and Nevyas Eye Associates, P.C. (hereinafter referred to collectively as "Plaintiffs," unless otherwise indicated) against Dominic Morgan, a former patient, and Mr. Morgan's former lawyer, Steven A. Friedman, M.D., J. D., L.L.M. (hereinafter referred to as "Defendants," "Morgan," or "Friedman"). Injunctive relief is sought against Morgan to bar any continued defamatory publications.
2. Morgan possesses an eye malady termed "premature retinopathy." As a result of extensive media advertisements for Lasik surgery by Plaintiffs, Morgan went to the Plaintiffs for treatment. In April of 1998, he underwent Lasik surgery performed by Dr. Anita Nevyas-Wallace. Dissatisfied with the outcome of the surgery, Morgan, represented by Friedman, instituted suit against the Plaintiffs in April of 2000 in the Court of Common Pleas of Philadelphia County. The matter was transferred to an arbitrator, who in June 2003 found in favor of the Plaintiffs. There was a high-low agreement in which Morgan received the "low" sum of \$100,000.00.

3. Morgan became upset and frustrated by the award. He created a website, lasiksucks4u.com, in which he defamed the professional ability and integrity of Plaintiffs. This conduct spawned the within suit against him and his attorney, Friedman, instituted in this Court in November of 2003. Friedman was accused of authoring four defamatory letters to the FDA, which were published on the internet by Morgan. The final letter of December 3, 2003, written to the Criminal Investigation Division of the FDA, occurred after this suit was instituted and forms the major contention of defamation against Friedman. The internet publication and the four Friedman letters are made part of this Court's findings of fact and conclusions of law. Plaintiffs also sought enforcement of an injunction against Defendant Morgan.
4. After a six-day non-jury trial, which concluded on March 14, 2011, this Court finds in favor of Plaintiffs and against Dominic Morgan, and grants Plaintiffs' injunctive relief (see attached Order). The Court further finds in favor of Defendant, Steven A. Friedman, and against the Plaintiffs in that there existed insufficient evidence to prove that the letters he authored, more particularly the letter of December 3, 2003, were maliciously written and published.

Conclusions of Law

The defamation law in the Commonwealth of Pennsylvania is based upon the balancing of one's right to protect reputation and another's right to free speech. The cases cited by this Court follow that concept.

1. An injunction hearing in the above matter was held before the Honorable Eugene Edw. J. Maier in 2005. At this hearing, he found that an agreement was entered into between Defendant Morgan and Plaintiffs, in which Morgan agreed to cease and desist from publishing any further defamatory materials. The matter was appealed to the Superior Court, which affirmed the part of Judge Maier's finding that there was a valid settlement agreement. The Plaintiffs have the

burden of proof of breach of any of the terms of this settlement agreement by a fair preponderance of the evidence.

2. In a pretrial motion, the Honorable Peter F. Rodgers of this Court found that the Plaintiffs, for the purpose of this defamation suit, were limited purpose public figures because of the extensive advertising of their Lasik procedure. *American Future v. Better Business Bureau*, 923 A.2d 389 (Pa. 2007). The Plaintiffs advertised on KYW, *Philadelphia Magazine*, in brochures, and TV videos. This Court agrees with the ruling of Judge Rodgers.

Plaintiffs argue that they are not limited purpose public figures because they never interjected themselves into any controversy involving Lasik surgery. This Court respectfully disagrees. The *American Future* case holds that extensive advertising can be sufficient to create a limited purpose public figure. Therefore, in order to impose liability on the part of Defendant Friedman, the Plaintiffs are obligated to prove malice in authoring and publishing his letters to the FDA. Malice is defined as publication with knowledge that the material is false or made with a reckless disregard for, or serious doubts of, the truth. *Norton, et al. v. Glenn, et al.*, 860 A.2d 48 (Pa. 2004).

3. Although the Plaintiffs' burden of proof as far as breach of the settlement agreement is by a fair preponderance of the evidence, proof of any subsequent publication on the part of Morgan that was not encompassed by the agreement is subject to the malice standard of proof.
4. The burden of proof of malice is a substantial one, and not easily shown. It must be established by clear and convincing evidence. *Bartlett v. Bradford Publishing, Inc.*, 885 A.2d 562 (Pa. Super. 2005); *Blackwell v. Eskin, et al.*, 916 A.2d 1123 (Pa. Super. 2007).
5. Friedman's attorney argues that there was an absolute privilege in the publishing of the aforementioned four letters because they were sent to an administrative agency and pertained to the underlying malpractice case brought by Morgan against the Plaintiffs. *See, Norton, supra.*

This privilege, however, does not extend to the publication of the letters by Morgan. In analyzing the liability of Friedman, this Court has to determine whether Friedman was malicious in turning the letters over to his client knowing that they would be published. *Post v. Mendel*, 507 A.2d 351 (Pa. Super. 1986).

Additional Findings of Fact

1. As stated above, Defendant Morgan suffered from “premature retinopathy.” After learning of Plaintiff’s advertisements for Lasik surgery, he went to them for treatment. He was operated on by Dr. Anita Nevyas-Wallace, using their excimer laser in April of 1998. Prior to undergoing the surgery, he was examined by retina specialist Edward Deglin, who approved him for the surgery. Dissatisfied with the results, Morgan brought suit against the Plaintiffs in April of 2000, in which he was represented by the co-Defendant, Steven A. Friedman, M.D., J. D., L.L.M., both a physician certified in internal medicine and an attorney. The suit alleged medical malpractice and lack of informed consent in that he was not an appropriate candidate for the surgery because his best corrected visual acuity was below standard. False advertising was also alleged in violation of the Pennsylvania Consumer Protection Law. After the grant of Summary Judgment motions on the advertising and informed consent claims, Friedman agreed to transfer the matter to arbitration/A.D.R. In June of 2003, the arbitrator found in favor of Plaintiff, and in a high-low agreement, Morgan received the low sum of \$100,000.00.
2. Some time in July of 2003, Defendant Morgan created a website, lasiksucks4u.com, wherein he published certain defamatory material such as that the Plaintiffs were “ruthless, uncaring, and greedy.” Later in the summer of 2003 Morgan published another website statement, accusing Plaintiffs of a “cover-up.” The full text of these publications is incorporated in this Court’s Findings of Facts and Conclusions of Law.

3. During the pendency of the underlying malpractice case, Friedman, at the request of his client, authored three letters to the FDA, dated December 20, 2001, January 4, 2002, and August 10, 2002, making complaints against the Plaintiffs for violation of the FDA regulations governing the I.D.E. (investigational device exemption) involving the use of Plaintiffs' excimer laser. He referred to the device as a "rogue" device, a "black box," and further accused the Plaintiffs of false advertising.¹ He gave copies of the letters to his client, who published them on his website on or about the summer of 2003. These letters are also part of the Court's Findings of Fact and Conclusions of Law.
4. It was Friedman's belief that the physicians had used this device, first without FDA approval and later when Plaintiffs received approval to use the laser as an I.D.E. in August of 1997, they failed to follow proper protocol. One of Friedman's allegations involved the failure of the Plaintiffs to report patients' adverse events.
5. The evidence at trial indicated that Plaintiffs were using this device prior to making an I.D.E. application. The application was approved in the summer of 1997, prior to Morgan's surgery of April of 1998. They had operated on approximately 200 patients prior to approval because they believed that it was a custom device, and therefore the application was not necessary. The evidence presented at trial was insufficient to show that Plaintiffs were ever sanctioned for this conduct.
6. Upon learning of Morgan's internet publications, the within suit was instituted against him in November of 2003. Friedman initially represented Morgan in this suit. Friedman did not learn of the internet publications, including his first three letters, until the middle of November of 2003, after a preliminary injunction request was made by the Plaintiffs. He then authored his fourth and final letter, dated December 4, 2003, to the Office of Criminal Investigation of the FDA. In

¹ A "black box" is a FDA term for a device which does not have FDA approval.

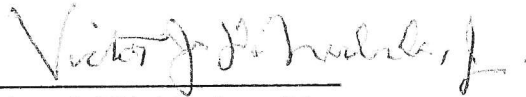
the letter, he accused the Plaintiffs of "possible outright criminal activity." He also made similar complaints of violations of FDA regulations, first by operating without an I.D.E., and then failure to follow proper I.D.E. protocol.

7. At the time Friedman authored this letter, he believed that Plaintiffs were still using the excimer laser, when in fact they had terminated its use sometime in 2001. From extensive discovery in the underlining malpractice case, he received information that protocol had not been followed, not just for his client, but for two other patients. Friedman was frustrated that he had not received any response from the FDA. He contacted an FDA ombudsman, who advised him to write to the Director of the Office of Criminal Investigation. The letter of December 4, 2003 was precipitated by this discussion. It was authored months before he was joined as an additional defendant in this case.
8. He furnished a copy of this letter to his client without any admonition about publication. Morgan published this letter, as he had the first three letters, on the internet shortly thereafter. On or about this time, he also published a letter dated July 15, 2003, to the Honorable Frederica Messiah-Jackson, then the President Judge of the Court of Common Pleas of Philadelphia County, complaining about his treatment by the Plaintiffs and the Court System. This letter was also made part of this Court's findings.
9. This Court finds that Friedman's role in the publication of these letters, including the letter of December 4, 2003, was done without malice. It is true that Friedman must have had reason to know that Morgan would publish this letter on his website, because he had done so with the previous three. This knowledge, however, did not constitute malice. First, he was Morgan's attorney. He had written these letters at Morgan's direction. As such, his client had a right to these copies. Second, this Court finds that there was a belief by Friedman that the Plaintiffs were in fact violating I.D.E. protocol. Plaintiffs' counsel argued that any information involving

violations was stale in that Plaintiffs had stopped using this device in 2001. This fact is not sufficient to convince this Court that Friedman's aims were malicious in nature. In addition, the demeanor of Friedman, both on the witness stand and throughout the trial, supports this conclusion. Consequently, the Plaintiffs have failed to prove malice against Defendant Friedman in both the authoring of the letters, and his role in the publication of the fourth letter.

10. This Court finds that the material published by Morgan was defamatory and that he had previously agreed to withdraw it from the various websites and to refrain from making further publications. Morgan has maintained that he has not breached this agreement. This Court finds that there was insufficient proof that there was a breach of this agreement. In order to protect the Plaintiffs in the future, however, this Court has issued an injunctive order barring further publication of this defamatory material.

BY THE COURT:



Victor J. DiNubile, Jr., S.J.

March 16, 2011

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

HERBERT J. NEVYAS, M.D. and ANITA	:	
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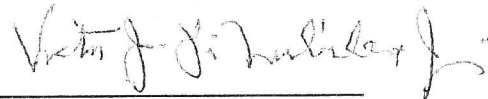
ORDER

As a result of a settlement agreement entered into between the parties based on a finding of the Honorable Eugene Edw. J. Maier of the Court of Common Pleas of Philadelphia County in 2005 (affirmed in pertinent part by the Superior Court in *Nevyas, et al. v. Morgan, et al.*, 921 A.2d 8 (Pa. Super. 2007)) and this Court’s findings arising from the defamation trial held in this matter from March 7, 2011 – March 14, 2011, it is **ORDERED** that the following equitable relief is **GRANTED** in favor of the Plaintiffs, Herbert J. Nevyas, M.D., Anita Nevyas-Wallace, M.D., and Nevyas Eye Associates, P.C. (hereinafter referred to collectively as “Plaintiffs,” unless otherwise indicated) and against Defendant Dominic Morgan:

1. Defendant Dominic Morgan is precluded from past or future publishing of any defamatory material pertaining to and against Plaintiffs, particularly regarding their professional actions as ophthalmologists and Lasik surgeons on any website owned, operated, controlled, or possessed by Defendant Dominic Morgan. This Order is specifically directed to but not limited to the following websites: lasiksucks4u.com, lasikdesign.com, flawedlasik.com, nevyaslasik.com, herbertnevyaslasik.com, nevyas-v-morgan.com, lasiksucks4u2.com, and lasikliberty.com.
2. An example of the type of defamatory statements enjoined by this Order, but not limited thereto are:
 - a. Statements that the Plaintiffs are “ruthless, uncaring, and greedy,”
 - b. Statements that the Plaintiffs were involved in a Lasik “cover-up” pertaining to Dominic Morgan,
 - c. Statements that the Plaintiffs “lied” or were deceitful to Dominic Morgan,

- d. Statements that there was "hush money" paid by the Plaintiffs,
 - e. Statements to the effect that the excimer laser used by Plaintiff Anita Nevyas-Wallace, M.D. for Defendant Dominic Morgan's Lasik surgery was not approved by the FDA. (At the time of Defendant Dominic Morgan's surgery in April of 1998, this device was under regulation by the FDA as a I.D.E. (investigational device exemption)),
 - f. Statements to the effect that the Plaintiffs are a disgrace to their profession,
3. Defendant Dominic Morgan is precluded from publishing the letters of December 20, 2001, January 4, 2002, August 10, 2002, and December 4, 2003, sent by Defendant Steven A. Friedman to the FDA.
 4. Defendant Dominic Morgan is also precluded from further publication of his letter of July 15, 2003 to the Honorable Frederica Massiah-Jackson, then the President Judge of the Court of Common Pleas of Philadelphia County.
 5. Any future publication in violation of this Order, after due notice to Defendant Dominic Morgan and after hearing before this Court in which a finding is made that there is such a violation, shall result in a finding of civil contempt of Court and imposition of appropriate sanctions.

BY THE COURT:



Victor J. DiNubile, Jr., S.J.

MARCH 16, 2011