

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION,)	Supreme Court No. 78517 District Court Case No. 2017-00057 Filed Jan 28 2021 04:26 p.m. Elizabeth A. Brown Clerk of Supreme Court
Appellants/Cross-Respondents,)	
)	
vs.)	
)	
DR. NICHOLAS G. COLON,)	
)	
Respondent/Cross-Appellant.)	
_____)	

**RESPONDENT’S REPLY TO APPELLANTS JAMES TAYLOR AND
NEVADA GAMING CONTROL BOARD’S OPPOSITION TO
RESPONDENT’S MOTION TO STRIKE AMENDED DECISION**

NOW COMES Respondent and Cross-Appellant, Nicholas Colon (“Colon”), and herewith replies to the Appellants’ Opposition concerning Colon’s pending Motion to Strike the Amended Decision. 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.” (Emphasis added). As of today, the Nevada Supreme Court has never denied or granted the Petition for *En Banc* Consideration in any respect, and it remains “pending.” *See* NRAP 40A.

Following the direction to the Defendants to answer Colon’s Petition, the assigned panel amended its Decision from months earlier and over sixty days after denying a Colon’s Petition for Reconsideration. This was not an amendment by “the Court” as Defendants’ aver, but rather, a panel. *See* Order Amending Opinion, *Taylor v. Colon*, No. 78517, 2020 Nev. LEXIS 80, at *1 (Dec. 31, 2020). Again, Colon’s Petition for *En Banc* Consideration remains pending. *See* NRAP 40A.

Defendants now contend that “this Court opted to issue an amended order.” Defendants’ Opposition, p. 3. No action by this Court, *en banc*, has occurred, per the order of November 20, 2020, since the issue of the advisability of *en banc* consideration has been joined on the direction to answer Colon’s Petition for *En Banc* Consideration. While being so considered, as shown below, the panel has caused this orderly process to be corrupted.

II. ANALYSIS IN REPLY

A. THE STATUS OF THE CASE REQUIRES THAT THE AMENDED DECISION BE STRICKEN

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.

Moreover, the panel decision was without jurisdiction. Simply, “[w]ithout procedural authority, a judicial officer's actions are void.” *Hart v. Hawtin*, No. 50350-6-II, 2019 Wash. App. LEXIS 842, at *13 (Ct. App. Apr. 9, 2019); *Davis v. Crist Indus.*, 98 S.W.3d 338, 342 (Tex. App. 2003)(Judicial actions without authority are a “nullity.”); and see *Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 960 (Or. 1991)(A judicial action in excess of authority is voidable on objection or appeal); accord *McMahon v. Eighth Judicial Dist. Court of Nev.*, 2017 Nev. App. Unpub. LEXIS 295, *2, 2017 WL 1806818 (2017). And here, the panel lost authority on denial of Colon’s Petition for Reconsideration and the filing of the Petition for *En Banc* Consideration. Simply, “an appellate court loses jurisdiction when it has made a final order and control of the case has passed out of its hands.”

Hong v. Wash. State Dep't of Soc. & Health Servs., No. 59549-1-I, 2008 Wash. App. LEXIS 2635, at *14-15 (Ct. App. Sep. 15, 2008).

That presents the direct effect of the denial of the motion for reconsideration issued by the Panel and on the filing of the Petition for *En Banc* Consideration by Colon. The Panel issuing the Amended Decision lost jurisdiction over the matter and correlatively lost the ability to issue an Amended Decision. The only appellate authority remaining is discretionary exercise of the authority to grant *en banc* consideration, the Amended Decision of the Panel is without authority, is void or a nullity, and should be stricken.

B. DEFENDANTS FAIL TO RESPOND TO THE MOTION FILED

Defendants' Opposition is limited to a conclusory and unsupported statement that the Panel's Amended Decision is the action of "the Court." In truth, the issue of *en banc* consideration is presently joined before the entire Court. There is no analysis whatsoever for the authority of a panel of this Court to act for the entire Court during consideration of a petition for *en banc* consideration. There is no analysis whatsoever of the authority or ability of a panel of this Court to amend its decision after the mandatory time for remittitur has passed and the remittitur was only stayed due to the entire Court considering a petition for *en banc* consideration. There is no analysis whatsoever of the due process issues raised. In

short, with their failure to respond, Defendants effectively concede large swaths of Colon's Motion to Strike.

III. CONCLUSION

No matter how many times Defendants say that the Amended Decision is the decision of the Court, it simply is not. Rather, it is a decision of a panel of this Court. Order Amending, *Taylor v. Colon*, No. 78517, 2020 Nev. LEXIS 80, at *4 (Dec. 31, 2020)(signatures). The Decision is subject to review by the entire Court. NRAP 40A.

The Amended Decision, being issued without authority or process is void, voidable, or a nullity, rendering it *ultra vires* after the filing of Colon's Petition for *En Banc* consideration. Nothing in the Nevada Rules of Appellate Procedure contemplates a panel of this Court subjecting a party to the moving target the Amended Decision seeks to impose on Colon. It should not be subject to consideration and should be stricken. As an aside, the fact that the Panel felt it had to materially amend its Decision following the filing of the *en banc* Petition also bespeaks material errors in the Decision, and the need for full briefing and review of the matter under the Petition for *En Banc* Consideration.

Dated this twenty-eighth day of January, 2021.

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian

Robert A. Nersesian
Nev. Bar No. 2762
Thea M. Sankiewicz
Nev. Bar No. 2788
528 South Eighth Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667
Email: vegaslegal@aol.com
Attorneys for Plaintiff

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 STRIKE AMENDED DECISION upon all
counsel of record by electronic service in accordance with the Court's Master

Service List as follows:

AARON D. FORD
Attorney General
THERESA M. HAAR
Special Assistant Attorney General
State Of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
thaar@ag.nv.gov
Attorneys for Defendants
James Taylor and Nevada Gaming Control Board

Jeff Silvestri, Esq.
Jason Sifers, Esq.
McDONALD CARANO LLP

2300 West Sahara Avenue, #1200
Las Vegas, Nevada 89102
jsilvestri@mcdonaldcarano.com
jsifers@mcdonaldcarano.com
Attorneys for American Gaming Association

/s/ Rachel Stein
An Employee of Nersesian & Sankiewicz