IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.: 82524

MARSHAL S. WILLICK and WILLICK LAW GROUP,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, and THE HONORABLE NANCY BECKER, DISTRICT SENIOR JUDGE,

Respondents,

and

STEVE W. SANSON, VETERANS IN POLITICS INTERNATIONAL, INC., and, DOES 1 through X,

Real Parties in Interest.

Petition For Writ to the Eighth Judicial District Court,
In and for the County of Clark
The Honorable Nancy Becker, District Senior Judge Presiding
District Court Case No.: A-17-750171-C

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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I. INTRODUCTION

The Sanson Parties speak as if they have all but won this lawsuit.[1] Among other things, they falsely published that Marshal Willick had been convicted of sexual coercion of a minor child.[2] In ruling on the earlier appeal, this Court was "careful to express no impression as to Willick's likelihood of success" on the merits of this lawsuit."[3] The Sanson Parties are wrong—defeat is not imminent. But, after four years have passed, during which time the case was mostly in stasis, the harm the Sanson Parties intended to inflict has long been accomplished. The exorbitant cost of winning on Prong 2 of the anti-SLAPP motion, litigating another appeal on that issue, and then first conducting discovery for a trial that will not be resolved for several more years before it also is appealed only to get a judgment against defendants who have proudly proclaimed themselves to be "judgment proof," is not worth it.

Legal defeat is not imminent. But voluntary dismissal was necessary because the legal victory the Willick Parties would realize years from now would come at far too high a price in time, aggravation and money.

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[1] Stating that the Willick Parties seek to "abandon their lawsuit only when defeat is imminent." Respondents' Answering Brief, p. 2.
[2] "Attorney Marshall [sic] Willick and his pal convicted of sexually [sic] coercion of a minor…" *Veterans in Pol. Int'l, Inc. v. Willick*, 457 P.3d 970, *2 (Nev. 2020) (unpublished).
[3] *Id.* at *8

The real issue presented by this petition is whether NRCP 41(a)(1)(A)(i) means what it says. If that rule does mean what is says, then the Willick Parties' voluntary dismissal was valid because the Sanson Parties never filed an answer or a summary judgment motion. Therefore, upon the filing of the voluntary dismissal, the case ended.

Over the years, the anti-SLAPP statute has been amended several times. Throughout that time, this Court has passed on many opportunities to amend Rule 41 to change the conditions for voluntary dismissal if it wanted to make any special exception for anti-SLAPP motions. In 2019, the Court ***did*** amend Rule 41(a)(1), but ***not*** the parts relevant here. Yet, the Sanson Parties would like this Court to read into the rule things that it does not say.

"How many legs does a dog have if you call his tail a leg? Four. Saying that a tail is a leg doesn't make it a leg."[4] And, no matter how many times the Sanson Parties try to call an anti-SLAPP Special Motion to Dismiss a summary judgment motion, it is still ***not*** a summary judgment motion. The Legislature can amend the anti-SLAPP statute. This Court can amend Rule 41. But, despite multiple orders by this Court regarding the unilateral right to dismiss under Rule 41(a)(1)(A)(i), including in the anti-SLAPP context, both the Legislature and this Court have

[4] Commonly attributed to Abraham Lincoln; *cf. Wolff v. Wolff*, 112 Nev. 1355, 1363, 929 P.2d 916, 921 (1996) ("Calling a duck a horse does not change the fact it is still a duck."

made their intentions known by choosing not to amend the anti-SLAPP statute or the voluntary dismissal rule.[5]

The Willick Parties' voluntary dismissal was valid and effective upon filing based on the plain language of the voluntary dismissal rule. Even if a party could be prevented from voluntarily dismissing if the other side had filed a motion that was "tantamount" to a summary judgment motion, an anti-SLAPP motion is not such a motion. While this Court has noted that an anti-SLAPP motion functions like a summary judgment motion for purposes of the standard of review on appeal, the burdens of proof on the two motions are quite different.

A summary judgment motion puts the burden on the moving party to prove there is no disputed evidence that prevents the court from ruling as a matter of law. On the other hand, an anti-SLAPP motion flips that burden and requires the non-moving party to come forward—usually without discovery—with evidence that supports its claims. This is a distinction with a meaningful substantive difference.

Even if a party could be prevented from voluntarily dismissing when a case had reached an "advanced stage" under the outlying case of *Matter of Petition of Phillip A.C.*, such a stage has not been reached here. No matter how much the Sanson Parties try to create a false impression by measuring the time (which was a

[5] Litigants rightfully rely on the rules to be applied as they are written until they are changed.

function of the time on appeal), or by counting motions (including disqualification motions necessitated solely by the Sanson Parties' misbehavior), the truth is that the *Phillip A.C.* exception—if it exists at all—applies only when a court has addressed the merits of a case. This case has not reached that point.

The Sanson Parties argument that the Willick Parties' voluntary dismissal "is ineffective because it violates the parties' stipulation" is nonsense. That the parties stipulated to supplement briefing on the anti-SLAPP remand after the motion had already been fully briefed does not impact the validity of the voluntary dismissal. Agreeing to additional briefing and waiving any argument regarding the timeliness of such briefing has nothing to do with waiving the right to voluntarily dismiss a case. Nothing in the stipulation expressly waives the right to file a voluntary dismissal. No such right can be waived when the Willick Parties did not express a clear intention to do so.

The voluntary dismissal rule means what it says. The Willick Parties' voluntary dismissal was valid and ended the case.

II. ARGUMENT

The Sanson Parties make two main arguments pertaining to their interpretation of Rule 41. First, they assert that an anti-SLAPP motion is "equivalent" to a summary judgment motion and, therefore, their anti-SLAPP motion prevented voluntary dismissal. Second, they argue that in the *Matter of*

Petition of Phillip A.C., this Court determined that voluntary dismissal should not be allowed if a case has reached an "advanced stage."

These are two distinct issues. But, it is smoke and mirrors to ignore case authority regarding what constitutes a summary judgment motion by arguing that some of that authority pre-dates the *Phillip A.C.* case. That case did not address the issue at all. Whether this Court has announced a binding rule that voluntary dismissal should be denied when a case reaches an advanced stage even when no answer or summary judgment motion has been filed is quite a different question than whether something other than a summary judgment motion "counts" as such a motion for Rule 41 purposes.

A. The Sanson Parties Do Not Dispute The Plain Meaning Of NRCP 41(a)(1)(A)(i) Or That Dismissal Was Proper Under That Plain Meaning.

The Sanson Parties do not and could not dispute what a plain reading of the voluntary dismissal rule requires or that the Willick Parties' voluntary dismissal was valid under its plain meaning.

The rule provides on its face that a party may dismiss an action without court order merely by filing a notice of dismissal before an answer or motion for summary judgment has been served by the opposing party. NRCP 41(a)(1)(A)(i) (the "Voluntary Dismissal Rule"). "When the language of a statute is unambiguous, this court will give that language its plain and ordinary meaning and

not go beyond it." *Delucchi v. Songer*, 133 Nev. 290, 297, 396 P.3d 826, 831 (2017).

Even the Sanson Parties do not claim the Willick Parties' voluntary dismissal did not meet the express requirements of the Voluntary Dismissal Rule. The Sanson Parties do not claim they filed an answer.[6] And, while they assert that an anti-SLAPP motion is "in effect" or "functionally equivalent to" a motion for summary judgment, they do not claim an anti-SLAPP motion ***is*** a motion for summary judgment.

How could they? It is readily apparent that summary judgment motions are subject to Rule 56 which is distinct from and applies different procedures than the anti-SLAPP statute. Even authority cited by the Sanson Parties makes clear the two motions are not the same. In another section of their brief, the Sanson Parties cite to *Wynn v. Associated Press*, 136 Nev. Adv. Op. 70, 475 P. 3d 44, 45, fn. 1 (2020). Actually, the *Wynn* case confirms what is otherwise obvious—the two motions are not one and the same. In the footnote cited by the Sanson Parties, this Court observed that after "stat[ing] the legal standard under Nevada's anti-SLAPP statute … the district court, in effect, rendered summary judgment." Then, in its

[6] The Sanson Parties claim that filing an answer would have defeated the purpose of the anti-SLAPP statute and increased the costs of litigation because it would have triggered the obligations for mandatory initial disclosures and an early case conference. That is not true. When an anti-SLAPP motion is filed, discovery is automatically stayed. NRS 41.660(e)(3).

mandate, this Court ordered that "the district court shall evaluate AP Respondents' anti-SLAPP motion to dismiss under NRS 41.660." In other words, this Court ordered the district court to treat the anti-SLAPP motion ***as*** an anti-SLAPP motion, not as a summary judgment motion.

An anti-SLAPP motion simply is not a summary judgment motion. And, unless this Court is going to announce that the Voluntary Dismissal Rule does not mean what it says, the Willick Parties' voluntary dismissal was valid.

B. A Motion That Is "Equivalent" To A Summary Judgment Motion Does Not Deprive A Party Of The Right To Voluntarily Dismiss.

The Nevada case that most closely (but not directly) answers the question of whether it is appropriate to consider whether a motion is "equivalent" to a summary judgment motion when considering the Voluntary Dismissal Rule is *Gallen v. Eighth Jud. Dist. Ct. In & For Cty. of Clark*, 112 Nev. 209, 911 P.2d 858 (1996).

In *Gallen*, one party filed a voluntary dismissal after an opposing party had filed a motion to dismiss ***supported by an affidavit***. *Id.* at 211, 859. Rule 12 provides that when matters outside the pleadings are submitted with a Rule 12(b)(5) motion the motion must be decided as a summary judgment motion under Rule 56. Therefore, the non-dismissing party argued that the dismissing party was "barred from dismissing…voluntarily because a motion for summary judgment had, ***in effect***, been filed." *Id.* at 211-212, 859 (emphasis added).

This Court rejected the argument. Referencing the "express terms" of the Voluntary Dismissal Rule, the Court stated that "[a] motion to dismiss remains a motion to dismiss until converted by the district court into a motion for summary judgment." *Id.* at 212, 860. Notably, once converted, pursuant to rule, the motion ***becomes*** a summary judgment motion (not "in effect" a summary judgment motion) which, of course, prevents a dismissal under the Voluntary Dismissal Rule. Before that, "[i]f the defendant wishes to protect herself from the plaintiffs' right to dismiss her voluntarily, she may file an answer or a ***formal*** motion for summary judgment." *Id.* (emphasis added). Because the motion to dismiss had not been converted to a summary judgment motion, it was not enough that the 12(b) motion supported by evidence outside the pleadings was, "in effect," a summary judgment motion. Therefore, the voluntary dismissal was valid. *Id.*

That a Rule 12(b) conversion to a Rule 56 motion makes the motion an ***actual*** summary judgment motion is significant. Again, as discussed in the Petition, the Ninth Circuit agrees that what is "in effect" a summary judgment motion is not enough to block a party's voluntary dismissal rights. *See Am. Soccer Co. v. Score First Enterprises, a Div. of Kevlar Indus.*, 187 F.3d 1108, 1111 (9th Cir. 1999). Thus, when a federal district court declared that it would ***treat*** a preliminary injunction hearing "as a motion for summary judgment," the Ninth Circuit still decided that the right to voluntarily dismiss had not been lost. As the

court explained, "summary judgment 'in the air' simply does not satisfy the Rule 41 requirement." *Id*. at 1112 (emphasis added).

There is no case authority in Nevada that even suggests the Voluntary Dismissal Rule has changed such that a plaintiff's right to voluntarily dismiss can be curtailed by filing what the movant believes is, "in effect," a summary judgment motion.

C. An Anti-SLAPP Motion Is Not "In Effect" A Summary Judgment Motion.

Even if this Court ***had*** announced a rule that made motions that were "in effect" a summary judgment motion a bar to dismissal under the Voluntary Dismissal Rule, an anti-SLAPP motion would not be such a motion.

Every case in which this Court discussed anti-SLAPP motions as "functioning" like a summary judgment motion involved the Court's consideration of procedural matters and not the substance of the motion. Thus, for example, in *Taylor v. Colon*, when the Court stated that an anti-SLAPP motion "functions" like a summary judgment motion, it did so in the context of the multiple changes in the evidentiary burden for anti-SLAPP motions across several amendments to the statute. *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1215 (2020) (discussing shifts from "clear and convincing evidence" to "prima facie" evidence).

This was relevant to the Court because it was considering a claim that the anti-SLAPP statute violated a party's constitutional right to jury. The Court

explained that under the current law, a district court "does not make any findings of fact. Rather, prong two merely requires a court to decide whether the plaintiff's underlying claim is legally sufficient." *Id*. at 1216. Thus, the Court found, the anti-SLAPP statute does not interfere with the jury's exclusive role of resolving the facts. Rather, "much like" a summary judgment motion, the anti-SLAPP statute allows a court to dismiss claims with no reasonable possibility of success. *Id.*

Taylor addressed the similarity of burden of proof requirements on both anti-SLAPP motions and summary judgment motions in the context of a jury's role of resolving factual disputes and the similar *prima facie* standards.

Likewise, in *Coker v. Sassone*, 135 Nev. 8, 432 P.3d 746 (2019), the Court was concerned with the standard of review on an appeal pertaining to anti-SLAPP motions. Again focusing on the 2015 adoption of the *prima facie* burden of proof for anti-SLAPP motions, the Court determined that, like a summary judgment motion, "de novo review is appropriate." *Id.* at 10, 748-49.

That said, the Court has never been reluctant to point out the differences between anti-SLAPP motions and summary judgment motions when those differences are relevant. *See Omerza v. Fore Stars, Ltd*, 455 P.3d 841, fn. 5 (2020) (unpublished). This Court's recent decision in *Wynn* also reflects that anti-SLAPP motions are not, "in effect," summary judgment motions. There, the Court noted that the parties had agreed to have the district court consider issues about the fair

report privilege ***before*** conducting further proceedings to consider the application of the anti-SLAPP statute. *Wynn*, 475 P.3d 44, 47. However, this Court explained that when the district court ruled on the motion it recited the standard under the anti-SLAPP statute while, in effect, it rendered summary judgment. *Id.* at fn. 1. This Court was ***not*** deciding that the anti-SLAPP motions and a summary judgment motions were same. To the contrary, on remand, this Court instructed the district court to evaluate the anti-SLAPP motion under the appropriate anti-SLAPP statute. *Id.* at 52.

The California Supreme Court has explained an important difference between these two types of motions. An anti-SLAPP motion:

> operates like a demurrer or motion for summary judgment ***in "reverse."*** Rather than requiring the defendant to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the plaintiff to demonstrate that he possesses a legally sufficient claim which is "substantiated," that is, supported by competent, admissible evidence."

Coll. Hosp. Inc. v. Superior Ct., 8 Cal. 4th 704, 719, 882 P.2d 894, 903 (1994), as modified (Nov. 23, 1994) (emphasis added).

That difference makes the motions substantively very different. Unlike an answer or summary judgment motion, once a defendant shows the anti-SLAPP statute applies (Prong 1), there is no requirement for the defendant to make any showing or do anything to put the merits at issue. The burden is solely on the plaintiff to make the requisite evidentiary showing. Quite differently, an answer

requires the defendant to admit or deny facts alleged against it. NRCP 8(b). A summary judgment motion requires a defendant to affirmatively show that there are no factual disputes that prevent the court from ruling, as a matter of law. NRCP 56(a); *Maine v. Stewart*, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). These differences show that an anti-SLAPP motion is not, in effect, a summary judgment motion in purpose or in substance. *Elnaggar v. Irvine Co. LLC*, No. G051262, 2016 WL 6275305, at *4 (Cal. Ct. App. Sept. 28, 2016) (unpublished) ("Both demurrers and anti-SLAPP motions are designed to be heard early in a lawsuit, and they address issues different from those addressed in a summary judgment motion").

That conclusion is consistent with this Court's decisions in *Padda*. The Sanson Parties' only response to *Padda* is that it is distinguishable because the voluntary dismissal in that case was filed only one day after the anti-SLAPP motion. While the Sanson Parties argue that fact is relevant to analyzing whether this case was at an "advanced stage" at the time the Willick Parties filed their voluntary dismissal, the Sanson Parties miss the key point. *Padda* indisputably stands for the proposition that an anti-SLAPP motion is not equivalent to a summary judgment motion for purposes of determining whether a party has lost the right to dismiss under the Voluntary Dismissal Rule. *Padda v. Hendrick*, 461 P.3d 160 (2020). Even in the face of an anti-SLAPP motion, a plaintiff need do

nothing more than file a notice of dismissal for a case to be dismissed. *Id*. at 3.

D. The Provisions Of The Anti-SLAPP Statute Do Not Require A Court To Disregard A Voluntary Dismissal

The Sanson Parties offer a host of arguments that refer to the provisions of the anti-SLAPP statute regarding immunity, interlocutory appeals, the discovery stay, and fee shifting. They argue that these provisions all show the Legislature intended to shield defendants from meritless lawsuits (which this case is not) before incurring the burdens and costs of substantial litigation and, therefore, the Legislature "must have" intended that the filing of an anti-SLAPP motion would bar a plaintiff from voluntarily dismissing.

In *Padda*, this Court rejected the argument that the very nature of the anti-SLAPP statute demonstrates the Legislature did not intend to allow plaintiffs to dismiss a lawsuit while an anti-SLAPP motion is pending. *Id.* at *2.

In truth, the Sanson Parties' complaint is with the Legislature based on a distinction between California and Nevada law that this Court has expressly recognized and the Legislature has not changed. Under California's statute, a defendant who has been dismissed after filing an anti-SLAPP motion can still recover fees because the California statute allows an award of fees to the "prevailing party" on an anti-SLAPP motion. *Id.* at *2. In Nevada, the anti-SLAPP statute conditions an award of attorneys' fees on the ***granting*** of an anti-SLAPP motion. *Id.* Thus, as noted in *Padda*, in California even after a voluntary

dismissal, a court determines whether a defendant would have been the prevailing party on the anti-SLAPP motion to decide whether to award attorneys' fees. *See Moore v. Liu*, 81 Cal. Rptr. 2d 807, 811 (Ct. App. 1999); *Coltrain v. Shewalter*, 77 Cal. Rptr. 2d 600, 608 (Ct. App. 1998). No such procedure is available in Nevada.

The Sanson Parties may take this issue up with the Legislature and seek amendment to the anti-SLAPP statute. But they cannot force the Willick Parties to continue to litigate their claims simply because the Sanson Parties claim to believe they will prevail. The Voluntary Dismissal Rule does not require that. The anti-SLAPP statute does not require that. And no decision by this Court requires that.

E. The Court Should Make Clear That There Is No "Advanced Stage" Exception To The Voluntary Dismissal Rule.

The *Phillip A.C.* court applied an "advanced stage" exception to the Voluntary Dismissal Rule. However, contrary to the Sanson Parties' argument, that case did not abrogate this Court's long standing law on the Voluntary Dismissal Rule—it disregarded it. The *Phillip A.C.* court did not mention the *Lerer* case or discuss the analysis of any other case in this jurisdiction or any other that addressed the absolute application of the Voluntary Dismissal Rule. Although, in *Lerer,* this Court made clear that after a voluntary dismissal is filed, the court "has no role to play," the *Phillip A.C.* court did not confront the rule, let alone overrule it.

The conflict should be resolved by reaffirming the rule in *Lerer* that this

Court has continued to apply after *Phillip A.C.*:

> Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he [or she] need do no more than file a ***notice*** of dismissal with the Clerk. ***That document itself closes the file***. There is nothing the defendant can do to fan the ashes of that action into life ***and the court has no role to play***. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary ***or court***.

Harvey L. Lerer, Inc., 111 Nev. at 1170, 901 P.2d at 646 (emphasis in original) (internal quotations and citations omitted); *See also*, *Padda v. Hendrick*, 461 P.3d at *1; *Stubbs v. Strickland*, 129 Nev. 146, 151, 297 P.3d 326, 329 (2013).

Far from being abrogated by *Phillip A.C.*, which has not since been relied on by a Nevada appellate court for any such proposition, the *Lerer* rule continues to apply. In the absence of an answer or summary judgment motion, a voluntary dismissal closes the file ***and the court has no role to play***. There is no room for a court to even consider whether the case has reached an "advanced stage."

As set forth in the Petition, the extensive and overwhelming authority from various federal jurisdictions applies the express interpretation of the federal voluntary dismissal rule without regard to the so-called "advanced stage" of a matter.

This Court should reaffirm that *Lerer* remains the standard for the Voluntary Dismissal Rule.

F. Even If There Was An "Advanced Stage" Exception To The Voluntary Dismissal Rule, This Case Has Not Reached An "Advanced Stage."

If this Court decides to adopt an "advanced stage" exception to the Voluntary Dismissal Rule, the Willick Parties' voluntary dismissal would still be valid.

The *Phillip A.C.* court held the Voluntary Dismissal Rule was not available because the district court had reached the merits of the case. *Phillip A.C.*, 122 Nev. at 1298, 149 P.3d at 60. Not one of the "extensive proceedings" referred to by the Sanson Parties addressed the merits of this case. Motions to disqualify (necessitated solely by the Sanson Parties), discovery stay motions, and even the Prong 1 analysis of an anti-SLAPP motion do not address the merits of a case. As explained in the Petition, this Court acknowledged as much when it noted that the issue of whether Marshal Willick is a public figure is an issue to be determined in the Prong 2 analysis "which relates to the merits," not during the first prong. *Veterans in Politics Int'l, Inc.*, 457 P.3d at *3, n.1.

The Sanson Parties argument that the determination of "advanced stage" should be dependent on "time and effort expended" in the matter finds no support in any case, even *Phillip A.C.* As noted above, the holding of the Court was that dismissal was not valid because the district court had reached the ***merits***. The discussion by the Court pertained to the fact that dismissal was filed after a

hearing on a motion to invalidate an adoption (the merits). *Phillip A.C.*, 122 Nev. At 1290, 149 P.3d at 56. Likewise, the oft-criticized Second Circuit case on which *Phillip A.C.* relied involved several days of argument and testimony comprising a 420 page record and the district court had reached the conclusion that the chances of success on the merits was "small." *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953).

The Sanson Parties cannot point to a single determination that has been made regarding the merits of the Willick Parties' claims. The first prong of the anti-SLAPP analysis is procedural. It asks whether the nature of the speech at issue is sufficient to trigger the protections of the anti-SLAPP statute which would ***then*** require the plaintiff to prove with *prima facie* evidence that its case has some minimal merit. *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1229 (2021).

Because the merits of the Willick Parties' claims have never been reached, ever if there was an "advanced stage" exception to the Voluntary Dismissal Rule, this case has not reached that stage.

G. The Parties' Stipulation Did Not Bar The Willick Parties' Voluntary Dismissal.

On the prior appeal, this Court found the Sanson Parties met their Prong 1 anti-SLAPP burden and remanded so the district court could consider the second prong of the analysis. Because this Court had issued numerous anti-SLAPP

decisions during the substantial time that passed since the parties briefed the original anti-SLAPP motion, the parties agreed it would be appropriate to allow for supplemental briefing of the Prong 2 issue. *See* PA 008 at ll. 11-15.

The parties also agreed to participate in mediation. PA 008 at ll. 16-19. The parties needed the district court's consent for the supplemental briefing on a motion that was otherwise fully briefed and on the timing for that briefing. So, the parties also agreed they would not dispute that the briefing was timely or that the district court had the ability to consider such a brief if it was submitted by a certain date. PA 008 at ll. 22-25.

Thus, the parties' stipulation, which became the order of the district court, provided for just that: If mediation was unsuccessful, the parties would engage in another round of briefing (PA 008-009, ¶ 2), deadlines for such briefing were set (PA 009, ¶ 3), and the parties waived arguments of timeliness regarding such briefing (PA 009, ¶ 4).

The Sanson Parties' recitation of law regarding stipulations includes authority that is not applicable to the issues presented here. *See Garaventa v. Gardella*, 63 Nev. 304, 169 P.2d 540, 549 (1946) (regarding the admissibility of certain testimony). Nonetheless, the stipulation at issue here was approved by the district court. And, the Willick Parties agree on the general principle that stipulations should be enforced with consideration of the surrounding

circumstances. *Taylor v. State Indus. Ins. Sys.* 107 Nev. 595, 598, 16 P.2d 1086, 1088 (1991).

Here, the surrounding circumstances do not suggest that the Willick Parties were surrendering their right to voluntarily dismiss. The circumstances clearly reflect that the parties were merely agreeing to supplemental briefing on a fully briefed motion and to assure that the delay caused by mediation would not be used by either side to make an untimeliness argument.

The stipulation makes no representation, and the Court made no order, that the Willick Parties could not voluntarily dismiss and that this case would proceed to hearing on the anti-SLAPP motion. The Willick Parties did not expressly waive their right to voluntarily dismiss. Such a waiver cannot be implied because nothing about the Willick Parties conduct reflects that it was their intent to waive such an important right. Wavier is the "voluntary relinquishment of a known right" and, "if an intention to waive a right is to be implied from conduct, the conduct should clearly reflect that intention." *Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985).

Also, the Sanson Parties provide no legal support for the statement on Page 3 of their answering brief that the stipulation "estops" the Willick Parties from dismissing under the Voluntary Dismissal Rule. Estoppel to prevent a party from asserting a legal right based on their conduct "requires a clear showing that the

party relying upon it was induced by the adverse party to make a detrimental change in position, and the burden of proof is upon the party asserting estoppel." *Nevada State Bank v. Jamison Fam. P'ship,* 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). The stipulation that did not mention any waiver of the absolute right to dismiss did not cause any party to make a detrimental change of position. It merely allowed both parties to engage in supplemental briefing and agree to the timing for that briefing.

As the district court correctly found, the parties' stipulation is not a bar to the Willick Parties' voluntary dismissal.

H. The Law Of The Case Doctrine Does Not Invalidate The Willick Parties' Voluntary Dismissal.

During the prior appeal in this matter, this Court limited its consideration to the "narrow" issue of the applicability of the first prong of the anti-SLAPP analysis. *Veterans in Pol. Int'l, Inc.,* 457 P.3d 970 at *3 ("Because the district court's order implicates only the first of two steps of anti-SLAPP analysis, our discussion here is limited to that narrow question of law…"). Thus, the only issue this Court resolved was whether the Sanson Parties satisfied their burden under the first prong of the anti-SLAPP statute.

"The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Servs., LLC,* 126 Nev. 41, 44,

223 P.3d 332, 334 (2010). Here, the ***only*** issues decided by this Court in this case were those associated with the Sanson Parties' Prong 1 burden. Whatever "principle" or "rule of law" was involved, this Court certainly did not consider or rule on whether the Willick Parties were obligated to continue to prosecute their case.

Nonetheless, the Sanson Parties contend that this Court's remand for further consideration of the anti-SLAPP motion somehow prevented the Willick Parties from dismissing. This Court rejected a nearly identical argument in *Venetian Macau Ltd. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 132 Nev. 1040 (2016). There, after this Court ordered Jacobs to file an answer in response to a writ petition, Jacobs filed a dismissal under the Voluntary Dismissal Rule and a notice of mootness in this court. *Id.* The petitioning party sought to strike the notice of mootness on the ground that the voluntary dismissal was invalid. Despite the fact that this Court had ordered an answer, it found that the voluntary dismissal was proper. Citing several cases standing for the same proposition as *Lerer*, this Court reaffirmed: "in order to accomplish a voluntary dismissal pursuant to NRCP 41(a)(1), a plaintiff need do no more than file a notice of dismissal with the Clerk, and that such a filing is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." *Id.*

Neither the "law of the case" or the contents of this Court's remand order

prevented the Willick Parties from voluntarily dismissing their claims.

III. CONCLUSION

When the Willick Parties filed their voluntary dismissal pursuant to NRCP 41(a)(1)(A)(i), the Sanson Parties had not filed an answer or a summary judgment motion. The analysis should end there. The dismissal was valid. Even if the Court were to consider the rules the Sanson Parties would like to read into Rule 41, or the other matters the Sanson Parties argue, the Willick Parties' voluntary dismissal was still valid.

Therefore, the Willick Parties respectfully request that this Court order the district court to vacate its Order Striking Plaintiffs' Notice of Voluntary Dismissal and to issue all orders necessary to effectuate the voluntary dismissal.

DATED this 17th day of March, 2021.

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VERIFICATION

I, Mitchell J. Langberg, declare as follows:

1. I am the attorney for Petitioners Marshal S. Willick, and Willick Law Group.

2. I verify that I have read the foregoing PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration was executed on the 17th day of May, 2021 in Las Vegas, Nevada.

/s/Mitchell J. Langberg
Mitchell J. Langberg, Esq., Bar No. 10118

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word for Microsoft Office 365 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d). The total word count of document is 5,312.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable NRAP, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NRAP.

DATED this 17th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 17th day of May, 2021, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION** properly addressed to the following:

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