PHILADELPHIA COURT OF COMMON PLEAS

PETITION/MOTION COVER SHEET

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CONTROL NUMBER: 09062101

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November (*Month*) Term, 2003 (*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 *(see list on reverse side)*	PETITION/MOTION CODE *(see list on reverse side)*
MOTION/PETITION REPLY FILED	REPLM

ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):
MTMIS - MISCELLANEOUS MOTION

I. CASE PROGRAM

NON JURY PROGRAM

II. PARTIES *(required for proof of service)*
(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.)

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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.

(Attorney Signature/Unrepresented Party)	August 3, 2009 *(Date)*	LEON W. SILVERMAN *(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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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.	:	

PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT FRIEDMAN'S MOTION CONCERNING PLAINTIFF'S PUBLIC FIGURE STATUS

Defendant Friedman is asking the Court to raise the burden of proof on two doctors and their private practice, whom Friedman defamed by accusing them of unethical conduct and "outright *criminal* activity," by arguing that Plaintiffs should be deemed limited purpose public figures. Friedman is asking the Court to rule that a plaintiff may be found to have thrust himself into the vortex of a public controversy when not one of the articles allegedly comprising that controversy has ever even mentioned the plaintiffs' name, and to hold, that through that non-existent participation, a private figure may be transformed into a public one. Such a decision would be a novel one, not supported by any authority.

Friedman's dispute with Nevyas is not part of a public controversy. Rather it is a wholly private dispute which began with Friedman losing his case against Nevyas in this Court. Friedman then viciously attacked Nevyas, accusing Nevyas of unethical and criminal conduct. This case is about Friedman's private vendetta against Nevyas, two private individual doctors

and their practice. There is no evidence to show that Friedman's conduct in falsely defaming Nevyas is anything other than a private, personal attack.

Friedman, in his Reply Brief fails to address the numerous factual and legal failures in his initial Memorandum, and he fails to do so because these failures cannot be remedied. He cannot turn his personal, private dispute with Nevyas into a public one. Instead of addressing his failures, Friedman claims that Nevyas has asked the Court to ignore American Future Systems, Inc. v. Better Bureau of Eastern Pennsylvania, 923 A.2d 389 (Pa. 2007). Friedman's assertion is untrue. Nevyas discusses this case in detail in its initial Memorandum, see pages ___.

The *American Future* Case Does Not Change the Requirement that Before Private Parties May Be Deemed Public Figures They Must Thrust Themselves to the Forefront of Some Public Controversy:

The American Future case does not change the law concerning when a defamation plaintiff may become a limited purpose public figure. American Future does not overrule the requirement set forth by the United States Supreme Court in Gertz that a defamation plaintiff does not become a public figure unless they have "voluntarily thrust themselves into the vortex of the public controversy." Rather, consistent with Gertz, and citing Gertz, the Court in American Future simply holds that a defamation plaintiff's advertising can be the means by which they thrust themselves into the public controversy.

Friedman grasps onto the idea that advertising may make a defamation plaintiff a public figure without any acknowledgement that the Gertz requirement continues to apply. Friedman asks this Court to find that a "plaintiff can now become a limited purpose public figure either by participating in a pre-existing public controversy ***or*** by virtue of their own activities, particularly with respect to widespread public solicitation and advertisements." Friedman Reply Brief at 1-2. American Future does not support this dichotomy. Indeed, it specifically rejects it.

The Court in American Future explains that "extensive promotional advertising" by itself is not sufficient. A court must also find a "direct relationship between the promotional message and the subsequent defamation (indicating plaintiff's pre-existing involvement in the particular matter of public concern and controversy.)" American Future at 403. The Court never held that a plaintiff could become a public figure either by the public controversy route or by advertising. To the contrary, the Court required the advertising to be part and parcel of "plaintiff's pre-existing involvement" in the "particular" public controversy. Thus, the mere fact of advertising, even far more extensive advertising than that done by Nevyas, will not transform a private figure into a public one. There must be a close "subject-matter nexus" between the defamation, the advertising and the public controversy. Id.

Nothing in American Futures saves Friedman from his evidentiary and legal failures. American Futures, like the cases which came before it, requires Friedman to establish (1) the existence of an actual public controversy; (2) that Nevyas thrust themselves into the vortex of the particular public controversy, and (3) that the public controversy, the advertising and the defamatory statements are all directly related. Friedman cannot clear any of these hurdles.

Friedman Ignores The Obstacles Which He Cannot Overcome:

Friedman asks this Court to find that the two doctors and their private medical practice are public figures rather than private ones, and thereby increase the burden of proof on these doctors at trial. The evidence, however, is clear that Nevyas is not part of any controversy other than the private one created by Defendants' virulent attacks on Nevyas' reputation -- the revenge Defendants took after this Court rendered a defense verdict on Defendants' case against Nevyas. Friedman's defamatory statements are particularly outrageous, accusing Nevyas of unethical behavior and "outright *criminal* activity." There is no precedent authorizing this Court to raise

the evidentiary standard on private figures who are victims of a purely private vendetta. A private figure cannot become a public one through any controversy created by the Defendants. Iafrate v. Hadesty, 621 A.2d 1005, 1008 quoting Hutchinson v. Proximate, 443 U.S. 111, 135 (1979.) Nevyas are not the subject of any article not published by either Friedman or Morgan. Rather, Nevyas are private figures who did nothing to assume the risk of unfair comment. The Court should not raise the evidentiary standard. Friedman's Motion should be denied.

1. **No Public Controversy Exists:**

The fact that no public controversy exists at all -- let alone involves Nevyas -- defeats Friedman's motion. Friedman concedes that there is not one newspaper article ever published that mentions Nevyas and Friedman. A controversy cannot be public if it does not even attract a modicum of public attention from any publication not authored by the parties. The general public has no interest in the dispute between Nevyas and Friedman. Friedman further concedes that not one newspaper article discussing the "public controversy" as he defines it -- general concern over the safety of LASIK (Reply Brief at 3) -- ever mentions Nevyas. A private figure cannot be deemed a public figure based upon a total lack of involvement in a public controversy.

More basically, a general concern over the safety of LASIK is just that -- a concern. It is not a public controversy. An actual public controversy "must be **a real dispute**, **the outcome** of which **affects the general public** or some segment of it in some appreciable way." Joseph v. Scranton Times, L.P., 959 A.2d 322, 340 (Pa. Super. 2008.), emphasis added. To determine whether a controversy indeed exists "the judge must examine whether persons actually were discussing some specific question. A general concern or interest does not suffice." Id. The articles cited by Friedman on the general topic of LASIK are not evidence of a "public controversy" because they are not focused on any "specific question" and they do not argue for

any particular "outcome." Only "[i]f the issue was being debated publicly and if it had **foreseeable and substantial ramifications for non-participants**" is it a "public controversy." Rutt v. Bethlehem's Globe Publishing Co., 484 A.2d 72, 81 (Pa. Super. 1984.) emphasis added.

A controversy, by definition, has at least two opposing sides, debating over what the outcome should be to a specific question. Friedman fails to identify the sides, to identify the debate, to identify the possible outcomes being debated, or to identify any specific question. The articles cited by Friedman may be evidence of a general concern or interest; they are not evidence of a public controversy.

Friedman cites Medure v. The New York Times Company, 60 F.Supp.2d 477 (W.D. Pa 1999), a case involving a casino magnate's involvement in organized crime. Medure presents an excellent example of when a defamation plaintiff becomes so involved in an actual public controversy that he becomes a limited purpose public figure. In Medure, the Court analyzed the articles at issue -- **all of which specifically discussed Medure** as the owner and operator of several casinos on Indian Reservations (Medure at 482-483) -- "to isolate the public controversy addressed in the articles and to assess Medure's own role in the controversy." Medure at 485. In Medure every article that comprised the controversy over casinos on Indian Reservations devoted at least a "significant portion" of the article to Medure who was a major player involved in developing and managing many such casinos and attempting to continue such development. Medure at 482-483.

The Court, therefore, refused to hold that the public controversy concerned only one of Medure's casino projects (the Fountaingrove) but concerned Medure's involvement in all his casino projects. Medure at 485: "[w]e conclude that part of what was controversial about the Fountaingrove project was what effect the casino's development might have on the area,

including whether such a facility might attract the involvement of organized crime." Id. "Thus, Medure's past business activities with individuals later determined to be involved with organized crime . . . were germane to the controversy being reported in the [newspaper.]" Id. Following the articles the specific outcome was achieved -- the Fountaingrove project was rejected by local officials. Id. at 483.

Significantly, Medure was discussed in every article which comprised the controversy and the controversy, no matter how defined, was focused on Medure. By contrast, Nevyas is not mentioned in any article which comprises the controversy, no matter how Friedman defines it, and the controversy, no matter how Friedman defines it, is not focused on Nevyas.

Friedman confuses Nevyas' argument concerning the necessary relationship between the defamatory statements and the "public controversy" with the scope of the controversy. Nevyas is not arguing that the scope of the public controversy identified by Friedman is too broad, rather Nevyas is arguing (1) that no such public controversy (as opposed to public concern or interest) exists, (2) that Nevyas have not thrust themselves to the vortex of any such public controversy, no matter how Friedman attempts to define it, and (3) that Friedman's defamatory statements do not fall with the context of any such public controversy.

2. Nevyas Did Not Thrust Themselves Into Any Public Controversy:

"[A] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Rutt v. Bethlehem's Globe Publishing Co., 484 A.2d 72, 81 (Pa. Super. 1984.) Rather a person becomes a limited purpose public figure only if "he is attempting to have, or realistically can be expected to have, a **major impact on the resolution of a specific public dispute** that has foreseeable and substantial ramifications for persons beyond its immediate participants." Id. at 80, emphasis

added. This language, of course, is simply another way of phrasing the requirement in Gertz that a person must "voluntarily thrust themselves into the vortex of the public controversy." See also Medure at 484 ("the court must first determine 'the nature and extent of an individual's participation in the **particular controversy giving rise to the defamation.**'") Emphasis original.

Medure, is a prime example of a defamation plaintiff who meets this definition -- he was a principal player in opening and managing casinos on Indian Reservations and his ties to organized crime were of public concern. Nevyas, by contrast, did not even garner a mention in any of the articles which Friedman claims evidence a public controversy, let alone assume the role of a principal player. Nevyas is not a public figure in the controversy Friedman claims existed or in any other public controversy.

While "mere newsworthiness" is not enough to create a public controversy (Joseph v. Scranton Times, L.P., 959 A.2d 322, 340 (Pa. Super. 2008)) a complete lack of newsworthiness eviscerates any claim that Nevyas is a public figure. Nevyas have not thrust themselves to the vortex of any public controversy, no matter how Friedman chooses to attempt to define that controversy. Not one of the newspaper articles which comprise the alleged public controversy even mention Nevyas.

Friedman complains that Nevyas fails to come forward with any legal authority for the proposition that "there must first be a written publication which specifically mentions a plaintiff before he can be viewed to have voluntarily injected himself into a public controversy." Reply Brief at 4. To the contrary, **every case** which discusses whether a defamation plaintiff has become a public figure discusses the relationship between the plaintiff and the public controversy. Some plaintiffs, such as those in Joseph, Iafrate v. Hadesty, 621 A.2d 1005 (Pa.

Super. 1993), or Computer Aid, Inc. v. Hewlett Packard Company, 56 F.Supp.2d 526 (E.D.Pa. 1999), for example, appeared in the newspaper but were not found to be public figures. Others, like Medure, were such a focus of the particular public controversy that they were deemed public figures. As far as Nevyas is aware, no case exists in which the defendant claimed that plaintiff was a limited purpose public figure when no newspaper or other public interest publication ever mentioned the plaintiff's name. The very essence of what makes a person into a public figure is public attention -- media attention. Thus, the Superior Court's instruction to look to whether the newspapers were covering the debate. Joseph at 340.

3. **No Nexus Exists Between Any Public Controversy, Nevyas' Advertising and Friedman's Defamatory Statements:**

No matter how Friedman chooses to define the alleged "public controversy," no connection exists between Friedman's defamatory statements and that alleged controversy._ Friedman's defamatory statements do not concern the general safety of laser surgery -- the "public controversy" that Friedman alleges existed. See Freedman's Reply at 4. Rather, Friedman defamed Nevyas by stating that Nevyas was engaged in "outright *criminal* activity" requiring "urgent" action and that Nevyas was unethical. Friedman offers no nexus between his defamatory statements and the alleged "public controversy" over the general safety of laser surgery, and indeed no such nexus exists.

The controversy between Friedman and Nevyas is a private controversy. Only the advent of the internet allowed Friedman's defamatory statements their devastating scope. No news outlet or public consumer advocacy group ever mentioned Nevyas -- there was simply no public interest in Nevyas or in Friedman. Nevyas is not part of any public discussion let alone any public controversy. Rather he is the victim of Friedman's private vendetta.

To the extent that Friedman could be seen to argue that a public controversy existed concerning doctors using lasers not approved by the FDA, Friedman's arguments still cannot clear the factual and legal hurdles. First, Friedman cites to a grand total of four such articles, one from 1995, two from 1996 and one from 1998 -- again not a raging public controversy by any means. Further, only one of the articles was published by a general news outlet, the other three are in medical journals. See Hemispherx Biopharma, Inc. v. Asensio, 55 Pa. D&C 4th 502 (Pa.Com.Pl.)(Sheppard, J.) which declines to find that the plaintiff is a public figure despite the fact that its product was discussed in over two-hundred (200) such medical journals.

Moreover, these scant four articles were all published long before Friedman wrote his defamatory letter to the FDA in December 2003 or his defamatory letters to the American Academy of Ophthalmology in June 2005. Thus even if a "public controversy" could be found to exist based upon the existence of four articles, that controversy ended in 1998, more than five (5) years and seven (7) years before Friedman wrote his defamatory letters.

Further, even using a doctor's use of an unapproved laser as the public controversy, no subject-matter nexus exists between that public controversy, Friedman's defamatory statements and Nevyas' advertisements. Nevyas had been using a laser under an investigational device exemption (IDE) from the FDA so the FDA was aware of Nevyas' actions and furthered them by granting Nevyas the IDE. Nevyas then terminated his IDE and purchased a commercially manufactured FDA approved laser for his own use. Friedman, as he admits in his letter to the FDA, was aware that the IDE was no longer ongoing. Yet, Friedman accuses Nevyas of "outright *criminal* activity" requiring "urgent" action. Friedman is clearly implying that Nevyas is currently actively engaged in some nefarious criminal conduct, otherwise the need for action would not be "urgent." Friedman's defamatory statements are simply too far removed from any

public controversy, both temporally and contextually, to clear the evidentiary hurdles necessary to turn two physicians and their private practice into public figures.

Friedman makes many misstatements of fact and he fails to support his factual assertions with any citation to the record. None of his factual misstatements, however, are germane to the issue before the Court. Rather than bog the Court down by correcting these misstatements as part of this Motion, Nevyas has chosen to stay focused on the issue before the Court. Nevyas will correct Friedman's misstatements at the appropriate time with actual evidence of record. For the meantime, Nevyas begs the Court not to be swayed by Friedman's false factual assertions.

CONCLUSION:

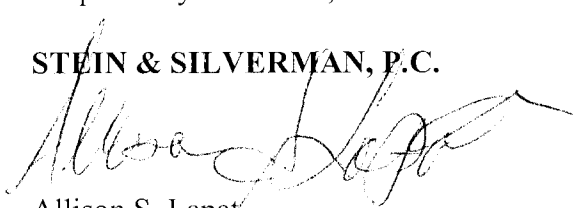
Herbert J. Nevyas, M.D., Anita Nevyas-Wallace, M.D. and their practice are not public figures. They were not involved in any public controversy. The record is bare of any article published by anyone other than Defendants which mentions Nevyas or Friedman or Morgan or their dispute. Friedman's defamatory statements are not related to any public controversy. They are vicious attacks, accusing Nevyas of "outright *criminal* activity" requiring "urgent" action and of unethical conduct. No public controversy is present. Rather, what is before the Court is evidence of a private vendetta by Defendants against Nevyas. They could not win their case in court so they took brutal revenge on the internet.

Friedman is now attempting to raise the standard by which Nevyas must prove their case by asking this Court to find that these doctors and their practice are public figures. Friedman is asking this Court to hold to a novel concept: to hold that a plaintiff may be found to have participated in a public controversy when not one of the articles allegedly comprising that controversy has ever even mentioned the plaintiffs' name, and to hold that through that non-

existent participation a private figure may be transformed into a public one. Nevyas are private figures and the Court should not find otherwise.

Respectfully submitted,

STEIN & SILVERMAN, P.C.



Allison S. Lapat

CERTIFICATE OF SERVICE

I, Florence R. Falace, Legal Assistant, hereby certify that I have caused a true and correct copy of the Plaintiffs' Sur-Reply Memorandum relating to the issue of wtether or not plaintiffs are limited to purpose public figures, be served via first class mail postage prepaid to the following individual listed:

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