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** District Court Case No. A782057

RESPONDENT'S REPLY TO APPELLANTS JAMES TAYLOR AND NEVADA GAMING CONTROL BOARD'S OPPOSITION TO RESPONDENT'S MOTION TO ALLOW SUPPLEMENTAL BRIEFING ON COLON'S PETITION FOR EN BANC CONSIDERATION OR ALTERNATIVELY, MOTION FOR INSTRUCTIONS

NOW COMES Respondent and Cross-Appellant, Nicholas Colon ("Colon"), and herewith replies to the Appellants' Opposition regarding supplemental briefing. This Reply is based on the papers on file to date and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL FACTS

On October 29, 2020, Colon filed his Petition for *En Banc* Consideration. On November 20, 2020, Justice Pickering, acting for the Supreme Court (not the panel assigned the matter), issued its order under NRAP 40(e) directing an answer

and "staying remittitur pending resolution of the petition for *en banc* consideration." As of today, the Nevada Supreme Court has never denied or granted the Petition for *En Banc* Consideration in any respect. *See* NRAP 40A.

Following the direction to the Defendants to answer Colon's Petition, the assigned panel *sua sponte* amended its Decision from months earlier and after denying a petition for reconsideration. This was not an amendment by the Court, just the panel. *See* Order Amending Opinion, *Taylor v. Colon*, No. 78517, 2020 Nev. LEXIS 80, at *1 (Dec. 31, 2020). In short, Colon's Petition for *En Banc* Consideration remains pending. *See* NRAP 40A.

Defendants now contend:

> Instead of issuing a separate order upholding the constitutionality of the Anti-SLAPP statute, **this Court opted** to issue an amended order, entirely consistent with the original order, but expressly holding that NRS 41.660 is not unconstitutional.

Defendants' Opposition, p. 3 (emphasis added). On this basis, Defendants contend that there is nothing pending in this Court. *Id*. Reference to the Amended Decision clearly shows that it is the action of a three member panel, and "this Court," as a whole, opted for nothing to this point.

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II. ANALYSIS IN REPLY

A. DEFENDANTS MISCONSTRUE THE STATUS OF THE CASE

Defendant's position is inconsistent with the Nevada Rules of Appellate procedure and the current posture of the case. First, considering their position, Defendants err in conflating a panel of this Court with the entirety of this Court. The fact that a petition for *en banc* consideration exists belies the assertion that a panel of the Court can act on behalf of the entire Court in considering or addressing a matter on behalf of the entire Court affecting the petition for *en banc* consideration. As defined, *en banc* refers to a session "where the entire membership of the court will participate in the decision . . .." Black's Law Dictionary, 5th ed. (1979). Clearly, that is the import of NRAP 40A, as well, and the assertion that the panel amendment is the resolution of an *en banc* matter is, in a word, impossible.

From a different perspective, as the Petition for *En Banc* Consideration is, by definition, before the entire Nevada Supreme Court, and in contrast the Amended Decision is issued by a three member panel, "this Court" did nothing regarding amending the Decision. Defendants' reference to "this Court" is simply wrong, and Defendants' explanation is baseless and unsupported.

Finally, NRAP 40A clearly delineates that it is the entire court, at the direction of two members, who is to grant or deny a petition for *en banc*

consideration. NRAP 40A(f). That remains pending, and the method of changing the Decision is under that rule where "the court may make a final disposition of the cause without reargument or may place it on the *en banc* calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case." None of this has occurred, and the Defendants are misapplying the law and misconstruing the record.

B. THE AMENDED DECISION IS NOT A CONSISTENT DECISION WITH THE PRIOR DECISION

Defendants' position that the Amended Decision is "entirely consistent with the original order" is wrong. In the Amended Decision, the panel adds the entirety of the following paragraph not appearing in the original Decision:

> Although 'contradictory evidence in the record' may undermine a defendant's sworn declaration establishing good faith, *Stark*, 136 Nev. at 43, 458 P.3d at 347, Colon failed to contradict Taylor's claim of good faith. Colon points to declarations that, if believed, would establish that the specific counting device he was caught with cannot be used to cheat at blackjack. But these declarations did not address the correct issue at prong one, which is whether Taylor *believed* Colon had been caught with a cheating device, and not whether he was correct. Accordingly, because appellants demonstrated that Taylor's presentation was truthful or made without knowledge of its falsehood, the district court erred in denying appellants' anti-SLAPP motion to dismiss."

Taylor v. Colon, No. 78517, 2020 Nev. LEXIS 80, at *3 (Dec. 31, 2020)(emphasis in original).[1] Further, the following entire paragraph was stricken from the original decision:

> Moreover, although there is dispute over what Taylor actually said during his presentation, Taylor's declaration denying that he called the individual depicted in the video a cheater constitutes a showing of good faith. *Cf. Coker*, 135 Nev. at 12-13, 432 P.3d at 750 (holding that a defendant who made no reference whatsoever in his declaration as to whether his statements were truthful or made without knowledge of their falsehood did not meet his burden under prong one of the anti-SLAPP analysis). Holding otherwise would make it nearly impossible for a defendant to make a showing of good faith when the parties dispute what was actually said. Because appellants demonstrated that Taylor's presentation was truthful or made without knowledge of its falsehood, the district court erred in denying appellants' anti-SLAPP motion to dismiss.

Taylor v. Colon, 468 P.3d 820, 826 (Nev. 2020). The decisional basis in the Amended Decision is that Colon failed to contest Taylor's "belief" with admissible evidence. The decisional basis in the original Decision is that "Taylor's declaration denying that he called the individual depicted in the video a cheater constitutes a

[1] While the Amended Decision couches the conclusion on Taylor's "belief," the anti-SLAPP statute addresses Taylor's "knowledge," rather than "belief." NRS 41.637, final sentence. This may actually be two sides of the same coin, and Colon argued evidence on the language of the statute, to wit: "Knowledge." Regardless, a person who has "knowledge" of a statement's falsehood cannot have a belief in the statement's truth.

showing of good faith."[2] With the entire premise for the Decision being materially altered, it is impossible to say that the Decision and the Amended Decision are "entirely consistent." Yet, that is the Defendants' premise.

As of this point, Colon has been given no opportunity to brief the panel's asserted failure of Colon to address this revised decisional basis that no evidence was submitted challenging Taylor's alleged belief and supporting a position that Taylor believed/knew his representation of Colon's criminality was false. To the contrary, Colon directly addressed and devoted entire paragraphs applying evidentiary analysis addressing the knowledge/belief of Taylor as to whether Colon was cheating and showing that he necessarily knew/believed that Colon was not cheating. *See* APP047: 3-23; App. 048-49: 7-2.

The appellate panel materially changed the basis of the Decision. This new basis remains unanalyzed in the Petition for *En Banc* Consideration. Under the Nevada Rules of Appellate Procedure, it is contemplated that Colon have the opportunity to present a petition for *en banc* consideration of the Decision being evaluated for *en banc* consideration. The Amended Decision issued by the panel is unaddressed and, absent leave for additional briefing, prevents Colon from

[2] This was a material premise upon which Colon has sought *en banc* consideration. *See* Motion for *En Banc* Consideration, pp. 4-6; 12-17.

addressing that which this Court is to evaluate. Supplemental briefing is, therefore, warranted.

III. CONCLUSION

For the reasons set forth above, Colon requests leave to file additional briefing addressing the Amended Decision, or alternatively, an indication as to how matters are to proceed considering the material changes to the decisional basis for the Appellate Panel's Amended Decision in this matter.

Dated this 28th day of January, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 2021, I served a copy of the above **RESPONDENT'S REPLY TO APPELLANTS JAMES TAYLOR AND NEVADA GAMING CONTROL BOARD'S OPPOSITION TO RESPONDENT'S MOTION TO ALLOW SUPPLEMENTAL BRIEFING**

ON COLON'S PETITION FOR EN BANC CONSIDERATION OR ALTERNATIVELY, MOTION FOR INSTRUCTIONS upon all counsel of record by electronic service in accordance with the Court's Master Service List as follows:

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