IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

GENE A. TENNESSEN,
Defendant,

DOUGLAS B. MOYLAN,
Real Party In Interest-Appellant.

Supreme Court Case No. CRA09-012
Superior Court Case No. CF0292-02

OPINION

Cite as: 2011 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted November 4, 2010
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice[1]; F. PHILIP CARBULLIDO, Associate Justice, RICHARD H. BENSON, Associate Justice *Pro Tempore.*

CARBULLIDO, J.:

[1] Self-styled "Real Party in Interest-Appellant" Douglas B. Moylan ("Moylan") appeals from a written decision and order of the trial court which lifted a previous order concerning the construction of a conflicts wall in this case. Moylan argues not that the lifting of the previous order was incorrect, but rather that the trial court erred in failing to lift the previous order *nunc pro tunc.* We find that Moylan has no constitutional standing to bring these claims to this court, and therefore dismiss this appeal without reaching the merits of Moylan's various arguments.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Gene Tennessen ("Tennessen") was charged with Theft, Falsifying Information, Official Misconduct and Obstruction of Government Functions and was being prosecuted by the Attorney General on behalf of the Government. Tennessen moved for a dismissal based on an apparent conflict of interest involving the Attorney General at that time, Moylan. On March 11, 2004, at the motion to dismiss hearing, Tennessen argued that based on that conflict, the Attorney General's office should not be permitted to prosecute this matter. The trial court stated that although it agreed that the circumstances of the case suggested a conflict of interest, the court did not agree that disqualifying the entire Attorney General's office was warranted. Further, absent proof that Tennessen was unfairly prejudiced by the conflict, the court stated that it could not make a finding that Tennessen was unable to obtain a fair and impartial trial. Thus, dismissal was not warranted.

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

[3] However, at the March 11, 2004 hearing, the court ordered that a conflict wall be placed to shield Moylan from any further participation in the prosecution of the case. The court held that "Moylan shall not discuss this case with anyone, shall not review files concerning this case, shall not have access to any files or information concerning this case, and shall not obtain or share confidential information concerning this case with anyone." Real Party in Interest's Excerpts of Record ("ER") at 5 (Dec. & Order, Mar. 26, 2004). The court further stated that Moylan should have absolutely no participation or input, either directly or indirectly, in the case and that since a conflict wall was already in place in the Attorney General's office by Moylan's own doing, Moylan and his staff would likely not have any problem complying with the court's order.

[4] Subsequently, Tennessen renewed his motion for the entire Office of the Attorney General to be disqualified from his case; this motion was denied by the trial court in a written decision and order issued on October 21, 2005. Tennessen was later convicted of two counts of Theft and two counts of Official Misconduct. Tennessen timely appealed his judgment of conviction and the October 21, 2005 order to this court. In *People v. Tennessen*, 2008 Guam 21 ("*Tennessen I*"), we over-ruled the trial court's October 21, 2005 order and vacated the judgment of conviction. *Tennessen I*, 2008 Guam 21, was later superseded by *People v. Tennessen*, 2009 Guam 3 ("*Tennessen II*"), which was filed April 1, 2009. *Tennessen II*, 2009 Guam 3 ¶ 1.

[5] Shortly thereafter, Moylan filed a declaration in the case, stating that because of the conflict wall in place he was not involved in the Tennessen case. Further, Moylan claimed that he was not notified or served with any documents to be present at any court proceedings, was not

served with any documents informing him that a "restraining order[2]" was issued against him, and that he did not review the Decision and Order dated March 26, 2004 ("March 2004 Order") that contained the "restraining order." ER at 9 (Moylan Decl., May 1, 2009). Simultaneously, Moylan filed a proposed order with the trial court, which contained language vacating the "restraining order" *nunc pro tunc*. No contemporaneous motion to intervene or otherwise formally seek leave of the court to appear in the case appears in the record.[3] *See* Supplemental Excerpts of Record ("SER") at 29 (Docket, Dec. 7, 2009); *see also* Certified Docket ("CD") at 30 (Feb. 23, 2010).

[6] On August 21, 2009, the trial court issued an Order, vacating the "restraining order" regarding Moylan's involvement in the prosecution of the case. ER at 14 (Order, Aug. 21, 2009). The court found that the concern which prompted the issuance of the restraining order no longer existed because Moylan was no longer the Attorney General as of December 31, 2006. *See Id.*; ER at 8 (Moylan Decl., May 1, 2009). However, the trial court did not vacate the March Order *nunc pro tunc*. *See* ER at 14 (Order, Aug. 21, 2009). This appeal followed.

[7] In his opening brief, Moylan claimed that the order issued on August 21, 2009 did not vacate the restraining order from its inception, *nunc pro tunc*, and thus, unjustly subjected Moylan to contempt and punishment for the period between its issuance on March 26, 2004 and the order on August 21, 2009, while the restraining order was in effect. Moylan claimed that his

[2] Moylan describes the portion of the March 2004 Order reproduced above as a "restraining order". ER at 9 (Moylan Decl., May 1, 2009).

[3] Moylan states in his brief that a formal motion to "vacate the permanent injunction" was filed, however the motion was not submitted in the Excerpts of Record presented by either party. *See* Real Party in Interest Appellant's Brief ("Appellant's Br.") at 6 (Nov. 10, 2009). The Certified Docket in this appeal reveals that a "Motion, Notice of Motion, and Memorandum Supporting Motion to Vacate Restraining Order *nunc pro tunc*" was filed on May 12, 2009. CD at 30. A review of the May 12, 2009 motion reveals no mention of intervention or any other discussion of obtaining the court's permission to appear in the case.

rights were affected by a case in which he is not a named party, and therefore styled himself a "Real Party in Interest." Appellant's Br. (Nov. 10, 2009).

[8] At the Status and Disqualification hearing held in this matter on February 15, 2010, counsel for Moylan advised the panel that Moylan objected to all panel members hearing his appeal. On February 22, 2010, Moylan filed three separate statements of objection, alleging various bases for disqualifying the panel members. The case was re-assigned to a disqualification panel, which issued an opinion on September 9, 2010 in *People v. Tennessen ("Tennessen III")*, 2010 Guam 12. The disqualification panel ruled that the current panel was not disqualified from hearing the case. *Tennessen III*, 2010 Guam 12 ¶ 52. The case was re-assigned to the current panel.

[9] On September 22, 2010 this court requested supplemental briefing on the issue of constitutional standing from the parties. Moylan filed a Memorandum Brief re: Standing ("Moylan ST Memo"); the People filed a Supplemental Brief ("People's ST Memo"); and Moylan filed a Reply Brief re: Standing ("Moylan's ST Reply"). All filings were timely. Defendant-Appellant Tennessen declined the opportunity to file any documents on the issue.

[10] Having reviewed the original and supplemental briefing, and deciding oral argument to be unnecessary, the court now issues its opinion.

II. JURISDICTION

[11] The Superior Court maintains jurisdiction over criminal cases pursuant to 7 GCA § 3105 (2005). The Supreme Court of Guam has jurisdiction over this case under 7 GCA §§ 3107(a), 3107(b) and 3108(a), and 8 GCA § 130.10 (2005).

III. STANDARD OF REVIEW

[12] An appellate court may raise issues of standing *sua sponte* and for the first time on appeal. *See, e.g., FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-31 (1990) *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) ("Although neither side raises the issue here, we are *required* to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.") (emphasis added) (citing *Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969), and *Allen v. Wright,* 468 U.S. 737, 750 (1984)); *see also Delorme v. U.S.*, 354 F.3d 810, 815 (8th Cir. 2004) ("Delorme claims that the issue of standing is not before this court because the district court did not dismiss on that basis. As a jurisdictional requirement, however, standing can be raised by the court *sua sponte* at any time during the litigation.").

IV. ANALYSIS

A. Is Moylan a "Real Party in Interest"?

[13] Moylan appears to assume that he is a "Real Party in Interest" simply by virtue of denominating himself as one, as nowhere in any of his briefs does he address the meaning of the term. This is inaccurate. In Guam, the issue of whether or not a certain individual is a "Real Party in Interest" is controlled by application of Rule 17 of the Guam Rules of Civil Procedure. *See Tennessen III,* 2010 Guam 12 ¶ 21. Federal courts interpreting Rule 17 of the Federal Rules of Civil Procedure (from which GRCP 17 is derived) have defined a "Real Party in Interest" as "the party that has a substantive right that is enforceable under the applicable substantive law." *Scheufler v. General Host Corp.*, 895 F. Supp. 1416, 1418 (D. Kan. 1995) (citing *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)). It is true that "[o]rdinarily, an appeal from a judgment may be taken only by a party-litigant adversely affected by it" but occasionally "when

they are the real parties in interest, attorneys are entitled to a day in court." *Lipscomb v. Wise*, 643 F.2d 319, 320 (5th Cir. 1981). However, as the *Lipscomb* court notes, one of the prerequisites of "Real Party in Interest" status is Article III "constitutional standing." *Id.*; *see also Whelan*, 953 F.2d at 672 ("Standing and real-party-in-interest questions do overlap to the extent that both ask whether the plaintiff has a personal interest in the controversy."). This court has previously held that under the Organic Act we are not strictly bound to the requirements of Article III (as the federal courts are), but that constitutional standing principles should nevertheless be applied in the absence of a statute conferring standing. *See Benavente v. Taitano*, 2006 Guam 15 ¶¶ 12-20. In this case, Moylan does not cite to any statute which grants statutory standing. Thus, if Moylan does not have Article III standing, he is not a "Real Party in Interest."

B. Does Moylan have constitutional standing?

[14] The doctrine of standing derives originally from the constitutionally limited role of the judiciary within the tripartite model of American government; the role of an arbiter of actual cases or controversies. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (Justice Scalia's discussion of the historical underpinnings of standing) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) and *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also In re Request of Governor Carl T.C. Gutierrez*, 2002 Guam 1 ¶ 32 (explaining that the Government of Guam contains three co-equal branches). In order for a party to have constitutional standing:

> [A] [party] must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). The party asserting an injury bears the burden of proving each element of standing exists. *See, e.g., Renne v. Geary*, 501 U.S. 312, 316 (1991) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.") (citation omitted).

[15] Moylan has asserted numerous injuries. The asserted injuries are laid out at pages three through five of Moylan's Standing Memorandum:

> (1) no due process notice of the March 26, 2004 hearing in which an injunction issued restraining Douglas' due process liberty rights; (2) no due process notice of the March 26, 2004 hearing in which an injunction issued restraining Douglas' First Amendment speech rights; (3) a deprivation of Douglas' liberty right to conduct his non-speech affairs as he would otherwise have been able to do so specifically...[excerpts from the March 2004 Order at pg. 5, lns. 21-25 and at pg. 6, lns. 9-13.]...(4) a deprivation of Douglas' First Amendment liberty right to Free Speech...(5) no due process notice was given to Douglas of the March 26, 2004 injunction against him restraining his non-speech liberty rights; (6) no due process notice was given to Douglas of the March 26, 2004 injunction against him restraining his First Amendment speech rights; (7) no due process notice was given him to participate in the Supreme Court of Guam proceedings in which the decisions of 2008 Guam 21 and 2009 Guam 3 issued finding that Douglas violated the lower court's order; and (8) no due process appellate right to have the Supreme Court of Guam review a trial court decision that he "violated a (3/26/04) court order."...the injury to Douglas may further be further described as (a) having Douglas' right to conduct his affairs freely and without restraint, as any other person would enjoy, restrained; (b) restraining what speech Douglas may or may not engage in; (c) imposing a finding of violation of the court's March 26, 2004 order that exposes Douglas to criminal and civil contempt for violations of the order and (d) for violating a court order, exposing Douglas to ethical misconduct punishments affecting his ability to earn money through his license to practice law without due process of law, to name a few[4] of the many injuries.

Moylan's ST Memo at 3 – 5 (Oct. 29, 2010).

[4] Moylan is the party asserting standing and must therefore offer proof on the issue if he hopes to prevail. *See, e.g., Renne*, 501 U.S. at 316. Any other claims Moylan may have, but which he has not explicitly presented, will not be considered by the court.

[16] Moylan has subsequently elaborated upon these claims, arguing that "Injury has been inflicted upon Douglas by a finding that he violated a court order that imposed a prior restraint upon him, versus simply a prior restraint that has expired without any finding of wrongdoing." Moylan's ST Reply at 2 (Nov. 19, 2010) (citing *Tennessen II*, 2009 Guam 3 ¶ 47[5]). Moylan's characterization of this cited portion of *Tennessen II*[6], which is identical to the relevant portion of *Tennessen I,* 2008 Guam 21, evolves considerably in different sections within his briefs. At first he states that "Though the trial court did not find Douglas in contempt, this appellate court essentially did . . ."; later he argues that "[t]he finding is akin to contempt."; finally concluding that "Douglas . . . was in fact found in contempt by a finding of willful violation of a court order. . . ." Moylan ST Memo at 15; Moylan ST Reply at 3, 7.

[17] The injuries asserted by Moylan can be categorized as follows: (1) discrete due process and First Amendment violations which occurred in the course of the proceedings of this case, as described in bullets one through eight and subsections (a) and (b) of the excerpt reproduced above; (2) an on-going threat of professional discipline for the same alleged violation of court orders, as described in subsection (d) of the excerpt reproduced above; (3) an on-going threat of exposure to contempt sanctions for alleged violation of court orders, as described in subsection (c) of the excerpt reproduced above[7]; (4) being found in contempt by this court's language in *Tennessen I* and *Tennessen II*, as described in Moylan Standing Reply Memorandum; and (5) economic damage to Moylan's law practice from these various other injuries, as described in

[5] Moylan's memorandum incorrectly cites the case as 2008 Guam 3.

[6] The passage which Moylan emphasizes reads, "[t]hus, the undisputed facts lead to the conclusion that Moylan violated Judge Unpingco's order." *Tennessen II,* 2009 Guam 3 ¶ 47.

[7] *See also* Appellant's Br. at 4.

subsection (d) of the except reproduced above. Each of these categories will be addressed individually.

1. Discrete due process and First Amendment violations

[18] Moylan asserts (1) that the trial court violated his due process rights by issuing the March 2004 Order before he had any opportunity to be heard; (2) that the March 2004 Order is an unconstitutional "prior restraint" on his free speech rights under the First Amendment; and (3) that this court violated his due process rights in issuing *Tennessen I* and *Tennessen II*, both by failing to give him an opportunity to be heard and by making a factual finding on the issue where the trial court had not previously made a finding. Moylan's ST Memo at 6-12. These asserted injuries, without more, are insufficient to grant standing.

[19] To obtain constitutional standing, a litigant must not only demonstrate an "actual injury" but also that "the injury or threat of injury [is] both '*real and immediate*,' not 'conjectural' or 'hypothetical.'[8]" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citation omitted) (emphasis added). In *City of Los Angeles v. Lyons*, the Supreme Court ruled that a citizen seeking an injunction against the Los Angeles Police Department for previous injuries inflicted by police officers *did not* have constitutional standing to sue for a permanent injunction against the Police Department, noting that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." 461 U.S. at 102 (citing *O'Shea v. Littleton,* 414 U.S. 488, 495-96 (1974)). Thus, even if we assume *arguendo* that all of Moylan's arguments about the alleged violations of his

[8] In providing an example of an "injury" which was too "conjectural" or "hypothetical" to provide standing to a plaintiff in a case, the *Lyons* court cited to *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969). In *Golden*, the court held that the possibility that the plaintiff in the case might potentially run for Congress in the future did not entitle him to seek prospective protection against misconduct similar to what occurred when he had previously run for office. *See id.* at 109.

constitutional rights are correct (that the March 2004 Order *was* a "prior restraint," etc.), these violations themselves do not confer standing unless there are continuing, present adverse effects.

[20] The important question in this case is not how to characterize the alleged violations, but whether or not Moylan is exposed to any continuing, present adverse injuries that confer him standing. The other injuries Moylan claims he suffers concern on-going issues, and could potentially combine with these discrete allegations to confer standing.

2. The threat of professional discipline.

[21] Moylan states in his brief that "an ethics investigation has been initiated against the real party in interest arising from the void injunction for possibly violating the Guam Rules of Professional Conduct in violating that same void injunction." Appellant's Br. at 18. There is no evidence in the record to support this statement. An unsupported allegation cannot confer Moylan standing. It is well settled that "standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990) (citing *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883) and *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)) (internal citations and punctuation omitted), *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). Any other proof on this issue would fall outside the appellate record as defined by Rule 7(a) of the Guam Rules of Appellate Procedure. Further, any ongoing investigation conducted by the Guam Bar Ethics Committee is a confidential proceeding, at least in preliminary stages. *See* Rule 2 of the Guam Bar Ethics Committee Governing Discipline ("Until the Committee has either filed its proposed order . . . or has issued the respondent a public reprimand, all proceedings under these rules . . . shall be *confidential and private.* . . .") (emphasis added); *see also State ex rel. Missouri Ethics Comm'n v. Nichols* 978 S.W.2d 770,

772 (Mo. Ct. App. 1998). Taking judicial notice of any ongoing disciplinary proceeding would be inappropriate.

[22] The *possibility* of an ethics investigation, unsubstantiated by any proof and/or by any actual ethics prosecution, is an "injury" which is too "hypothetical" or "conjectural" to convey standing to Moylan. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969). Although we cannot say that such an investigation *could not* happen, no evidence (other than arguments in the briefs) have been presented showing that it *has* happened, or that it *will* happen. *See, e.g., Younger v. Harris*, 401 U.S. 37, 42 (1971) ("[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. . . .") (citing *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969)). Should an actual ethics prosecution ever occur, Moylan would have the opportunity to marshal many of the same arguments he makes here in his own defense against such a prosecution.

3. Exposure for contempt sanctions

[23] Moylan originally argued that he was "subject to contempt and professional misconduct charges for the period the injunction was in effect (March 26, 2004 - August 20, 2009)." Appellant's Br. at 9. Moylan has since slightly modified his argument, stating that this court's "finding of violation of the court's March 26, 2004 order . . . exposes Douglas to criminal and civil contempt for violations of the order. . . ." Moylan ST Memo at 5. Neither argument is correct; Moylan is not subject to the threat of either any criminal contempt sanctions or any civil contempt sanctions for his actions between 2004 and 2009.

[24] Much of the confusion here seems to be brought on by Moylan's seeming disregard for the technical and legal meaning of the term "contempt." The court in *Tennessen III* described this state of affairs as follows:

> The word "contempt" has a technical legal meaning referring to the imposition of sanctions by a court to coerce compliance with a court order or to punish a party or lawyer for acting in opposition to the court's authority. *See* 7 GCA §§ 34101-34102 (2005) (setting forth the specific actions constituting contempt and the procedural requirements that must be adhered to prior to the imposition of sanctions upon a finding of contempt); *Latrobe Steel Co. v. United Steelworkers of America,* 545 F.2d 1336, 1343 (3d Cir. 1976) (stating that criminal contempt proceedings "are separate from the actions which spawned them").

2010 Guam 12 ¶ 4 n.3.

[25] This court previously discussed, in considerable detail, the contours of the contempt powers of the Guam courts in the case of *People v. Torres*, 2008 Guam 26. We recognized that Guam courts may impose either civil or criminal sanctions under the general contempt powers found in Title 7 of the Guam Code Annotated, Chapter 34. *See Torres*, 2008 Guam 26 ¶¶ 31-39. We also discussed the key differences between civil and criminal contempt, stating that "[a] sanction is likely to be civil if the defendant stands committed unless and until (and only until) he performs the affirmative act required by the court's order. However, where the sanction is to punish past misconduct, to vindicate the authority of the court, it is criminal.[9]" *Torres*, 2008 Guam 26 ¶ 20 (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

[26] Under these standards, it is clear that any "contempt" sanction which could be leveled at Moylan would have to be criminal; there is no longer (if there ever was) any method for "curing" the alleged violations of the March 2004 court order which would be the basis for any contempt sanction. *Id.* The lack of any ability to cure contempt through compliance indicates that civil

[9] Put differently, for a contempt order to be considered civil, the contemnor must "carry the keys of their prison in their own pockets." *Torres*, 2008 Guam 26 ¶ 24 (citation and quotation omitted).

contempt is inapplicable. *Id.* (citing *United States v. Haggerty*, 528 F. Supp. 1286, 1296 (D. Colo. 1981) ("[I]f the sentence imposed is conditional and grants the defendant the ability to end the penalty by complying with the order, the contempt is civil; where the penalty is fixed and *there is no possibility of complying with the court order*, the contempt is criminal.") (emphasis added) (internal citations omitted)).

[27] It is equally clear that any criminal prosecution for contempt would now be barred by Guam's general one year statute of limitations for non-felony crimes, as the underlying contemptuous acts would have been committed on or before August 21, 2009 (the date when the trial court lifted the March 2004 order). *See* 8 GCA § 10.30 ("A prosecution for any offense which is not a felony shall be commenced within (1) year after it is committed."). This is because a criminal contemnor, like any other person subjected to criminal sanction, is entitled to protection from the various legal mechanisms which operate in traditional criminal practice, even though the contempt statute itself is not explicitly a part of the criminal code. *See, e.g., U.S. v. Dixon*, 509 U.S. 688, 696 (1993) ("We have held that constitutional protections for criminal defendants . . . apply in nonsummary[10] criminal contempt prosecutions just as they do in other criminal prosecutions."); *People v. Torres*, 2008 Guam 26 ¶ 56 (". . . we find that Torres may not be punished under both the general contempt statute and the substantive crime statute for the same offenses. . . ."); *see also Pendergast v. United States*, 317 U.S. 412, 418 (1943) ("power to punish contempts for willful violations of the court's decrees must have some limit in time . . . Chief Justice Marshall stated that it would be utterly repugnant to the genius of our laws to allow

[10] Note that this is not *necessarily* true in cases of "summary contempt", or contempt which concerns actions which actually take place in the physical presence or proximity to the judge issuing the contempt order; a history of the divergence between "summary" and "non-summary" contempt can be found in *Bloom v. State of Ill.*, 391 U.S. 194 (1968). As the alleged actions which would be the potential basis for contempt in this case did not take place in court, the distinction is irrelevant here.

such an action to lie 'at any distance of time'. That observation is equally apt here.") (citing *Gompers v. United States*, 233 U.S. 604, 612 (1914) (further quotation and citation omitted)). Moylan cannot be held in contempt for any of his actions which allegedly took place during the pendency of the March 2004 order.

4. Language in *Tennessen I*, 2008 Guam 21 and *Tennessen II*, 2009 Guam 3

[28] In his standing memoranda, Moylan focuses most of his argument on the language of *Tennessen I* and *Tennessen II*, which states that "[t]hus, the undisputed facts lead to the conclusion that Moylan violated Judge Unpingco's order." 2008 Guam 21 ¶ 25; 2009 Guam 3 ¶ 47, respectively. Moylan claims that this is a finding of contempt, and also that the language "affect[s] his ability to earn money through his license to practice law. . . ." Moylan ST Memo at 5. Neither of these contentions is correct. Each argument will be discussed separately.

a. No finding of contempt

[29] Once again, Moylan demonstrates a willingness to play fast and loose with precise legal meaning of "contempt" in order to make a rhetorical point. Moylan's Standing Reply reads: "Douglas . . . was in fact found in contempt by a finding of *willful* violation of a court order, despite no notice to Douglas to appear and to defend himself by the Supreme Court of Guam." Moylan ST Reply at 7 (emphasis added). Moylan misstates the language used in the previous opinions. Neither opinion discusses "willfulness" at all.[11]

[30] In *People v. Torres*, we followed the U.S. Supreme Court's decision to impose a willfulness requirement in contempt proceedings even when not explicitly commanded to do so by statute. 2008 Guam 26 ¶ 54. Without any mention of willfulness, Moylan cannot effectively

[11] In fact even the word "will" only appears in *Tennessen I* at two unrelated occasions (in paragraph 8 and again in paragraph 17) and does not appear in *Tennessen II* at all.

argue that the language of the previous opinions was a finding of criminal contempt as defined by Guam law. Moylan has highlighted this issue in his previous briefing. *See* Appellant's Br. at 3 ("Before and during the hearing that resulted in the Decision & Order restraining the real party in interest, no notice was afforded the real party in interest . . . subsequent to the issuance of the Decision & Order, that Decision & Order was never served upon the real party in interest. . . . ") This court, in *Tennessen I* and *Tennessen II*, did not pass upon the issue of whether Moylan's violation of Judge Unpingco's order was willful. Had this court done so, we would have a different set of precedents to consider. However, where no discussion of willfulness exists, Moylan is not entitled simply to create one.[12]

b. Damage to reputation alone does not grant standing in this case

[31] Although Moylan has not argued these cases directly, it is true that some federal courts have found that attorneys who are criticized in published decisions *may* have standing to seek appeal, even in the absence of (1) an explicit order of contempt, or (2) any monetary sanction. *See, e.g.*, *Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316, 1319-20 (Fed. Cir. 2007); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163 (10th Cir. 2003); *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000); *Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997); *Sullivan v. Comm. on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967). This is primarily based on recognition of the fact that an attorney's reputation may be his or her most valuable asset, potentially far more valuable than any fine or monetary penalty levied in a case. As the court stated in *Walker*:

[12] As the court in *Tennessen III* noted, in making these arguments Moylan walks on the razor's edge of a separate contempt proceeding for making what appear to be deliberately misleading arguments bordering on misrepresentation. 2010 Guam 12 ¶ 4 n3.

> Stripped to essentials this proposition would maintain that an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct. We reject this proposition out of hand, being persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset.

129 F.3d at 832. While these different federal circuits use different standards to determine whether an attorney has standing in a case, at a bare minimum the attorney must be complaining of a finding of misconduct, which in this context is equated to the finding of a violation of an ethical duty. *See Butler*, 348 F.3d at 1167 ("ethical violations"); *Walker*, 129 F.3d at 832 ("Peebles violated his obligation of candor."); *Sullivan*, 395 F.2d at 956 ("found that each of the said Canons had been violated. . . ."). As the Ninth Circuit explained in *Talao*, "a finding . . . [or] conclusion that [an attorney] knowingly . . . violate[s] a specific rule of ethical conduct . . . *per se*, constitutes a sanction [sufficient to confer standing]." 222 F.3d 1133, 1138 (9th Cir. 2000).

[32] Unfortunately for Moylan, he cannot even claim that there has been a finding of misconduct made against him, the minimum of what would be necessary to grant standing under these standards. Although the court stated that "Moylan has violated Judge Unpingco's order" there is no statement that he violated any ethical rule, or (as discussed above) that he violated any order willfully. 2008 Guam 21 ¶ 25; 2009 Guam 3 ¶ 47. There is also no evidence on the record as to how or to what degree Moylan's "reputation in the community" may have been damaged directly as a result of *Tennessen I* and/or *Tennessen II*. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (a party asserting standing must provide evidence beyond argument). Moylan does not gain standing on these grounds.

C. Summary

[33] None of the on-going injuries which Moylan asserts in this case provides standing. The prospect of a professional misconduct investigation is unsupported by evidence. Moylan cannot, by virtue of Guam's fallback statute of limitations, face further contempt penalties for his alleged violations of the trial court's March 2004 order. The language of *Tennessen I* and/or *Tennessen II* is not a finding of contempt, nor is it sufficient grounds on its own to provide standing. Moylan does not have Article III standing and is not a proper "Real Party in Interest". As these jurisdictional findings are dispositive, the court need not address the merits of the other arguments presented by the parties.

V. CONCLUSION

[34] In order for a person to be a "Real Party in Interest" under Rule 17 of the Guam Rules of Civil Procedure that person must have Article III constitutional standing. None of the bases for Article III constitutional standing which Moylan puts forward in this case are sufficient to grant standing. Moylan is not a "Real Party in Interest". Moylan's appeal is therefore **DISMISSED**.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Richard H. Benson
RICHARD H. BENSON
Justice *Pro Tempore*

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice