PHILADELPHIA COURT OF COMMON PLEAS

# PETITION/MOTION COVER SHEET

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

**CONTROL NUMBER:** 09111466

***(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)***

November (*Month*) Term, 2003 (*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 *(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):
MTCIA - MOT-CERTFY ORDER INTERLOC APPL

**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)* | December 23, 2009 *(Date)* | MAUREEN P. FITZGERALD *(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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**ATTORNEYS FOR DEFENDANT**
Steven A. Friedman, M.D., J.D., LL.M.

| | | |
|---|---|---|
| HERBERT J. NEVYAS, M.D.<br>ANITA NEVYAS-WALLACE, M.D.,<br>NEVYAS EYE ASSOCIATES, P.C.<br>Plaintiffs,<br><br>v.<br><br>DOMINIC MORGAN<br>STEVEN FRIEDMAN<br>Defendants. | : | COURT OF COMMON PLEAS<br>PHILADELPHIA COUNTY<br><br>NOVEMBER TERM, 2003,<br>No. 00946 |

**SUR-REPLY OF DEFENDANT STEVEN A. FRIEDMAN, M.D., J.D., LL.M. IN OPPOSITION 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 Sur-Reply in Support of His Opposition to Plaintiffs' Motion to Amend this Honorable Court's October 14, 2009 Order and Certify it for Purposes of Taking an Interlocutory Appeal.

## I. ARGUMENT

Plaintiffs' Reply continues to ignore the proper standard for determining whether an interlocutory appeal should be permitted. Plaintiffs argue that an interlocutory appeal is warranted because the public figure determination is "a controlling question in this litigation" and that the Court's finding has "a profound effect on this litigation." That argument ignores the proper standard under 42 Pa.C.S.A. §702(b). Indeed, if Plaintiffs' argument were accepted, then

any significant ruling by a trial court which decides an important issue or which effects the parties in a case, would be grounds for an interlocutory appeal.

An order is appropriately certified for interlocutory appeal only in the narrowest of circumstances, and specifically where it 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. Most often, this involves novel questions of law, issues of first impression, or concerns of a constitutional nature. See Darlington, et al., *Pennsylvania Appellate Practice*, §1311:6.

Determination of a plaintiffs' public figure status does not involve novel questions of law, concerns of a constitutional nature, and is not an issue of first impression. Plaintiffs have not – and cannot – cite to any courts which have a difference of opinion as to the law applicable to this determination. Indeed, the Pennsylvania Supreme Court reiterated the applicable law in its recent decision in *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania, 923 A.2d 389, 404 (Pa. 2007).*

In their Reply, Plaintiffs cite several cases where an interlocutory appeal has been granted, however, none involve a plaintiff's public figure status in a defamation case. *Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181 (Pa. Super. 1988)* involved a constitutional question and specifically considered whether a private right of action existed for breach of the Pennsylvania Constitution. In *Jennings v. Cronin, 389 A.2d 1183, 1185 (Pa. Super. 1978)*, an interlocutory appeal was granted to consider a question of first impression in Pennsylvania – whether a witness before a legislative committee was covered by absolute privilege. In *Ford Motor Co. v. Buseman, 954 A.2d 580 (Pa. Super. 2008)*, the trial court did not certify its order under 42 Pa.C.S.A. §702(b), however the Superior Court granted an appeal by permission Pa.R.A.P. 1311(b), to address a novel question of law regarding the interpretation of a general

release signed by an administratrix of an estate. In *In re Consolidation Coal Sales Company, et al, 932 A.2d 341 (Pa. Cmwlth. 2007)*, a divided State Mining Commission (not a court) allowed an interlocutory appeal of its determination of the date of a "taking" for eminent domain purposes, where the Commission members were split on this very issue. Finally, in *Mullin v. Com., Dept. of Transportation, 870 A.2d 773 (Pa. 2005)*, the court considered an interlocutory appeal of a novel question of law involving the interplay of the Transfer of State Highways Act, 75 Pa.C.S. §§9201-08 and the real estate exception under Sovereign Immunity Act, 42 Pa.C.S. §§8521-28. None of these cases have any relevance to the issue before this Court.

## II. CONCLUSION

Plaintiffs have failed to set forth any basis by which this Court should allow the extraordinary remedy of an interlocutory appeal of its October 14, 2009. The fact that Plaintiffs may ultimately appeal after trial is of no consequence. After trial, Plaintiffs and Defendants may then bring any and all issues to the forefront with the appellate court, including the plaintiffs' public figure status. 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

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Dated: December 23, 2009

## CERTIFICATE OF SERVICE

I, Maureen P. Fitzgerald, Esquire, do hereby certify that on this 23rd day of December, 2009, I caused a true and correct copy of Defendant Steven A. Friedman, M.D., J.D., L.L.M.'s Sur-Reply in Support of his 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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