

# Public Participation Project

Fighting for Free Speech

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March 25, 2014

Senator Lawrence M. Farnese, Jr.  
543 Main Capitol Building  
Harrisburg, PA 17120

Re: Support for Senate Bill No. 1095

Dear Senator Farnese:

The Public Participation Project (PPP) is a national non-profit organization dedicated to protecting citizens from lawsuits designed to chill their ability to communicate with their government or speak out on issues of public interest. These lawsuits are known as Strategic Lawsuits Against Public Participation (SLAPPs). SLAPPs are brought not to vindicate legal rights, but to harass and intimidate, and to divert attention and resources away from the underlying public issue. Such lawsuits turn the justice system into a weapon and have a serious chilling effect on free speech.

Because many states still do not provide sufficient protections for such speech and petitioning activities, PPP is working to pass federal anti-SLAPP legislation in Congress. A federal anti-SLAPP bill will provide a streamlined procedure to dismiss lawsuits designed to chill public participation. PPP has built a coalition including over one hundred organizations and businesses, as well as prominent individuals, who support federal anti-SLAPP legislation. PPP also assists in efforts to pass anti-SLAPP legislation in the states, and it monitors SLAPP developments in legislatures and courts across the country. PPP provides online educational resources, including a collection of state speech laws and First Amendment scholarship, and provides commentary on current SLAPP cases and legislation.

## **SB 1095 Would Add Important Protections to Pennsylvania's Anti-SLAPP Law**

The Pennsylvania Legislature recognized the problem of SLAPPs when it enacted its anti-SLAPP legislation in 2000, noting, "[i]t is contrary to the public interest to allow lawsuits ... to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances." H.B. No. 393, 184th Reg. Sess. (2000).

However, Pennsylvania's anti-SLAPP law is exceedingly narrow, protecting only against lawsuits brought on the basis of statements made about ongoing environmental regulation and compliance. To be protected, statements must be geared toward affecting a favorable government outcome, whether addressed to the government body with jurisdiction, or to a third party if there is a reasonable likelihood the statements will result in a favorable government outcome. 27 Pa. Cons. Stat. §§ 7707, 8301-05. Although this is important protection, it leaves those who speak out on issues other than the environment vulnerable to lawsuits designed to silence their public participation.

This is why PPP supports SB 1095. SB 1095 will protect Pennsylvanians who engage in petition and speech in connection with an issue of public interest, no matter where they speak out. Specifically, SB 1095 protects against SLAPPs by:

1. Broadly defining protected speech to include statements about any public issue, not just environmental issues;
2. Providing a procedure for quick dismissal, and limiting or prohibiting discovery in a SLAPP;
3. Providing for potential attorney's fees and costs for a defendant who successfully has the case dismissed.

Organizations and individuals from Pennsylvania have publicly supported federal anti-SLAPP legislation, which includes broad protections similar to those contained in SB 1095. Among those supporters are the Pennsylvania Center for the First Amendment, Pennsylvania Freedom of Information Coalition, Pennsylvania NewMedia Association, and Robert D. Richards, Distinguished Professor of Journalism and Law at Penn State University.

### **SLAPPS in Pennsylvania**

Pennsylvania has been home to troubling SLAPP suits over the past 20 years that demonstrate the tremendous need for this important legislation. If Pennsylvania had a strong anti-SLAPP law on the books, these SLAPP targets could have potentially gotten these baseless suits dismissed quickly and relatively painlessly. Below are just a few examples of SLAPPs that have affected citizens of Pennsylvania:

In 2009, parents of children in an online charter school raised issues in their online chat room about management and improper relationships between management and the board of directors. The head of the school responded by suing six of the parents for defamation, alleging \$150,000 in damages. See attached Exhibit A.

In December of 2008, the Philadelphia Inquirer ran a story about Chester Charter School, raising issues of the school's use of public funds. In January of 2009, the operator of the charter school sued the paper, along with an editor and three reporters, for defamation and other claims. See attached Exhibit B.

In 1996, medical services provider Beverly Enterprises sued a nurses union for malicious defamation in the publication of fliers and radio statements about safety issues and the ongoing labor dispute between the union and the medical services company. See attached Exhibit C.

In 1997, the same medical services provider sued the local president of the Service Employees International Union, accusing her of defaming an executive of the company in a one-on-one confrontation at a rally and at an informal town hall meeting called by five members of Congress. See attached Exhibit D.

In 1998, Dominick Morgan had LASIK surgery performed by father and daughter doctors, the Nevyas. Thereafter, he was left legally blind. Morgan started a website, Lasiksucks4u.com, on which he chronicled his treatment and experience, and made specific references to the Nevyas. The Nevyas sued. The Nevyas then added Morgan's attorney as an additional defendant in a second amended complaint, alleging defamation based on letters his attorney wrote to the U.S. Food and Drug Administration that Morgan had posted on his website. See attached Exhibit E.

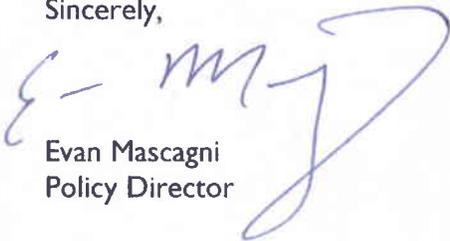
If Pennsylvania had a strong anti-SLAPP law, defendants like those above could have filed an anti-SLAPP motion early on in the case, potentially getting it dismissed early without incurring substantial attorney's fees.

### Conclusion

In today's world, financial health, public safety, environmental well-being, national security, and government accountability all demand an active, engaged citizenry. Technology now facilitates this vital discourse and, makes it possible for everyone to don the hat of journalist, editor, town crier or anonymous pamphleteer. SB 1095 is particularly timely: it protects and encourages critical open dialogue, whether that speech takes place in the town square, on a cable news network, or a blog or consumer review website.

The Public Participation Project is proud to support SB 1095.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E- MJ', is written over the typed name and title.

Evan Mascagni  
Policy Director

EXHIBIT A

# Slander or freedom of speech? A charter school's founder sued parents over pointed e-mails. Some see First Amendment issues.

By Martha Woodall INQUIRER STAFF WRITER  
POSTED: February 09, 2009

For months, parents from the Agora Cyber Charter School in Devon were e-mailing about their difficulties obtaining information on the financial arrangement between the school's founder and her management company.

"I have not given up my fight to clean up this mess. As a taxpayer, I will not rest . . . until legal authorities have dealt with June Brown and her funneling of public funds directly into her pocket," parent Gladys Stefany of Milford, Pike County, wrote in a Dec. 17 message to an online group of Agora parents.

Stefany says she thought she was making a legitimate comment about the woman who founded her daughter's taxpayer-funded school.

Dorothy June Brown responded by suing Stefany and five other parents for defamation, accusing them of slander, libel and civil conspiracy. The suit also names the Agora Parent Organization and unnamed others.

The suit, which seeks more than \$150,000 in damages, raises questions: When does criticism of a public official cross the line? And when does a lawsuit against the critics become an attempt to stifle free speech?

A suit aimed at quashing public debate or stopping criticism of officials is known as a "strategic lawsuit against public participation" (SLAPP). First Amendment experts and some legal scholars say such suits have a chilling effect on free speech.

"They are often going after people who have no money to pay damages or anything," said David Kalrys, a professor of constitutional law at Temple University. "They have nothing to gain but to shut them up. It's the classic chilling effect."

Such suits "strike at the very core of our democracy because they do discourage ordinary citizens from participating in matters of public importance," said Paul K. McMasters, former First Amendment ombudsman at the Freedom Forum in Arlington, Va.

The Agora parents said they believe they are targets of a SLAPP.

The attorney who represents Brown and her management company disagreed.

"It is a defamation suit," attorney Wendy Beetlestone said. "The defendants have the right to defend themselves like anybody else. It isn't a SLAPP lawsuit."

Other lawyers and First Amendment scholars, though, said that SLAPPs are often defamation cases and that the Agora suit seemed to fit the pattern.

"That is certainly how a SLAPP suit looks," said Robert D. Richards, a professor of journalism and law, who codirects the Pennsylvania Center for the First Amendment at Pennsylvania State University.

Filed Jan. 21 in Montgomery County, the suit is an outgrowth of parents' efforts to obtain answers to questions about the financial relationship between Brown and her management company, Cynwyd Group L.L.C., and the cyber charter school.

Agora, which provides online instruction to 4,000 students across the state, rents its headquarters from Cynwyd under a nine-year lease and pays the firm a management fee. Brown owns Cynwyd and serves as its senior consultant to Agora.

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### We Recommend

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The suit says the parents made misleading statements online and in complaints to the state Department of Education "that give the clear but false impression that Dr. Brown is corrupt, incompetent and possibly criminal."

In one of the e-mails, Stefany complained that Agora and its board of trustees in November banned parents from communicating with one another via school e-mail and an online forum maintained by the school.

"This action is being done for the clear purpose of covering up ineptitude, malfeasance and financial corruption on the part of Ms. Brown and, by their silent acquiescence, the Agora Cyber Charter School Board of Trustees," Stefany wrote to Brown and the board president.

Beetlestone said that when parents refused to heed requests to stop defaming Brown, the educator filed suit because she saw it as the only way to end the defamation.

The suit said Brown and Cynwyd Group's ability "to attract business is dependent on Dr. Brown's reputation within the local educational community, a reputation that defendants' statements have compromised."

The parents have denied the charges. They don't yet have an attorney because they can't afford the \$300- to \$500-per-hour fees lawyers have quoted.

The parents already have received their first round of information requests from Brown's attorney, including all documents and communications they sent to The Inquirer and other news media.

Gene Roberts, former Inquirer editor and a journalism professor at the University of Maryland, has long been concerned about SLAPP suits.

"By and large, they are a well-honed technique to stifle debate," he said. "Unfortunately, they often work because they scare people into silence. They can visualize losing their homes."

He added: "I have long felt there ought to be a legal assistance organization that weighs in on behalf of people who are targets of SLAPP suits."

Legal experts said they knew of no other cases of parents at a publicly funded school in Pennsylvania being sued by school officials for defamation.

"The right to petition the government is a separate right under the First Amendment in addition to freedom of speech, and your right to discuss and ask questions about what some officials are doing," said Temple's Kairys. "The finances of these schools are fair game."

Although the lawsuits have been around for decades, two professors at the University of Denver came up with the term SLAPP about 10 years ago. George W. Pring and Penelope Canan brought attention to their growing use in the book SLAPPs: Getting Sued for Speaking Out, published by Temple University Press in 1996.

SLAPP cases often involve real estate developers and other companies with deep pockets who sue citizens who oppose their proposed developments. They have surfaced all over the country, McMasters said.

He said it is hard to keep track of SLAPP suits, though, because they are filed as defamation suits or as tort claims in local courts.

Pennsylvania and 25 other states have passed some form of anti-SLAPP laws to protect citizens. Many of the laws provide a speedy process for dismissal of suits involving citizens engaged in rights guaranteed by the First Amendment, including freedom of speech and petitioning the government for redress. Many of the laws require the developer or public official who brought the suit to cover citizens' legal fees if the case is tossed out of court.

But Pennsylvania's 2001 statute was so watered down in the state Senate that it only covers citizens who speak out on environmental concerns, according to a prime sponsor, State Rep. Camille "Bud" George (D., Clearfield). New Jersey does not have an anti-SLAPP law.

George said he has been trying to expand the law to protect citizens who make comments in good faith about any issue of public concern.

He began trying to get an anti-SLAPP law passed in 1994 after one of his constituents was sued for complaining that nearby mining had caused her basement to flood.

"Nobody," he said, "should be denied their rights to put forth their position by being buffaloed by the big power interests or the government."

Richards of Penn State, who has worked with George, said Pennsylvania's law, known as the "Environmental Immunity Act," is so narrow it offers little protection.

In fact, the law was no help to residents of Montgomery County's Lower Gwynedd Township who opposed Penlynn Greene, a townhouse development. The developer sued them in 2003, saying their efforts to stop the project had abused the legal process and harassed him and potential buyers.

The courts ruled the residents' statements and actions, including zoning appeals, were not covered because they did not constitute "complaints . . . to a governmental agency" as described in the law.

The state Supreme Court turned down the residents' appeal without comment in 2007. The lawsuit continues.

Contact staff writer Martha Woodall at 215-854-2789 or [martha.woodall@phillynews.com](mailto:martha.woodall@phillynews.com).

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A nonprofit association dedicated to providing free legal assistance to journalists since 1970

EXHIBIT B

## Charter school official sues Philadelphia Inquirer for defamation

Kathleen Cullinan | Libel | Quicklink | January 9, 2009

A charter school official is suing *The Philadelphia Inquirer* for defamation, the paper reports.

Vahan Gureghian, chief executive of the managing company for Chester Community Charter School, claims a series of articles on the school's handling of public funds were fueled by failed business negotiations he says he had with the *Inquirer* publisher. According to the newspaper, the articles pointed out that the charter had spent a consistently high proportion on administration expenses and a consistently low portion on teaching.

*Inquirer* editor William Marimow countered in the paper that the reporting was "accurate . . . thorough . . . and it focuses on an issue of public importance."

"To me, that is what the First Amendment is all about," Marimow said.

A lawyer for *The Inquirer's* parent company, Philadelphia Media Holdings, challenged Gureghian's claims that he and publisher Brian P. Tierney were even in "negotiations regarding a business transaction," as the paper put it.

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## SEIU Wins Historic Injunction Against Beverly Enterprises; Hundreds of Nursing Home Workers Granted Reinstatement to Work

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WASHINGTON, Jan. 22 /PRNewswire/ -- U.S. District Court Judge D. Brooks Smith yesterday granted an injunction in Pennsylvania against Beverly Enterprises ordering immediate reinstatement of hundreds of workers represented by the Service Employees International Union (SEIU). The injunction was sought by the National Labor Relations Board (NLRB) at the request of the Union. In April 1996, nearly 1,000 nursing home workers employed by Beverly went on strike to protest Beverly's unfair labor practices at its Pennsylvania facilities. The strike lasted only three days but Beverly responded by illegally permanently replacing hundreds of the strikers, and denying other workers their former positions.

The U.S. District Court Order requires that Beverly "reinstatement all of the employees who participated in the April 1, 1996 strike at the fifteen health care facilities to their former positions during the pendency of the unfair labor practice charges before the Board." Beverly's refusal to reinstate the hundreds of employees to their former positions "has great potential to jeopardize the integrity of the bargaining process," according to the Judge. The NLRB is currently litigating hundreds of unfair labor practice charges against Beverly, including charges against the company for firing strikers for speaking out about company practices, tearing down union bulletin boards, barring union representatives, and threatening and conducting surveillance against nursing home workers in union nursing homes throughout the state.

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"We feel vindicated by the judge's decision, and by the message it sends to lawbreakers like Beverly who choose to ignore our nation's labor laws and treat nursing home workers with such contempt," said Andrew L. Stern, president of the 1.1 million-member union. "We are proud of our members in Pennsylvania for their patience in waiting for this long overdue order. We question whether a company like Beverly, which operates with taxpayer funds and spends enormous amounts of money trying to break the union should be doing business in Pennsylvania at all. Beverly's ideological opposition to the union harms the residents, workers, and stockholders."

Beverly Enterprises, the nation's largest nursing home chain, operates 632 nursing homes in 33 states and the District of Columbia and took in more than \$3 billion in revenues in 1995.

SEIU Locals 585,668 and District 1199P represent approximately 8,000 nursing home workers including 1,800 employed by Beverly Enterprises in Pennsylvania. SEIU is the largest health care workers Union with 1.1 million members in the United States, Canada and Puerto Rico.

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/CONTACT: Unnia Peltus of the Service Employees International Union, 202-898-3266; or Lenore Friedlaender of the Pennsylvania Dignity Campaign, 717-238-9745/

(BEV)

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**EXHIBIT D**

« back 182 F.3d 183 (3rd Cir. 1999)

**BEVERLY ENTERPRISES, INC.; DONALD L. DOTSON  
APPELLANTS**

v.

**ROSEMARY TRUMP; SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 585**

NO. 98-3222

U.S. Court of Appeals, Third Circuit

*Argued December 11, 1998*  
*Opinion Filed June 28, 1999*  
*Corrected July 8, 1999*

- 1 On Appeal From the United States District Court For the Western District of  
Pennsylvania (D.C. Civil Action No. 97-cv-01490) District Judge: Honorable Gary L.  
Lancaster[Copyrighted Material Omitted][Copyrighted Material Omitted]
- 2 Michael T. McMenamin (Argued) Walter & Haverfield 50 Public Square 1300  
Terminal Tower Cleveland, OH 44113 Attorney for Appellants
- 3 Claudia Davidson Healey, Davidson & Hornack Law & Finance Building, 5th Floor  
Pittsburgh, PA 15219 and Harold C. Becker (Argued) Associate General Counsel  
Service Employees International Union 14 West Erie Street Chicago, IL 60610  
Attorneys for Appellees
- 4 Geraldine R. Gennet General Counsel Kerry W. Kircher Deputy General Counsel  
Office of General Counsel U.s. House of Representatives 219 Cannon House Office  
Building Washington, D.c. 20515-6601 Attorneys for Amicus Curiae Bipartisan  
Legal Advisory Group of the United States House of Representatives
- 5 Before: Becker, Chief Judge, and Stapleton, Circuit Judges, and HARRIS,\*  
District Judge

**OPINION OF THE COURT**

Stapleton, Circuit Judge

- 6 This diversity-based defamation action arises from statements allegedly made by  
a union representative about a company official during two separate incidents, one  
at a political rally and another at a "Town Hall meeting." The District Court  
dismissed the plaintiffs' complaint after finding the comments at the rally incapable  
of defamatory meaning and the Town Hall meeting comment protected under the  
doctrine of absolute testimonial immunity. Although for somewhat different  
reasons, we will affirm.
- I.

- 7 There is a long-standing and acrimonious relationship between Beverly  
Enterprises, a national provider of nursing home care, and the Service Employees  
International Union ("SEIU"), whose local affiliates represent a substantial number  
of Beverly's employees. Plaintiffs are Beverly Enterprises and Donald L. Dotson,  
Beverly's Senior Vice President for Labor and Employment. Before joining Beverly

« back nterprises, Dotson had a prestigious career in labor relations, serving as Chairman of the National Labor Relations Board and as Assistant Secretary for Labor-Management Relations at the U.S. Department of Labor. This suit arises from two incidents in which Rosemary Trump, President of Local 585 of the SEIU, allegedly made false and defamatory statements about Dotson and Beverly. Plaintiffs allege that, as a result of the statements uttered by Trump, Dotson and Beverly have suffered damage to their reputations. A district court's order dismissing a complaint is subject to plenary review. *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1197 (3d Cir. 1993). We accept as true all well-pleaded factual allegations in the plaintiffs' complaint and all reasonable inferences therefrom. *Independent Enterprises v. Pittsburgh Water*, 103 F.3d 1165, 1168 (3d Cir. 1997). The parties agree that Pennsylvania law governs this dispute.

## II.

8 The first set of allegedly defamatory statements were made in August, 1996, at a political rally in Pittsburgh, Pennsylvania, sponsored by the Dole/Kemp presidential campaign. Plaintiffs allege that Trump approached Dotson in the midst of a large crowd, ascertained his identity as a Beverly official, and asked him whether he knew who she was. When Dotson said he did not, Trump became visibly upset, told Dotson he should know her, identified herself, and then began to berate Dotson in a loud and angry voice. Specifically, Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals." When Dotson tried to respond, Trump cut him off and angrily accused him of "devoting [his] entire career to busting unions." Despite Dotson's efforts at reasoned discourse, Trump continued berating Dotson, finally shouting at him: "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

9 Plaintiffs allege that these statements were false and defamatory as to both Dotson and Beverly Enterprises. Moreover, they allege that Trump uttered the statements with actual malice, and that, as a result of these statements, Dotson suffered damage to his reputation. The District Court concluded that each of the three statements at the rally were incapable of defamatory meaning because they constituted mere hyperbole and insulting rhetoric, all too common in labor disputes.

10 We begin by addressing Trump's alleged statements accusing Dotson of "union-busting" and referring to Dotson and others at Beverly as "criminals." By statute in Pennsylvania, a plaintiff in a defamation action has the burden of proving:

11 "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of any conditional privilege."

12 42 Pa. C. S. § 8343(a) (West 1999).

13 The Pennsylvania Supreme Court has held that "[i]n an action for defamation, it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Id.* at 1055 (quoting *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 215 (Pa. 1981)).

14 Appellants contend that Trump's references to "criminals" and "union busting" were defamatory per se because they imputed criminal conduct to both Dotson and

« back <sup>everly.</sup><sup>1</sup>

15        Moreover, they argue that other attendees at the Dole/Kemp rally within earshot could reasonably have interpreted Trump's statements as alleging actual facts about Dotson and Beverly.

16        We disagree. Although Trump's statements were undoubtedly offensive and distasteful, the law of defamation does not extend to mere insult. Courts in Pennsylvania and elsewhere have long recognized a distinction between actionable defamation and mere obscenities, insults, and other verbal abuse. "[S]tatements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are not defamatory." *Kryeski v. Schott Glass Techn., Inc.*, 626 A.2d 595, 601 (Pa. Super. 1993) (quoting *Redding v. Carlton*, 296 A.2d 880, 881 (Pa. Super. 1972)); see also *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 14 (1970) (finding that a statement that was "no more than rhetorical hyperbole, a vigorous epithet" was not slander). As the Restatement (Second) of Torts explains: "A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case."

17        Restatement (Second) of Torts § 566, comment e (1977).

18        Similarly here, Trump's exclamation that "you people at Beverly are all criminals" is reasonably understood as a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing. Trump's accusation that Dotson "devot[ed] [his] entire career to busting unions" is equally incapable of a defamatory construction. Appellants describe these statements as "mean-spirited . . . accusations of illegal and immoral conduct." First, it is doubtful at best that an accusation of "union-busting" amounts to an insinuation of criminal activity. Even if it were so understood, however, the reasonable listener would recognize this statement as merely a vituperative outburst which, although undoubtedly offensive, it is not actionable in defamation. On this basis, we conclude that these two statements are incapable of defamatory meaning and thus cannot support an action in tort.

19        Plaintiffs' claim based on the third comment Trump allegedly made at the rally -- that Dotson was "part of that World War II generation that danced on the graves of Jews" -- fails for a different reason. As a rule, except as to allegations of slander per se, plaintiffs in slander actions must allege special damages beyond an injury to reputation. 42 Pa. C. S. § 8343(a)(6); *Baird*, 285 A.2d at 171 ("[i]t is a general rule that defamatory words are not actionable, absent proof of special damage"); *Solosko v. Paxton*, 119 A.2d 230, 232 (Pa. 1956) ("[g]enerally speaking, damages for defamatory words when spoken are not recoverable in the absence of proof of special damages"); *Altoona Clay Prod. Inc., v. Dun & Bradstreet, Inc.*, 246 F. Supp. 419, 422 (W.D. Pa. 1965), rev'd on other grounds, 367 F.2d 625 (3d Cir. 1966) ("The Pennsylvania cases require both the allegation and proof of [a] specific item of damage to support the recovery."); Restatement (Second) of Torts, § 558(d). Whereas the aforementioned comments arguably impute criminal conduct to the plaintiff, and thus constitute allegations of slander per se, this accusation of bigotry does not fall within the narrowly defined categories of per se defamation. *Clemente*, 749 F. Supp. at 677 (citing the four categories of slander per se as words imputing the commission of a criminal offense, a loathsome disease, business misconduct, or

« back serious sexual misconduct).

20 Consequently, as to the alleged statement imputing anti-Semitism, to survive a motion to dismiss, the plaintiff must go beyond a claim of injury to reputation and allege special damages. Typically considered as a pecuniary loss, special damages are "actual and concrete damages capable of being estimated in money, established by specific instances such as actual loss due to withdrawal of trade of particular customers, or actual loss due to refusal of credit by specific persons, all expressed in figures." *Altoona*, 246 F. Supp. at 422; Restatement (Second) of Torts, § 575, comment b (special harm is "the loss of something having economic or pecuniary value"). Because plaintiffs have only alleged damage to their reputation, they have failed to meet this requirement.<sup>2</sup>

### III.

21 The second incident in which plaintiffs allege that Trump made a defamatory statement was in May, 1997, at a "Town Hall meeting." According to the plaintiffs' complaint, the SEIU persuaded several members of Congress to convene the meeting in the Allegheny County Courthouse to discuss an item of federal legislation then pending in Congress. The bill, entitled the "Federal Procurement and Assistance Integrity Act," was designed to preclude businesses that are in violation of certain federal labor standards from obtaining federal contracts. Plaintiffs allege that the "true purpose" of the meeting was to provide a forum for disparaging Beverly Enterprises and, to that end, members of Congress were importuned to ask speakers about the adverse effects that the pending legislation would have on Beverly. Trump, an invited speaker, allegedly made the following statement in response to a question from Congressman Klink:

22 CONGRESSMAN KLINK: "Thank you. To Ms. Trump and Ms. Ford, just to clear up in my mind, why have we seen this problem exacerbated so much in Pennsylvania and we haven't seen it at the other Beverly locations across the country? What transpired in Pennsylvania to make the situation here much worse?"

23 MS. TRUMP: "Well, this is one of the most unionized, heavily unionized Beverly states, if not the most unionized Beverly state. They operate approximately 42 facilities in Pennsylvania, 20 of which are organized and we have had a history of bargaining that went very well. But quite frankly when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government and besides which, I could really -- really this is conjecture on my part, but I can only assume that because they went out and recruited the former general counsel for the National Right to Work Committee. They decided that you're the largest chain of Beverly facilities, if we're able to break unionism in the Beverly chain, then, of course, it will have a ripple effect in the entire industry and the whole industry will operate nonunion."

24 Plaintiffs allege that the italicized statement by Trump is defamatory because it accuses Dotson of criminal violation of the Ethics in Government Act, 18 U.S.C. #8E8E # 201 et seq. ("EGA"). Specifically, plaintiffs allege that the "gist or sting" of Trump's statement is that Dotson (1) may have negotiated for employment with Beverly while Chairman of the NLRB, and (2) eventually represented Beverly in matters that were pending before the NLRB during his Chairmanship, both in criminal violation of federal government ethics laws. Further, plaintiffs allege that Trump's statement also implicates Beverly as a participant in a criminal conspiracy with Dotson toward these same ends. According to plaintiffs, these statements are

« back ilse, defamatory, and slanderous per se, as accusations of criminal conduct. On the basis of this statement, Dotson and Beverly claim to have sustained damage to their reputations.

25 The District Court dismissed this claim after concluding that Trump enjoyed absolute testimonial immunity for her statement. Like absolute judicial immunity, the common law testimonial immunity provides that:

26 "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

27 See *Jennings v. Cronin*, 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978) (quoting and adopting § 590A of the Restatement (Second) of Torts). After considering the scope, purpose, and format of the meeting, the District Court concluded that the meeting constituted a "legislative proceeding" for purposes of testimonial immunity. Moreover, because Trump was an invited speaker and made the allegedly defamatory statement in response to a question posed by a panel member, the District Court concluded that the statement was "part of" the legislative proceeding. Finding Trump's statement absolutely privileged, therefore, the Court dismissed plaintiffs' claim.

28 We see no need to consider the contours of absolute testimonial immunity in this case, however, because we find Trump's statement at the Town Hall meeting incapable of either of the defamatory constructions plaintiffs allege.<sup>3</sup>

29 Whether a reasonable listener could have construed Trump's statements as defamatory is a question of law to be determined by the court. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir. 1978); *Thomas Merton Ctr.*, 442 A.2d at 215-16; Restatement (Second) of Torts, § 614.

30 Plaintiffs allege that Trump's statement implicates Dotson and Beverly in violation of two separate provisions of the Ethics in Government Act. Construing the allegations in the complaint in the plaintiff's favor, as we must, we nonetheless find neither of these interpretations reasonable. First, the act prohibits an executive branch officer from "personally and substantially" participating in a quasi-judicial proceeding if the officer is also negotiating prospective employment with an organization that has a financial interest in that proceeding. See 18 U.S.C. § 208. Plaintiffs' complaint alleges that Trump's statement asserts a violation of this provision insofar as she said that "when President Clinton was elected and a new Chairman of the National Labor Relations [Board] was appointed, the former chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door . . . ." We find this interpretation of Trump's statement unreasonable. Not only is there nothing in Trump's statement to suggest that Dotson simultaneously sought employment from Beverly and supervised cases involving Beverly, but Trump's statement suggests to us just the opposite: that Dotson did not approach Beverly until after he left his government job.

31 Second, the Ethics in Government Act restricts former federal officers from representing another individual or entity in a matter formerly under the officer's supervision. See 18 U.S.C. § 207. Plaintiffs contend that Trump accused Dotson of violating this provision when she said, "Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly . . . than me since I have been supervising them on behalf of the government . . . ." Trump's statement, according to plaintiffs, amounts to an accusation that Dotson violated § 207 of the EGA "by representing Beverly in matters that had been pending before the NLRB

« back uring his Chairmanship." Again, we fail to see how a reasonable hearer of the statement Trump allegedly made could interpret it as plaintiffs suggest.

32 Trump's statement undeniably implies that Dotson sought to capitalize on his knowledge of the NLRB's prosecutions of Beverly in an effort to obtain employment with Beverly. Moreover, given that Dotson was a Beverly Vice President at the time of the alleged statement, Trump's statement implies that Dotson successfully secured his job at Beverly on the basis of his knowledge of their ongoing litigation with the NLRB. However, none of these implications amounts to a violation of federal law-- civil or criminal. Trump's comment simply does not state or imply that Dotson has done that which the EGA prohibits: making, with an intent to influence, a communication to or appearance before any department, agency, or court in connection with matters he previously supervised. See 18 U.S.C. § 207(a)(2).

33 Unless Trump's statement is reasonably susceptible of a defamatory meaning, plaintiffs have failed to state a claim with respect to the Town Hall meeting. See *Sarkees v. Warner-West Corp.*, 37 A.2d 544, 546 (Pa. 1944) ("If the words are not susceptible of the meaning ascribed to them by the plaintiff, and do not sustain the innuendo, the case should not be sent to a jury."); *McAndrew v. Scranton Republican Pub. Co.*, 72 A.2d 780, 783 (1950). We conclude that Trump's statement is incapable of conveying either of the defamatory meanings plaintiffs advance. Moreover, to the extent the statement is susceptible of another defamatory interpretation that does not constitute an accusation of criminal wrongdoing, such interpretation would not constitute slander per se and, as a result plaintiff's complaint would be insufficient for failure to allege special damages.

#### IV.

34 Accordingly, we will affirm the order of the District Court dismissing the plaintiffs' complaint for failure to state a claim.

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#### Notes:

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\* Honorable Stanley S. Harris, United States District Judge for the District of Columbia, sitting by designation.

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<sup>1</sup> Insofar as plaintiffs' allegations can be construed as alleging slander per se, plaintiffs are excepted from the requirement that they must also allege special damages. *Baird v. Dun & Bradstreet*, 285 A.2d 166, 171 (Pa. 1971); *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990) (construing Pennsylvania law).

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<sup>2</sup> Beverly also argues that it need not allege or prove special damages because Trump acted with actual malice. But Beverly confuses the requirements of special damages and actual damages. Under Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages. See *Frisk v. News Co.*, 523 A.2d 347, 354 (Pa. Super. Ct. 1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 467-68 (Pa. Super. Ct. 1985). This rule requires that, in the absence of actual malice, even if the plaintiff need only prove general damage to reputation, as in a defamation per se case, he or she cannot rely on a presumption of damages; he or she must offer actual specific evidence of such general damages. This is different from the principle of special damages (proof of which is excused in defamation per se cases, see *Agriss*, 483 A.2d at 468-75).

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<sup>3</sup> Plaintiffs contend that the District Court erred by considering matters outside the pleadings without converting defendants' motion into one for summary judgment. See Fed.R.Civ.P. 12(b). Specifically, plaintiffs contend the District Court erroneously

« back

considered a videotape of the meeting and a copy of the pending legislation at issue. Plaintiffs thus assert that "Dotson and Beverly must be provided the opportunity to rebut the extrinsic materials relied on by the District Court, and discover Rule 56 evidence in support of their claims." Appellant's Brief at 23.

It is well-settled that in deciding a motion to dismiss, courts generally may consider only the allegations contained in the complaint, exhibits attached thereto, and matters of public record. *Pension Benefit Guar. Corp. V. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993). As the federal bill is a matter of public record, the District Court did not err in considering it before deciding defendants' motion to dismiss.

However, the District Court's opinion also reflects the Court's reliance on the videotape of the meeting, which was relevant to determining whether the meeting constituted a "legislative proceeding." For example, the District Court noted the relevance of several details only obtained from the videotape, such as one Congressman's opening words at the meeting, his reference to the meeting as a "field hearing," and the number of other members of Congress present as well as their relationship to the bill. Although "a court may consider an undisputedly authentic document that the defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," such exception does not apply here. See *id.* This exception prevents "a plaintiff with a legally deficient claim [from surviving] a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Id.* In this case, however, defendants offered the videotape (and the District Court considered it) in support of their affirmative defense of testimonial immunity. Because the plaintiff was not given an adequate opportunity for discovery or to submit rebuttal evidence, we will treat the District court's decision as a 12(b)(6) dismissal and will disregard the videotape of the meeting in conducting our plenary review of that decision. See *Indep. Enterprises*, 103 F.3d at 1168 n.2.



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**EXHIBIT E**

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## Nevyas v. Morgan

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Posted October 7th, 2009 by [DMLP Staff](#)

### Summary

<b>Threat Type:</b> Lawsuit	<b>Date:</b> 11/07/2003
<b>Status:</b> Pending	<b>Location:</b> Pennsylvania
<b>Disposition:</b> Injunction Denied; Injunction Issued; Material Removed; Material Reinstated	<b>Verdict/Settlement Amount:</b> n/a
<b>Legal Claims:</b> Breach of Contract; Defamation	

The plaintiffs, Nevyas, Nevyas-Wallace, and Nevyas Eye Associates, brought suit in November 2003 for damages and injunctive relief for defamation and breach of contract for statements about their LASIK eye surgery practice posted online by a former patient, Dominic Morgan. A motion... [read full description](#)

### Parties

<b>Party Issuing Legal Threat:</b> Herbert J. Nevyas MD; Anita Nevyas-Wallace MD; Nevyas Eye Associates	<b>Party Receiving Legal Threat:</b> Dominic J. Morgan; Steven A. Friedman
<b>Type of Party:</b> Individual; Organization	<b>Type of Party:</b> Individual
<b>Location of Party:</b> Pennsylvania	<b>Location of Party:</b> Pennsylvania
<b>Legal Counsel:</b> Andrew Lapat, Leon Silverman, Allison Lapat - Stein & Silverman PC	<b>Legal Counsel:</b> Steven A. Friedman, Carl H. Hanzelik, and Paul Alan Levy (for Morgan); Jeffrey B. Albert (for Friedman)

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**Description**

The plaintiffs, Nevyas, Nevyas-Wallace, and Nevyas Eye Associates, brought suit in November 2003 for damages and injunctive relief for defamation and breach of contract for statements about their LASIK eye surgery practice posted online by a former patient, Dominic Morgan. A motion for temporary restraining order was denied in 2003 by the Common Pleas Court in Philadelphia County, and the plaintiffs subsequently also brought suit in federal court when the defendant made further additions to his website. The federal claims were dismissed in 2004. The state court claims proceeded to trial in July 2005, and the trial court granted an injunction in favor of the plaintiffs. On appeal, the Superior Court of Pennsylvania vacated the injunction in March 2007 and remanded the case to the trial court for further proceedings.

Dr. Nevyas-Wallace performed elective LASIK eye surgery on the defendant Dominic Morgan in 1998. Displeased with the results, Morgan commenced a medical malpractice action against Nevyas-Wallace, Nevyas, and the clinic, Nevyas Eye Associates. Ultimately, the dispute was resolved through arbitration. According to the complaint, Morgan created a website that contained numerous defamatory statements. (Compl. ¶ 17). The plaintiffs contend that they entered into an agreement with Morgan in August 2003 in which Morgan agreed to remove all defamatory material and references to the plaintiffs from the website, and in return the plaintiffs would forego filing suit against him. (Compl. ¶ 20) In November 2003, the plaintiffs discovered a reconstructed website containing what they contend were defamatory statements. (Compl. ¶¶ 21-22).

The plaintiffs filed a petition for a temporary restraining order and preliminary injunction on November 10, 2003, but the motions were denied on November 18, 2003. The case proceeded to a non-jury trial limited to specific performance of the contract on July 26, 2005. The trial court granted an injunction in favor of the plaintiffs on October 19, 2005, forbidding Morgan from mentioning the Nevyses at all on his website.

On appeal, the court found that Morgan did not waive his right to make critical statements in the future and he had specifically reserved the right to update his website. Thus, the Superior Court of Pennsylvania vacated the order granting the injunction and remanded the case to trial court for determination of whether the statements were defamatory and whether the statements posted in November were the same as the statements posted in July 2003. *Nevyas v. Morgan*, 2007 PA Super. 66.

Related case in federal court: [CMLP: Nevyas v. Morgan II \(federal lawsuit\)](#).

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- [Marshall, Dennehey, Warner, Coleman & Goggin: Disgruntled Lasik Surgery Patient Not Precluded](#)
- [Public Citizen: Public Citizen Appeals on Behalf of Gripe Web Site Operator to Protect Internet Free Speech](#)
- [CMLP: Nevyas v. Morgan II \(federal lawsuit\)](#)

**Details**

<b>Website(s) Involved:</b>	<b>Content Type(s):</b>
<a href="http://www.lasikucks4u.com">http://www.lasikucks4u.com</a>	Text
<a href="http://www.lasikdecision.com">http://www.lasikdecision.com</a>	
<a href="http://www.flawedlasik.com">http://www.flawedlasik.com</a>	
<b>Publication Medium:</b>	<b>Subject Area(s):</b>
Website	Defamation Gripe Sites Prior Restraints

**Court Information & Documents**

<b>Location of Filing/Threat:</b>	<b>Source of Law:</b>
Pennsylvania	Pennsylvania
<b>Court Name:</b>	<b>Court Type:</b>
Philadelphia Court of Common Pleas City Hall; Superior Court of Pennsylvania	State
<b>Case Number:</b>	
031100946 (trial); J.A32030-06 (appeal)	
<b>Relevant Documents:</b>	
<a href="#">Nevyas Cease and Desist (07-30-2003)</a>	
<a href="#">Morgan letter of intent (08-01-2003)</a>	
<a href="#">Nevyas Complaint and Misc Exhibits (11-07-2003)</a>	
<a href="#">Morgan Appeal Brief (06-26-2006)</a>	
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Submitted by [lasikdecision](#) on Mon, 10/25/2010 - 12:45.

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09-NOV-2009 11:12 AM WSFFD - FINDING FOR DEFENDANT ROGERS, PETER F 09-NOV-2009

11:13 AM

Docket Entry: THE COURT FINDS THAT PLTFS [Dr. Herbert Nevyas, Dr. Anita Nevyas, and Nevyas Eye Associates] ARE "LIMITED PURPOSE PUBLIC FIGURES" RELATIVE TO THE INSTANT DEFAMATION CASE. BY THE COURT ...ROGERS,J 10/14/09

20-OCT-2010 11:29 AM ORDER - ORDER ENTERED/236 NOTICE GIVEN ROGERS, PETER F

20-OCT-2010 11:29 AM

Docket Entry: 66-09111466 IT IS ORDERED THAT PLTFS' MOTION TO AMEND ORDER TO CERTIFY FOR APPEAL IS DENIED. BY THE COURT ...ROGERS,J 10/14/10

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### **Final Submission - by Defendant Morgan**

Submitted by [lasikdecision](#) on Fri, 01/24/2014 - 20:28.

In 1998 I had LASIK surgery with Drs. Herbert Nevyas and Anita Nevyas-Wallace of Nevyas Eye Associates in Bala Cynwyd, PA. I was told I was a "Good Candidate" when in fact I was NOT a candidate for this procedure due to pre-existing Retinopathy of Prematurity (ROP). They were doing an investigational study using an FDA sanctioned laser. I sued for medical malpractice and lost because I could not bring anything relating to the FDA into my med mal lawsuit. As a result of this surgery and that I was such a "good Candidate", I am legally blind as a result.

In 2002 I posted a website warning others what could and has happened if you were not a good candidate for LASIK surgery. In 2003, after my med mal lawsuit ended I posted the doctors names because I believed they were a risk to public safety. I was served with a defamation lawsuit from the Nevnyases for "reposting "allegedly" defamatory material". Throughout the lawsuit, Plaintiffs, represented by Stein & Silverman, was replete with lies, deceit, misrepresentations, and defamation of my character. None of that mattered.

The case went to trial in 2005 in front of Judge Eugene Maier and his findings were:

Nevyas v. Morgan: 19-OCT-2005 02:13 PM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 19-OCT-2005 12:00 AM Docket Entry: IT IS ORDERED THAT, ON COUNT III OF THE COMPLAINT, THE AGREEMENT WHICH WAS ENTERED INTO BY DEFT, MORGAN AND PLTFS ON OR ABOUT THE PERIOD 7/30/03 THROUGH 8/4/03 IS ENFORCED AND DEFT, MORGAN WILL NOT MENTION DR NEVYAS OR HIS PRACTICE OR ANYTHING CONCERNING PAST ITEMS FROM DR NEVYAS OR HIS PRACTICE IN DEFT'S WEBSITE. DEFT, MORGAN IS ORDERED TO OPERATE HIS WEBSITE AND ANY WEBSITE IN ACCORDANCE WITH THE 8/4/03 AGREEMENT. THE DEFAMATION ACTION BY DR NEVYAS AGAINST MR MORGAN IS DISMISSED AS AGREED TO IN THE 7/30/03 THROUGH 8/4/03 AGREEMENT. BY THE COURT ...MAIER,J 9/29/05

After I appealed Judge Maier's ruling with the help of Public Citizen, which was vacated and remanded back to the trial court by the Superior Court, the case went back to Judge Maier.

As shown on the case docket (partial listing of docket below), everything filed on my behalf after the Superior Court's ruling was DENIED by Judge Maier! I am listing this as proof:

11-MAY-200703:27 PM ORDER VACATED BY APPELLATE CT 11-MAY-200712:00 AM

Docket Entry:

ORDER OF THE SUPERIOR COURT AT 3084 EDA 2005 THAT THE ORDER OF THE COURT OF COMMON PLEAS IS VACATED AND CASE IS REMANDED FOR PROCEEDINGS. JURISDICTION RELINQUISHED.....3/9/07 RECORD RETURNED.

21-MAY-200702:27 PM MISCELLANEOUS MOTION FRIEDMAN, STEVEN A 23-MAY-200712:00 AM

Docket Entry:

76-07051276 RESPONSE DATE 6-11-07. MOTION TO RECUSE

05-JUN-200709:58 AM ANSWER (MOTION/PETITION) FILED 07-JUN-200712:00 AM

Docket Entry:

76-07051276 ANSWER OF PLAINTIFF'S HERBERT J. NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D. & NEVYAS EYE ASSOCIATES, P.C. TO MOTION TO RECUSE.

15-JUN-200711:01 AM MOTION ASSIGNED 15-JUN-200711:01 AM

Docket Entry:

76-07051276 MOTION TO RECUSE ASSIGNED TO JUDGE MAIER ON 6-18-07.

11-JUL-200710:20 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 11-JUL-200710:21 AM

Docket Entry:

76-07051276 IT IS ORDERED THAT DEFT, STEVEN FRIEDMAN'S MOTION TO RECUSE IS DENIED. BY THE COURT ...MAIER,J 7/2/07

12-JUL-200712:19 PM MISCELLANEOUS MOTION MORGAN, DOMINIC 13-JUL-200712:00 AM

Docket Entry:

02-07070902 RESPONSE DATE 8-1-07 (PRO SE DEFENDANT DOMINIC J. MORGAN'S MOTION TO RECUSE JUDGE EUGENE MAIER FILED).

18-JUL-200702:02 PM ANSWER (MOTION/PETITION) FILED SILVERMAN, LEON W 18-JUL-200712:00 AM

Docket Entry:

02-07070902 ANSWER OF PLAINTIFFS' HERBERT J. NEVYAS, M.D., ANITA NEVYAS-WALLACE, M.D. AND NEVYAS EYE ASSOCIATES, P.C. TO MOTION TO

RECUSE.

23-JUL-2007 11:37 AM MOTION FOR SUMMARY JUDGMENT MORGAN, DOMINIC 24-JUL-2007 12:00 AM

Docket Entry:  
97-07071697 RESPONSE DATE 8/22/07

30-JUL-2007 10:31 AM MOT-PROCEED IN FORMA PAUPERIS MORGAN, DOMINIC 02-AUG-2007 12:00 AM

Docket Entry:  
45-07072345 RESPONSE DATE 8-20-2007:

30-JUL-2007 05:08 PM MISCELLANEOUS MOTION MORGAN, DOMINIC 13-AUG-2007 12:00 AM

Docket Entry:  
45-07072345 CROSS MOTION FOR DECLARATORY JUDGMENT FILED.  
RESPONSE DATE: 08/20/07.

03-AUG-2007 10:18 AM MOTION ASSIGNED 03-AUG-2007 10:18 AM

Docket Entry:  
02-07070902 MOTION TO RECUSE ASSIGNED TO JUDGE MAIER ON  
8-6-07.

06-AUG-2007 02:13 PM MOTION-JUDGMENT ON PLEADINGS MORGAN, DOMINIC 20-AUG-2007 12:00 AM

Docket Entry:  
54-07080054 RESPONSE DATE 8-27-07.

10-AUG-2007 03:10 PM ANSWER (MOTION/PETITION) FILED 13-AUG-2007 12:00 AM

Docket Entry:  
97-07071697 ANSWER OF PLAINTIFFS' HERBERT J. NEVYAS, M.D.,  
ANITA NEVYAS-WALLACE, M.D. AND NEVYAS EYE ASSOCIATES, P.C. TO MOTION FOR  
SUMMARY JUDGMENT.

13-AUG-2007 05:06 PM CORRECTIVE ENTRY 13-AUG-2007 12:00 AM

Docket Entry:  
45-07072345 PLEASE NOTE THE MOTION DOCKETED ON 07/30/07  
SHOULD READ AS A MOTION FOR DECLARATORY JUDGMENT FILED NOT AS A MOTION FOR  
INFORMA PAUPERIS. MXG@CIVIL.

14-AUG-2007 03:10 PM MOTION FOR SUMMARY JUDGMENT MORGAN, DOMINIC 15-AUG-2007 12:00 AM

Docket Entry:  
35-07080835 RESPONSE DATE 9/13/07

17-AUG-2007 10:33 AM ANSWER (MOTION/PETITION) FILED 21-AUG-2007 12:00 AM

Docket Entry:  
54-07080054 ANSWER OF PLAINTIFFS' HERBERT J. NEVYAS, M.D.,  
ANITA NEVYAS-WALLACE, M.D. AND NEVYAS EYE ASSOCIATES, P.C. TO MOTION FOR  
JUDGMENT ON THE PLEADINGS.

22-AUG-2007 10:59 AM REPLY FILED MORGAN, DOMINIC 23-AUG-2007 12:00 AM

Docket Entry:  
45-07072345 REPLY FILED TO MOTION FOR DECLARATORY JUDGMENT.

22-AUG-2007 11:01 AM REPLY FILED MORGAN, DOMINIC 23-AUG-2007 12:00 AM

Docket Entry:  
97-07071697 REPLY FILED TO MOTION FOR S.J.

22-AUG-2007 11:02 AM REPLY FILED MORGAN, DOMINIC 23-AUG-2007 12:00 AM

Docket Entry:  
54-07080054 REPLY FILED TO MOTION JOURNAL ON THE  
PLEADINGS.

23-AUG-2007 02:29 PM MOTION ASSIGNED 23-AUG-2007 02:29 PM

Docket Entry:  
45-07072345 MOTION FOR DECLARATORY JUDGMENT ASSIGNED TO  
JUDGE GREENSPAN ON 8-24-07.

24-AUG-2007 03:02 PM MOTION ASSIGNED 24-AUG-2007 03:02 PM

Docket Entry:  
97-07071697 MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE  
MAIER ON 8-27-07.

24-AUG-2007 03:03 PM MOTION ASSIGNMENT UPDATED 24-AUG-2007 03:04 PM

Docket Entry:  
97-07071697 MOTION FOR SUMMARY JUDGMENT MOTION ASSIGNMENT  
DATE UPDATED UNTIL 9-13-07.

24-AUG-2007 03:04 PM MOTION ASSIGNMENT UPDATED 24-AUG-2007 12:00 AM

Docket Entry:  
45-07072345 MOTION FOR DECLARATORY JUDGMENT RE-ASSIGNED TO  
JUDGE MAIER ON 8-27-07.

30-AUG-200702:05 PM MOTION ASSIGNED 30-AUG-200702:05 PM

Docket Entry:  
54-07080054 MOTION FOR JUDGMENT ON PLEADINGS ASSIGNED TO JUDGE MAIER ON 8-31-07.

11-SEP-200702:30 PM ANSWER (MOTION/PETITION) FILED NEVYAS MD, HERBERT J 13-SEP-200712:00 AM

Docket Entry:  
45-07072345 ANSWER OF PLAINTIFF TO MOTION FOR DECLARATORY JUDGMENT.

12-SEP-200711:44 AM ANSWER (MOTION/PETITION) FILED MORGAN, DOMINIC 13-SEP-200712:00 AM

Docket Entry:  
02-07070902 REPLY OF DEFENDANT TO PLAINTIFF'S RESPONSE TO MOTION TO RECUSE.

19-SEP-200702:11 PM MOTION ASSIGNED 19-SEP-200702:11 PM

Docket Entry:  
97-07071697 MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE MAIER ON 9-20-07.

19-SEP-200702:16 PM MOTION ASSIGNED 19-SEP-200702:16 PM

Docket Entry:  
35-07080835 MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE MAIER ON 9-20-07.

12-OCT-200710:37 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 12-OCT-200710:37 AM

Docket Entry:  
45-07072345 IT IS ORDERED THAT DEFT, DOMINIC MORGAN'S MOTION FOR DECLARATORY JUDGMENT IS DENIED. BY THE COURT ...MAIER,J 10/4/07

12-OCT-200710:39 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 12-OCT-200710:39 AM

Docket Entry:  
02-07070902 IT IS ORDERED THAT DEFT, DOMINIC MORGAN'S MOTION TO RECUSE IS DENIED. BY THE COURT ...MAIER,J 10/4/07

12-OCT-200710:39 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 12-OCT-200710:40 AM

Docket Entry:  
97-07071697 IT IS ORDERED THAT DEFT, DOMINIC MORGAN'S IN FORMA PAUPERIS CROSS-MOTION FOR DECLARATORY JUDGMENT IS DENIED. BY THE COURT ...MAIER,J 10/4/07

12-OCT-200710:40 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 12-OCT-200710:42 AM

Docket Entry:  
54-07080054 IT IS ORDERED THAT DEFT, DOMINIC MORGAN'S IN FORMA PAUPERIS CROSS-MOTION FOR DECLARATORY JUDGMENT IS DENIED. BY THE COURT ...MAIER,J 10/4/07

12-OCT-200710:42 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 12-OCT-200710:43 AM

Docket Entry:  
35-07080835 IT IS ORDERED THAT DEFT, DOMINIC MORGAN'S MOTION FOR SUMMARY JUDGMENT IS DENIED. BY THE COURT ...MAIER,J 10/4/07

16-OCT-200709:23 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 16-OCT-200712:00 AM

Docket Entry:  
45-07072345 IT IS ORDERED THAT THE CROSS-MOTION FOR DECLARATORY JUDGMENT IS GRANTED. SEE ORDER FOR TERMS. BY THE COURT ...MAIER,J 10/4/07

16-OCT-200709:24 AM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 16-OCT-200712:00 AM

Docket Entry:  
45-07072345 IT IS ORDERED THAT THE ORDER GRANTING CROSS-MOTION FOR DECLARATORY JUDGMENT WAS SIGNED IN ERROR AND IS THEREFORE RECONSIDERED AND DENIED. BY THE COURT ...MAIER,J 10/15/07

16-OCT-200704:16 PM MOTION FOR JUDGMENT 17-OCT-200712:00 AM

Docket Entry:  
61-07101461 RESPONSE DATE 11-5-07. (PLFS, HERBERT J. NEVYAS, M.D., ANITA NEVYAS WALLCE, M.D. AND NEVYAS EYS ASSOCIATES, P.C.)

02-NOV-200711:17 AM ANSWER (MOTION/PETITION) FILED MORGAN, DOMINIC 05-NOV-200712:00 AM

Docket Entry:  
61-07101461 ANS FILED TO MOTION FOR JUDGMENT FOLLOWING

REMAND.

08-NOV-200709:51 AM MOTION ASSIGNED 08-NOV-200709:51 AM

Docket Entry:

61-07101461 MOTION FOR JUDGMENT ASSIGNED TO JUDGE MAIER ON  
11-9-07.

31-DEC-200701:53 PM ORDER ENTERED/236 NOTICE GIVEN MAIER, EUGENE E 31-DEC-  
200701:54 PM

Docket Entry:

61-07101461 AND NOW, THIS 28TH DAY OF DECEMBER, 2007, UPON  
CONSIDERATION OF PLAINTIFFS' MOTION FOR JUDGMENT ON REMAND AND DEFENDANT  
MORGAN'S RESPONSE, THE MOTION IS DENIED. BY THE COURT: HON. EUGENE EDWARD J.  
MAIER, 12-28-07.

09-JUN-200811:50 AM MISCELLANEOUS MOTION NEVYAS MD, HERBERT J 13-JUN-200812:00  
AM

Docket Entry:

66-08060766 MOTION FOR EVIDENTIARY HEARING ON REMAND IN  
ACCORD WITH THE ORDER OF THE SUPERIOR COURT. RESPONSE DATE 06-30-08.

30-JUN-200804:09 PM ANSWER (MOTION/PETITION) FILED MORGAN, DOMINIC 07-JUL-  
200812:00 AM

Docket Entry:

66-08060766 PRO SE DEFENDANT DOMINIC J. MORGAN'S RESPONSE TO  
PLAINTIFFS NEVYASES' MOTION FOR AN EVIDENTIARY HEARING FILED.

16-JUL-200812:31 PM MOTION ASSIGNED 16-JUL-200812:31 PM

Docket Entry:

66-08060766 MOTION FOR AN EVIDENTIARY HEARING ON REMAND IN  
ACCORD WITH THE ORDER OF THE SUPERIOR COURT ASSIGNED TO JUDGE MAIER ON  
07-17-2008.

In 2011, the Nevyas v. Morgan case finally went to trial in front of Judge Victor DiNubile. His final ruling gave the Nevyses the injunctive relief they've sought for numerous years even after hearing testimony from Dr. Morris Waxler (former FDA Director of Medical Devices) of the Nevyses' illegalities of their investigational study and also of the FDA sending warning letters consistently about Nevyses' violations, including one sent in 2012!

As soon as the underlying case was on appeal, the Nevyses filed a petition for contempt against me. This did not get to a hearing until April, 2012.

One of the first statements Judge DiNubile stated was that "he was not re-addressing the March 2011 trial". He did however allow the Nevyses over 2 hours to put themselves up on their perpetual pedestal and issued this order. I disagree with Judge DiNubile for several reasons:

Per DiNubile's order: I had to remove the Nevyas laser was a "black box laser".

Morris Waxler (who was head of the medical devices panel at the FDA during my LASIK) testified at trial that the Nevyas laser was indeed a "black box" laser. Both doctors perjured themselves at the contempt hearing stating it was not.

Per DiNubile's specific instructions, A letter I wrote to the American Academy of Ophthalmology was never argued or introduced as evidence at trial or appeal. They may have stated but never argued the letter as defamatory.

The March 2011 trial was never really about me. The only thing I believe the Nevyses were interested in was going after my ex attorney's insurance company. They sued him for \$1mil because I posted letters on my websites he wrote to the FDA on my behalf (They lost). The letters, all factual had been removed several years prior but I was still ordered by the courts to never repost them.

I was also ordered to remove (per DiNubile's specific instructions) that "the Nevyses damaged my eyes".

I testified at the contempt hearing that I have thousands of pages to back up every allegation made against the Nevyses.

The facts are in black and white and have been proven numerous times. The courts I believe only cared about getting rid of this case because I was left without legal representation, the duration this case was in the courts, and the financial and political influence of the doctors. This case seems like it was never about the lifetime damage inflicted on me.

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