



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 8, 2010

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Re: *Dr. Richard P. Tu, et al v. Vietnamese Medical Society of Northeast America, et al* No. 2009-18307

Dear Counsel:

This matter comes before the Court on Defendants' Motion for Sanctions against Mr. Tran and the plaintiffs. After considering the written briefs and reviewing the applicable legal authority, the Court finds that sanctions are

warranted against Mr. Tran only. Therefore, the Defendants' motion is granted, the Court's September 13, 2010 Order is hereby reinstated and the case is dismissed without prejudice.

## BACKGROUND

The Plaintiffs in this case are doctors who are members of the Vietnamese Medical Society of Northeast America ("VMNSA"), and they are suing the VMNSA along with other individual doctors who are also members. The Plaintiffs originally retained Thomas Campbell to represent them but later substituted Jason Zellman as their counsel of record. Mr. Zellman filed an amended complaint on May 7, 2010. At all times relevant to the Court's consideration of the Defendants' Motion for Sanctions, Mr. Zellman has remained the attorney of record for the Plaintiffs as no Order of Substitution has ever been entered to remove him.

The Defendants have been represented by Mr. Richard Nguyen at all times in this case. On June 7, 2010, Mr. Nguyen filed a demurrer to the amended complaint, and it was set for a hearing on August 13, 2010. Between June 7 and the August 13 hearing, several relevant events took place. They are as follows:

- June 21, 2010 – Due H. Tran calls Mr. Nguyen and asserts that he is not representing the Plaintiffs but merely attempting to mediate the dispute as a third party. Nguyen objects to having a substantive conversation about the case due to Mr. Zellman's absence from the conversation.
- July 28, 2010 – Mr. Tran calls Mr. Nguyen to reiterate that he was not representing the Plaintiffs during the June 21 phone call and was merely trying to act as a mediator. Mr. Tran reiterates this in an Email later that same day.
- August 12, 2010 – Mr. Nguyen receives via first class mail a copy of an Order of Substitution (endorsed only by Mr. Tran), Plaintiffs' Opposition to Defendants' Demurrer (endorsed by Mr. Tran as counsel of record), and a Praecipe: Erratum.

During the August 13 hearing, originally scheduled for arguing the demurrer, Mr. Tran made an oral motion for substitution of counsel for the Plaintiffs before any argument on the demurrer began. Mr. Tran moved to substitute himself for Mr. Zellman, who was not present, but who had purportedly signed the Order of Substitution. Mr. Nguyen noted his objection, stating that he had refused to sign the Order, and asserted that he had prepared a motion to disqualify Mr. Tran. Mr. Tran stated to the Court in support of his substitution motion, that he had read Mr. Nguyen's motion but denied all allegations contained within it. After some discussion the Court refused to hear argument on the demurrer based on stated concerns about the appropriateness of having an attorney argue a case who may later end up disqualified. At the close of the hearing, the Court ordered that argument on the demurrer and a motion to disqualify Mr. Tran as counsel be set for Tuesday, September 7, 2010, at 8:30AM. The Court asked Mr. Nguyen to prepare

the Order, noting that he was the only counsel of record in the court that day. Mr. Tran refused to sign the Order.

On August 30, 2010, the Court referred the parties to conciliation to discuss Mr. Tran's representation and Mr. Nguyen's objections thereto. At conciliation Mr. Tran, Mr. Nguyen, and Mr. Zellman agreed that if the Court was inclined, it could allow Mr. Tran a limited appearance solely for the purposes of arguing the opposition to the demurrer and then based on the outcome, the Court would entertain arguments regarding Mr. Tran's ability to represent the Plaintiffs. Due to the potential for a longer hearing than originally anticipated, the Court rescheduled the hearing for Thursday, September 9, 2010 at 9:00AM. The Court's law clerk informed Mr. Nguyen, Mr. Tran, and Mr. Zellman. Mr. Nguyen and Mr. Zellman agreed to appear, and Mr. Tran stated that he thought he could make it but would call back if he had any conflicts. The Court's law clerk never received a return phone call from Mr. Tran stating that he could not make the hearing.

At the September 9 hearing, Mr. Nguyen and Mr. Zellman appeared, but Mr. Tran did not. The Court listened to statements by both Mr. Nguyen and Mr. Zellman as to Mr. Tran's involvement in the case. The Court also questioned Mr. Zellman about the nature of the amended complaint and understood that the Plaintiffs intended to change the complaint to allege a shareholders' derivative action instead of a declaratory judgment action. With this considered, the Court ruled that the demurrer was sustained without leave to amend, but dismissed the case without prejudice so that the plaintiffs could re-file the action as a shareholders' derivative suit. The Court granted Defendants' request to suspend the final order pending Defendants' filing and the Court's ruling on Defendants' motion for sanctions against Mr. Tran and the plaintiffs. The Court asked the attorneys to return on Monday, September 13, 2010 at 9:00AM for entry of the order.

Late in the afternoon on September 10, 2010, Mr. Tran left a voicemail for the Court's law clerk indicating that he thought the Court had rescheduled the hearing on the demurrer for that day, Friday, September 10, 2010, and requested that the Court entertain additional argument from him. Prior to the commencing of the hearing on September 13, 2010, Dr. Lan Tu, one of the Plaintiffs, approached the Court's law clerk in the hallway and attempted to convince her that there had been a misunderstanding regarding the date and time of the hearing on the demurrer. The Court's law clerk did not engage in the conversation. At the September 13, 2010 hearing, Mr. Tran appeared, along with Mr. Nguyen and Mr. Zellman, and repeated his request for the Court to entertain argument. The Court declined to do so but granted Mr. Tran's request to edit the language in the Order to state that he "was not present" as opposed to "declined to be present." Mr. Tran stated to the Court that a "disconnect" had happened between him and the Court's law clerk and that he thought the hearing was scheduled for Friday, September 10<sup>th</sup>.

On September 16, 2010, Mr. Nguyen notified Mr. Zellman and Mr. Tran that he intended to appear in calendar control to request a long briefing schedule for the Motion for Sanctions and asked Mr. Zellman, current counsel of record, to appear with him. All three attorneys conferred via Email regarding available dates. On September 20, 2010, Mr. Nguyen and Mr. Zellman appeared in front of Judge Thacher in calendar control, and Judge Thacher set down a briefing schedule. The schedule required Mr. Nguyen to file his brief by September 21, with a response due from Mr. Tran by September 27, and disallowing a reply brief. Judge Thacher did not set a hearing date as he ordered the motion to be decided on the briefs.

On September 21, 2010 Mr. Nguyen filed his motion. On or about September 24, Dr. Lan Tu called the Court's law clerk seeking advice because Mr. Tran was allegedly out of town and she was concerned about him missing another hearing. The Court's law clerk responded that she could not give any advice but that there was currently no hearing scheduled in the case.

Mr. Tran did not file any response until October 4, when he filed a response in the form of a motion for a continuance or an extension of time. The motion contains an accusation that Mr. Nguyen conducted an *ex parte* hearing with the calendar control judge and contends that the time frame allotted for the response to the Motion for Sanctions was not appropriate. In response, the Court informed Mr. Tran, with copies to Mr. Zellman and Mr. Nguyen, that the calendar control hearing was not *ex parte* because Mr. Tran was duly notified and chose not to appear. The Court allowed Mr. Tran until 3:00pm on Friday, October 8, 2010, to file a response to the allegations in the Defendants' Motion for Sanctions and noted that failure to respond would result in the Court deciding the Motion on the Defendants' brief alone. Mr. Tran filed his response on October 8, 2010 prior to the deadline.

On October 8, 2010, Mr. Nguyen filed a supplemental brief to his motion for sanctions with the Court's permission. The supplemental brief contains exhibits that demonstrate quite conclusively that Mr. Tran misrepresented his "calendar mistake" to the Court and the Court's law clerk. The exhibits are public documents from the United States District Court for the Eastern District of Virginia showing that Mr. Tran appeared in that court to argue a criminal motion and sponsor another attorney for pro hac vice admission on the morning of September 10, 2010. Multiple documents have September 10, 2010 stamped on them, and the document summarizing the motion hearing states that the argument took place from 9:57AM until 10:12AM.

On October 12, 2010, another one of the Plaintiffs, Dr. Tram Buie, left a voicemail for the Court's law clerk stating that she wanted to know the date and time for when the Court would be giving its decision that week. Simultaneously, attorney Tim McGary appeared in calendar control in front of Judge Devine on behalf of the Plaintiffs, attempting to get the Court to consider another response to

the Defendants' Motion for Sanctions. The Court refused to consider this as it was past the extended deadline the Court set for filing a response.

On October 14, 2010, a scheduling conference was on the court's docket for this case. Neither attorney appeared, but Mr. Nguyen called the Court's law clerk and apologized for mistakenly thinking the scheduling conference had been canceled due to the pending Motion for Sanctions and order of dismissal. Mr. Tran's colleague, Mr. Steven Oh, called the Clerk's Office and stated that Mr. Tran had not had notice of the hearing despite Mr. Oh's confirmation that the Clerk's office had used the correct address in sending the notice. Dr. Richard Tu and Dr. Lan Tu, however, did appear for the scheduling conference. Dr. Richard Tu told Court staff that he was one of the Plaintiffs and was not represented by an attorney. Dr. Lan Tu told Court staff that she was not a party to the case, but had just come with her husband.

## ANALYSIS

### *Sanctions*

Defendants' Motion for Sanctions asserts that several actions by Mr. Tran and the Plaintiffs are sanctionable under Virginia Code § 8.01-271.1. That section states:

[E]very pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name...

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

If a pleading, motion, or other paper is signed or made in violation of this rule, the court upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

*Id.* An objective standard of reasonableness is used to determine whether litigants and attorneys, after reasonable inquiry, could have formed a reasonable belief that their pleadings were well grounded in fact. *Ford Motor Co. v. Benitez*, 273 Va. 242, 253, 639 S.E.2d 203, 208 (2007).

Defendants contend that Mr. Tran's failure to withdraw pleadings he filed prior to August 13, 2010 is a violation of this rule because the court determined at the August 13<sup>th</sup> hearing that Mr. Tran's status as counsel of record for the Plaintiffs was in dispute. These pleadings were then not signed by a counsel of record because Mr. Zellman had not signed them. Mr. Tran argues that because the Court did not rule on his oral motion for substitution or Mr. Nguyen's objection at the August 13 hearing, he was not improperly representing the Plaintiffs. But that argument does not respond to the Defendants' concerns about the pleadings Mr. Tran had already filed. Moreover, these pleadings were signed and filed after Mr. Tran had told Mr. Nguyen that he would not be representing the Plaintiffs and before Mr. Zellman had signed off on an Order of Substitution. Additionally, Mr. Tran had not entered an official appearance with the Court as counsel of record for the Plaintiffs prior to the August 13 hearing. Therefore, it was unreasonable for Mr. Tran to think that these previous filings were still properly before the Court.

Defendants further argue that Mr. Tran's filing of additional pleadings and papers with the Court after the August 13 hearing, while knowing that his status as counsel was in dispute constitutes a violation of the second paragraph of § 8.01-271.1. These additional filings include a Praecipe: Erratum, Entry of Appearance of Counsel, Motion to Strike Defendants' Counsel's Appearance, and Motion for Protective Order Against Defendants' First Request for Admissions. In response, Mr. Tran states that because the Court did not exercise its power to disqualify or discipline him for misconduct at any of the hearings, his actions are not sanctionable. Again, Mr. Tran's argument fails to respond directly or adequately to the allegations. If it was not apparent prior to the August 13 hearing, it became clear by the Court's Order from that hearing, that Mr. Tran's status as counsel was in dispute as the Court agreed to hear argument on Defendants' objections to his presence in the case. Filing an Entry of Appearance of Counsel is in direct contradiction to the Court's August 13<sup>th</sup> Order that sets up a hearing to decide exactly that issue. Furthermore, the Motion to Strike Defendants' Counsel's Appearance is baseless and clearly interposed for an improper purpose, to needlessly create delays and increase costs of litigation.

Additionally, Defendants assert that Mr. Tran's oral motion for substitution and his supporting statements regarding Mr. Nguyen's allegations are sanctionable because they are directly contradicted by evidence Mr. Nguyen has submitted to the Court. Mr. Tran does not directly address this allegation. But the Court is persuaded by the Emails and phone records Defendants have submitted that Mr.

Tran did in fact attempt to serve as a neutral third party prior to entering his appearance on behalf of the Plaintiffs.

### *Civil Contempt*

Lastly, Defendants point to Mr. Tran's statements to the Court and the Court's law clerk regarding his "mis-calendaring" and intention to appear at the September 9, 2010, hearing as sanctionable actions. Mr. Tran stated more than once that he did not appear on September 9 because he "mis-calendared" the hearing and/or had a "disconnect" with the Court's law clerk and thought he was supposed to appear on September 10. Defendants have submitted evidence which demonstrates that Mr. Tran appeared in the U.S. District Court for the Eastern District of Virginia on the morning of September 10, thereby proving that Mr. Tran did not make any mistake in the date as he could not have been in two places at once. Mr. Tran has also failed to respond to this allegation. These statements formed the basis for Mr. Tran's oral motion for the Court to change the phrasing of its September 13<sup>th</sup> Order to state that Mr. Tran "was not present" instead of "declined to be present."

"The power of the court to punish for contempt can no longer be challenged." *Robinson v. Commonwealth*, 41 Va. App. 137, 145 (2003). It is well settled in Virginia that a court "is invested with power to punish for contempt in the disobedience of its orders and decrees, both by the inherent nature and constitution of a court, and by statute in Virginia." *French v. Clintwood*, 203 Va. 562, 569 (1962). *See also* Va. Code § 18.2-456. "Any act which is calculated to embarrass, hinder, or obstruct the court in the administration of justice is contempt." *Clugston v. Commonwealth*, 2009 Va. App. LEXIS 344 (Va. Ct. App. Aug. 4, 2009). The Court declines to convene a hearing to determine whether Mr. Tran's actions constitute contempt in this case.

### *Sanctions Against Plaintiffs*

Virginia Code § 8.01-271.1 gives the Court the power to sanction the individual plaintiffs along with Mr. Tran. In pertinent part, it states that "[i]f a pleading, motion, or other paper is signed or made in violation of this rule, the court. . . shall impose upon the person who signed the paper or made the motion, *a represented party, or both*, an appropriate sanction. . . ." *Id.* (emphasis added).

Admittedly, questionable actions by the individual plaintiffs have occurred during the proceedings of this case. Despite many requests and instructions from the Court's law clerk, the plaintiffs repeatedly attempted to contact the Court directly through the law clerk. The plaintiffs did so while claiming that they were represented by Mr. Tran, and then on at least one occasion that they were not represented, but wished to tell the Court what their "attorney," Mr. Tran, could not.



The Court declines, however, to sanction the individual plaintiffs, in spite of their attempts at ex parte communications and the great confusion and delays caused by these actions, not to mention their misrepresentations to the Court. The Court will keep in mind, this time, their lack of a legal education that prevents them from fully understanding and appreciating the impact and ramifications of their actions. All parties are hereby on notice, however, that at no time in the future may any represented party contact the law clerks of this Court directly. Only counsel of record in a case may do so. If a represented party contacts any law clerk directly regarding the present suit, or any future suits which may be filed, they may be subject to future sanctions for attempting inappropriate ex parte communications.

#### *Sanctions Against Mr. Due H. Tran*

With respect to Mr. Due H. Tran, counsel does indeed have a legal education, and is presumed to know the rules and laws of ethics and professional conduct. The Court is aware that within a time frame of two weeks, Mr. Tran called defense counsel (Mr. Nguyen) asserting that he was a "third party" attempting to mediate the cause, yet doing so without including or notifying Plaintiffs' counsel of record, Mr. Zellman. Mr. Tran then proceeded to file pleadings in this matter as "counsel of record." Not only did Mr. Tran file additional pleadings as "counsel of record," he filed an Entry of Appearance as counsel for the Plaintiffs on August 25, 2010, after witnessing the Court's August 13<sup>th</sup> Order setting a hearing to decide whether he would be disqualified from representing the Plaintiffs. Considering the Court's August 13<sup>th</sup> Order, this Entry of Appearance is in direct contradiction to the Court's decision to set the matter for a later date.

Mr. Tran filed these pleadings in this alleged capacity before obtaining leave of Court to do so, before any Substitution Order had been entered, and without properly consulting with Mr. Zellman, who remains counsel of record for the Plaintiffs. These actions have understandably created a virtual nightmare of confusion, requiring several hearings, motions, etc. to try and straighten out which matters are properly before the Court, WHO is representing the plaintiffs and whether the plaintiffs are represented at all. Moreover, to the Court's knowledge, no Order has EVER been entered identifying Mr. Tran as counsel of record for any party in this case. Yet, he has interjected himself nonetheless.

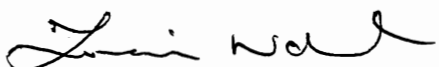
The court declines to sanction Mr. Tran regarding the confusion over the September 9<sup>th</sup> hearing date. Nor will the Court initiate any contempt proceedings against Mr. Tran for his apparent misrepresentation regarding his "belief" that the September 9<sup>th</sup> hearing was scheduled for the 10<sup>th</sup> when he was already scheduled for federal court on the 10<sup>th</sup>. Most of these statements and representations were



made to other individuals and involve matters and events which occurred not in the Court's presence.

However, for the reasons stated above, I grant the Defendants' Motion for Sanctions against Mr. Due H. Tran with respect to the inappropriate and unsanctioned pleadings he filed in this matter and will order him to pay attorneys fees incurred in responding to said pleadings in the amount of \$7,500 plus the costs of the court reporter and transcripts. Counsel for the Defendants will prepare the appropriate Order, reinstating the provisions of the Court's September 13<sup>th</sup> Order, and reflecting that the Demurrer is sustained without leave to amend, and without prejudice. As discussed in court on Sept 9<sup>th</sup>, 2010, this suit was improperly brought as a declaratory judgment action, and since plaintiffs actually intended to file a shareholders' derivative suit, an amendment of the original filing would not have corrected the error(s). This matter will be set for December 10, 2010, at 10:00AM, for presentation of the Order, which should reflect the above.

Sincerely,



Lorraine Nordlund

Judge, Fairfax County Circuit Court

Cc: Timothy McGary