IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION, Appellants/Cross-Respondents, vs. DR. NICHOLAS G. COLON, Respondent/Cross-Appellant.	**Supreme Court No. 78517** Electronically Filed Jan 15 2021 05:02 p.m. Elizabeth A. Brown Clerk of Supreme Court

MOTION TO STRIKE AMENDED DECISION BY THREE MEMBER PANEL

NOW COMES Respondent and Cross-Appellant, Nicholas Colon ("Colon"), and herewith moves to strike the Amended Decision filed by the three member of this Court on December 31, 2020. This motion is based upon the amendment to the three member panel's Decision of July 30, 2021 being *ultra vires* and out of time. This motion is supported by the papers filed to date in the current matter and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action involves an anti-SLAPP motion where a three member panel of this Court reversed the District Court's determination that the 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.

Colon's defamation claim stems from a publication by Taylor, the sting of which labeled Colon a cheater. In their anti-SLAPP motion, Defendants never presented any evidence that this communication was true. Contrarywise, Colon presented evidence that the communication was false including the declarations of two notable gaming experts and a simple and straightforward analysis demonstrating the falsity of the sting of the allegations concerning the activities of Colon.

The District Court's determination turned on the question of whether Taylor's communication of Colon's activities was made in good faith. In light of his demonstrated position and expertise, the District Court was unbelieving under the evidence that the Board's expert could ascribe cheating to the possession of a ubiquitous item (a crowd counter). 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 not made in good faith.

On appeal, a three member of this Court reversed the District Court. 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.

Colon filed a motion for reconsideration. This motion for reconsideration was denied. Colon filed his Petition for *En Banc* Reconsideration. This Court entered an order directing that the Defendants answer this Petition. While the Petition was pending and months following the panel's denial of the Petition for Reconsideration, the three member panel, without motion, without notice, and without hearing, amended their original decision. Colon contends that this amendment was *ultra vires*, without jurisdiction, and violates basic precepts of due process. This Motion seeks the vacation of the Amended Decision of December 31, 2020.

II. PROCEDURAL AND SUBSTANTIVE FACTS RELEVANT TO THIS MOTION

Colon filed an action in defamation against Defendants. Defendant, Taylor, brought an anti-SLAPP motion seeking to dismiss the defamation claim claiming that his ascription of criminal activity to the Plaintiff was a good-faith communication subject to dismissal pursuant to NRS 41.660. Per this statute, the communication cannot be a good-faith communication if the publisher knew that it

was false at the time the communication was made. Per the anti-SLAPP statute and case law, this determination is to be determined by the District Court unless Plaintiff proves, by a preponderance of the evidence as determined by the District Court, that the publisher knew that the communication was false. *See* NRS 41.637, where "knowledge of its falsehood" forecloses good faith in a communication.

Colon opposed the motion. With the opposition Colon submitted abundant evidence that the publisher here, Taylor, knew that the ascription of criminal activity to Colon was false at the time the communication was made. The District Court denied Taylor's anti-SLAPP motion finding the claim of Taylor under the evidence that he believed the activities of the Colon were criminal at the time of the communication were likely false.

Taylor appealed. A three member panel of this Court reversed, finding that Taylor's affidavit of good faith and alleged reliance on his subordinates foreclosed a contrary conclusion by a preponderance of the evidence. Plaintiff moved for rehearing. The motion for rehearing was denied. At that point Plaintiff sought *en banc* reconsideration. Upon review of the Plaintiff's Petition for *En Banc* Reconsideration, this Court issued an order for Taylor to answer, providing at least some indication that there were issues raised by the Plaintiff meriting a full panel decision.

Months after the denial of the Plaintiff's Motion for Reconsideration and over a full month following the Court's order regarding the Petition for *En Banc* Reconsideration, the three member panel issued a document entitled Amended Decision altering the Decision upon which rehearing was sought and upon which the Court ordered an answer to the Petition for *En Banc* Reconsideration. This Amendment issued without motion and without notice or hearing. That is, the three member panel *sua sponte* changed the established and final decision being considered for *en banc* reconsideration, and purportedly erased the history of the rehearing, the Petition for *En Banc* Reconsideration, and invalidated the current status of this proceeding sans any authority whatsoever.

This action by the three member panel was *ultra vires* under the Nevada Court Rules, the statutes of the State of Nevada, the right to due process, and the orderly administration of justice to which the Plaintiff is entitled.

II. ARGUMENT/ANALYSIS

The three judge panel issued the Decision in this matter on July 30, 2020. *Accord* NRAP 36. A motion for rehearing or reconsideration was timely filed by Appellee. On October 1, 2020, the three member panel denied this motion for rehearing or reconsideration without change to the Decision, thusly ending their authorized interaction with the matter. Nonetheless, on December 31, 2020, five months after the decision was entered, two months after the review for rehearing

was completed and denied, and over a month following the entire Court taking up reconsideration the matter by directing an answer to Colon's Motion for *En Banc* Reconsideration, the three judge panel issued an amended decision. This amendment was an *ultra vires* act of the three member panel, and the amended decision should be stricken.

The format for the amendment of a decision is exemplified in *Valdez v. Emplrs Ins. Co.*, 123 Nev. 170, 172, 162 P.3d 148, 149-50 (2007). In *Valdez*, an amendment after a motion for reconsideration occurred under the following format:

> We previously issued an opinion in this matter on November 9, 2006. After appellant petitioned for rehearing, we withdrew that opinion and granted the petition for rehearing. We now issue this opinion in place of our prior opinion. On rehearing, we reach the same conclusion as in our prior opinion.

Simply, the opportunity to modify a decision exists in, and should be exercised through, the process concerning a motion for reconsideration. This is obviously the contemplation of the Nevada Rules of Appellate Procedure, and has been the previous mechanism under which decisions are amended.

In contradistinction here, the Motion for Reconsideration was expressly denied. That can certainly be taken as a direct ruling that the decision of the three member panel has been reviewed, that the panel is satisfied with the Decision, and thereafter a change to the decision must be in accord with the rules. Simply, the

rules contemplate that any change to a decision would be available, and solely available, under the procedures stated in NRAP 40. Moreover, once a motion for rehearing is denied, it is also contemplated under the rules that any change to a decision would be available, and solely available, under an *en banc* reconsideration under NRAP 40A.

This is simply the universal application of uniform jurisprudence. Once consideration of a decision is taken up by a reviewing authority, the issuing authority is to lose jurisdiction over the amendment of the decision. *See e.g. United Pac. Ins. Co. v. St. Denis*, 81 Nev. 103, 110, 399 P.2d 135, 139 (1965)("The amended decision of October 24, 1962, was followed by findings, conclusions, and a judgment based thereon. This judgment must fall."); *Rambusch v. Burke*, 221 A.D. 777, 777, 223 N.Y.S. 464, 465 (App. Div. 2nd Dept. 1927)*Begley v. Tyree*, No. 6:14-191-KKC, 2017 U.S. Dist. LEXIS 57952, at *1 (E.D. Ky. Apr. 17, 2017)(A decision being reviewed by a superior tribunal cannot be amended). Here, at least for the time being, with the Petition for *En Banc* Reconsideration having been filed and action on that Petition pending, the three member panel was without jurisdiction to modify the final decision published and reviewed months prior to the purported amendment. The amended decision should be stricken.

This is supported on other analysis as well. It is axiomatic that a court acts through the powers and jurisdiction granted. Save for a motion for reconsideration

(here already reviewed and determined), the Nevada statutes and the Court Rules are devoid of any provision allowing for the amendment of a Decision sans motion or notice or hearing. The action of the three member panel in issuing the Amended Decision was simply *ultra vires*, and this Amended Decision should be stricken.

Add to this the unseemly passage of time considering the amendment to the Decision. The ordinary course for modifying precedent is to have the matter come before the Court again. This matter never came back before the Court. There would be no authority for this Court to *sua sponte* amend the seminal case of *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 729, 192 P.3d 243, 246 (2008). Clearly, it has become part of Nevada's jurisprudence. Yet, with the panel amending its decision months after denial of a Petition for Reconsideration, that is the effect of the current amendment. This matter was long out of the hands of the panel, and there was no basis or authority for it to modify its ruling. The Amended Decision should be stricken.

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III. CONCLUSION

For the reasons set forth above, Colon requests that the Amended Decision of December 31, 2020 be stricken.

Dated this15th 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 STRIKE AMENDED DECISION BY THREE MEMBER PANEL** upon all counsel of record by electronic service in accordance with the Court's Master Service List as follows:

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