

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JAMES TAYLOR; NEVADA GAMING	)	<b>Supreme Court No. 78517</b>
CONTROL BOARD; AND AMERICAN	)	Electronically Filed
GAMING ASSOCIATION,	)	Jan 15 2021 04:12 p.m.
	)	Elizabeth A. Brown
Appellants/Cross-Respondents,	)	Clerk of Supreme Court
	)	
vs.	)	
	)	
DR. NICHOLAS G. COLON,	)	
	)	
Respondent/Cross-Appellant.	)	
	)	

**MOTION TO ALLOW SUPPLEMENTAL BRIEFING ON COLON’S  
PETITION FOR *EN BANC* RECONSIDERATION OR ALTERNATIVELY,  
MOTION FOR INSTRUCTIONS**

NOW COMES Respondent and Cross-Appellant, Nicholas Colon (“Colon”), and herewith moves to have the Court authorize supplemental briefing on his original Petition for *En Banc* Reconsideration as the Decision which may appertain to this matter has been substantially revised by the Supreme Court Panel following the filing by Colon of his Petition for *En Banc* Reconsideration. This motion is based on the papers on file to date and the following Memorandum of Points and Authorities. Simply, as matters currently stand, there is no format or rule addressing the current status of the case, and Colon requests that the Court clear up any confusion and provide the process for proceeding.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION AND PROCEDURAL FACTS**

This action involves an anti-SLAPP motion where, on July 30, 2020, a three member panel of this Court reversed the District Court's determination that the defamation complaint filed by Colon was not subject to dismissal under NRS 41.660. The principal defendant is James Taylor ("Taylor") who, at the time of the relevant events, was the Deputy Chief at the Nevada Gaming Control Board, Enforcement Division. ("Board"). He is the Board's expert on cheating at gaming, and has since been promoted to Chief of the Enforcement Division.

The gravamen of Colon's defamation claim stems from a publication by Taylor, the sting of which labeled Colon a cheater. The District Court denied Defendants' anti-SLAPP motion to dismiss. In its decision, in light of Taylor's demonstrated and acknowledged position and expertise, the District Court was incredulous that the Board's expert could ascribe cheating to the possession of a ubiquitous item (a crowd counter) which could not be used as a prohibited device under NRS 465.075. On the evidence of Taylor's status and the uncontroverted evidence of a lack of cheating, the District Court found that Taylor would have most likely recognized that Colon's activities were not cheating, and therefore, his communication of Colon's alleged criminal activity was likely not made in good faith. District Court Decision, App. 173:7-8. That is, Taylor would likely not have

believed that his communication was “truthful or is made without knowledge of its falsehood,” under NRS 41.637.

On appeal, a three member panel of this Court reversed the District Court. *Taylor v. Colon*, 468 P.3d 820, 822 (Nev. 2020). The rationale for the reversal can be summed up as follows: Because Taylor swore in an affidavit that he relied upon a conclusion of cheating by his subordinates applying the same facts as he held, he demonstrated unchallengeable and unimpeachable good faith in the publication of Colon being a cheater.<sup>1</sup>

Colon filed a Petition for Rehearing. This Petition for Rehearing was denied on October 1, 2020. Colon filed a Petition for *En Banc* Reconsideration. On November 20, 2020, the full Court took up this Petition and entered an order directing that the Defendants answer this Petition. On December 31, 2020, five months following the filing of the Panel’s Decision, three months following the denial of Colon’s Petition for Rehearing, and over a month following the directive that the Petition for *En Banc* Reconsideration be answered by Defendants, the Panel, apparently *sua sponte* and without motion, without notice, and without

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<sup>1</sup> “We hold that appellants demonstrated that Taylor's presentation was made in good faith. Taylor's declaration states that he acquired all of the information, videos, and photographs used in his presentation through GCB investigations, and that the information contained in his presentation was true and accurate. This declaration shows that the gist of Taylor's presentation was either truthful or made without knowledge of its falsehood.” *Taylor v. Colon*, 468 P.3d 820, 826 (Nev. 2020)

hearing or an opportunity for hearing, amended its Decision of July 20, 2020. *See Taylor v. Colon*, No. 78517, 2020 Nev. LEXIS 80, at \*1 (Dec. 31, 2020).<sup>2</sup>

The changes to the Decision of July 20, 2020 are now arguably before this Court.<sup>3</sup> Colon has never had an opportunity to address these changes or the Amended Decision in the context of his *en banc* petition, and with this Motion, seeks an opportunity to do so. Due to the anomalous nature of the current matter (post-Petition for En Banc Reconsideration with the underlying decision arguably modified), Colon also seeks guidance as to how this should be addressed.

## **II. ANALYSIS**

### **A. LEAVE TO SUBMIT ADDITIONAL BRIEFING**

Before the entire Court is a Petition for *En Banc* Reconsideration of an opinion that is materially different than that upon which the entire Court has sought briefing in its order of November 20, 2020. *Compare Taylor v. Colon*, 468 P.3d 820, 822 (Nev. 2020) *with Taylor v. Colon*, No. 78517, 2020 Nev. LEXIS 80, at \*1 (Dec. 31, 2020). Indeed, whole paragraphs are added and deleted between the two

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<sup>2</sup> This amendment appears to alter a critical factor in the Decision. The original Decision indicates that the declaration of Taylor satisfies the standard for determining a good faith communication. With the supplantation of an entirely new paragraph at pp. 11-12 of the Decision, the Amended Decision changes the test, even though Colon can contend, but has not yet briefed, that the new test remains a bastardization of the law and the anti-SLAPP statutes.

<sup>3</sup> Contemporaneously, Colon is filing a Motion to Strike the Amended Decision. The determination of that motion may moot this motion.

decisions. Colon has never had an opportunity to brief an argument as to why or how this Amended Decision warrants *en banc* reconsideration. Colon should have an opportunity to present further discussion on the advisability of the matter warranting reconsideration on the actual language in the Amended Decision. Euphemistically, it appears that the Amended Decision, months after an answer on the Petition was directed, pulls the proverbial rug out of the briefing before the Court.

A process exists for seeking *en banc* reconsideration. This process contemplates briefing on the rationale for the evaluation of such a petition. NRAP 40A(d). Absent additional briefing, Colon is arguably denied the opportunity to address the actual decision at issue. Thus, leave to file additional briefing should be granted. Simply, when a court undertakes an action which impacts the rights of an individual, notice and hearing is required by precepts of due process. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). Here, with the notice and the prospective hearing (determination of the Petition) having occurred prior to the modification of the Decision, Colon lacks notice and there exists no opportunity for a meaningful hearing (here argument in the form of briefing).

## **B. CLARIFICATION OF THE CURRENT STATUS OF THE MATTER**

The Nevada Rules of Appellate Procedure do not contemplate the current circumstance in any fashion. Nonetheless, the full Court and Colon have been

placed in an unprecedented position regarding the Decision and Amended Decision of the three member panel.

A party aggrieved by a decision is constrained to file a petition for rehearing “within 18 days after the filing of the appellate court's decision under Rule 36.” N.R.A.P. 40. The decision under NRAP 36 was entered on July 30, 2020. By Order, Colon received an extension for the time to file his Petition for Reconsideration up to and including August 31, 2020, and duly filed the Petition for Reconsideration within this time. There is no provision in NRAP 36 addressing the operation of an “amended” decision. Simply, must Colon file a new Petition for Reconsideration premised on the Amended Decision, or is the running of the time under NRAP 36 the sole opportunity to seek reconsideration as NRAP 40 appears to allude?

In this respect, if the amendment of the decision constitutes the “filing of the appellate court’s decision” under NRAP 36, then Colon must file a Petition for Reconsideration concerning the Amended Decision on or before January 19, 2021.<sup>4</sup> Out of abundance of caution, Colon will so file. And depending on how that filing is addressed by the three member panel, a new Petition for *En Banc* Reconsideration may also be indicated. Both the panel and Colon are entitled to

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<sup>4</sup> As January 18, 2020 is Martin Luther King day, the day to file is extended to January 19, 2021 under NRAP 26(a)(1)(C).

know the status of this Amended Decision filed five months after the Decision, filed three months after a Petition for Reconsideration was denied, and filed forty days after the order to answer was issued on the Petition for *En Banc* Reconsideration. For example, should, or even can, the three member panel even address the Petition for *En Banc* Reconsideration to be filed on the Amended Decision.

Also of note, after the passage of months, the amendment of the prior decision will cost Colon \$150.00 for the later Petition for Reconsideration. This money has already been spent once, and it appears that the amendment requires the same expenditure twice for the single action. Moreover, per NRAP 1, the “Rules shall be liberally construed to secure the proper and **efficient** administration of the business and affairs of the courts and to **promote and facilitate the administration of justice by the courts.**” (Emphasis added) Clearly, Colon and this Court have been placed in positions of duplication of efforts and filings due to the late amendment of the decision. With no rules to govern such a circumstance, this matter presents a circumstance where the courts, the parties, and the Bar are entitled to have a definitive determination of that which is or is not authorized and how they should be addressed.

### **III. CONCLUSION**

For the reasons set forth above, should the motion to strike the Amended Decision be denied, Colon requests and should be granted leave to file additional briefing to address the changes to the Decision of July 30, 2021, and all concerned should be given some guidance as to how this anomalous circumstance is to be addressed.

Dated this 15th day of January, 2021.

#### **NERSESIAN & SANKIEWICZ**

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## **CERTIFICATE OF SERVICE**

I certify that on the 15th day of January, 2021, I served a copy of the above  
**MOTION TO ALLOW SUPPLEMENTAL BRIEFING ON COLON'S**  
**PETITION FOR *EN BANC* RECONSIDERATION OR ALTERNATIVELY,**  
**MOTION FOR INSTRUCTIONS** upon all counsel of record by electronic  
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