IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.:

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

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities described in NRAP 26.1(a) must be disclosed. In the course of these proceedings leading up to this Petition, Petitioner has been represented by the following attorneys:

a. Mitchell J. Langberg, Esq., of the law firm BROWNSTEIN HYATT FARBER SCHRECK, LLP.

b. Jennifer V. Abrams, Esq., of the law firm THE ABRAMS AND MAYO LAW FIRM.

c. Dennis L. Kennedy, Esq., and Joshua Gilmore, Esq., of the law firm BAILEY KENNEDY, LLP.

There are no corporations, entities, or publicly-held companies that own 10% or more of Plaintiff's stock, or business interests.

DATED this 23rd day of February, 2021.

THE ABRAMS AND MAYO LAW FIRM
Jennifer V. Abrams, Esq.

BROWNSTEIN HYATT FARBER
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By: *__/s/ Mitchell J. Langberg__*
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Attorney for Petitioners, MARSHAL S. WILLICK and WILLICK LAW GROUP

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Pursuant to NRAP 21, NRS 34.320, and NRS 34.160, Petitioners Marshal Willick and Willick Law Group hereby submit this Petition for Writ of Mandamus and Prohibition requesting issuance of a writ mandamus and prohibition:

1. Directing the district court to vacate its February 11, 2021, order striking Petitioners' Notice of Voluntary Dismissal pursuant to NRCP 41(a)(1)(A)(i), and

2. Otherwise arresting the proceedings of the district court because such proceedings are in excess of the jurisdiction of the district court.

ROUTING STATEMENT

This petition should be retained by the Nevada Supreme Court pursuant to NRAP 17(a)(12) because one of the main issues in this Petition involves inconsistent authority from the Nevada Supreme Court as it relates to a party's right to voluntarily dismiss a lawsuit pursuant to NRCP 41(a)(1)(A)(i) when the opposing party has neither filed an answer nor a motion for summary judgment. Several decisions from the Nevada Supreme Court recognize the absolute right for a party to file such a dismissal. *See Gallen v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 112 Nev. 209, 212, 911 P.2d 858, 860 (1996); *Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995); *Padda v. Hendrick*, 461 P.3d 160 (Nev. 2020).

(unpublished). But one Nevada Supreme Court case has determined that the right of voluntary dismissal is conditional, requiring the district court to consider whether the case has reached an "advanced stage." *Matter of the Petition Phillip A.C.*, 122 Nev. 1284, 1290; 149 P.3d 51, 55 (2006).

This Court also may wish to entertain this Petition because the Court has already heard an earlier appeal in the matter.

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I. PROCEDURAL POSTURE AND REASON FOR WRIT PETITION

On January 5, 2021, Petitioners (the "Willick Parties") filed a notice voluntarily dismissing this action pursuant to NRCP 41(a)(1)(A)(i) (the "Voluntary Dismissal"). Petitioners' Appendix ("PA"), 11-12. Although Respondents (the "Sanson Parties") have never filed an answer or motion for summary judgment, on February 11, 2021, the district court entered an order striking the Willick Parties' voluntary dismissal (the "Order"). PA 015-022.

The district court erred when it determined that the Willick Parties could not voluntarily dismiss their case under NRCP 41(a) because the Sanson Parties' filing of a special motion to dismiss meant that "a summary judgment has been filed under the rule."

The district court also erred both by determining that this case had reached an "advanced stage" and by concluding that voluntary dismissal is waived at an "advanced stage," regardless of whether an answer or summary judgment motion has been filed.

Writ relief is appropriate because the voluntary dismissal was valid and, therefore, the district court has lost jurisdiction to conduct further proceedings. This Court should issue a writ of mandate requiring the district court to vacate its order striking the voluntary dismissal. It should further issue a writ of prohibition instructing the district court to proceed no further. *Harvey L. Lerer, Inc. v. Eighth*

Judicial Dist. Court In & For Cty. of Clark, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995) (after Rule 41 voluntary dismissal, writ relief appropriate to mandate that district court vacate orders in excess of jurisdiction and prohibit district court from proceeding further in the matter).

II. STATEMENT OF ISSUE PRESENTED AND OF THE RELIEF SOUGHT

A. Issue Presented

Whether a litigant can voluntarily dismiss a case under NRCP 41(a)(1)(A)(i) prior to the adverse party filing an answer or a motion for summary judgment where the adverse party had filed an appeal from denial of prong one of a special motion to dismiss, and the order was reversed and remanded.

B. Relief Sought

A writ of mandate and prohibition requiring the district court to vacate its order striking the voluntary dismissal, reinstating the dismissal and prohibiting the district court from proceeding further in this matter.

C. Damages Caused By Not Granting The Writ

Where a voluntary dismissal has been properly filed, the district court is divested of jurisdiction to act further. If this matter is not addressed by way of writ, the parties will fully litigate a lawsuit, including discovery and a significant additional expenditure of time and money when the district court no longer has jurisdiction. Should this Court then hear an appeal and find that the case should

have been dismissed, all of that time and money on both sides will have been entirely wasted.

III. STATEMENT OF FACTS

The Willick Parties filed this lawsuit on January 27, 2017.[1] PA 026. The Sanson Parties never filed an answer. Nor did they ever file a summary judgment motion. The Sanson Parties filed only three substantive motions: their February 17, 2017, anti-SLAPP Special Motion to Dismiss and their February 24, 2017, Motions to Dismiss pursuant to Rule 12(b)(1) and 12(b)(5). PA 026-027.

The Sanson Parties' anti-SLAPP motion was denied by Judge Charles Thompson on March 30, 2017. PA 001-006. Considering the two-step anti-SLAPP analysis, Judge Thompson determined that the Sanson Parties failed to meet their first step burden which required them to demonstrate that the claims arose from their good faith communications in furtherance of the right to petition or the right to free speech in direct connection with a matter of public concern. PA 001-006. Therefore, Judge Thompson denied the motion without ever reaching the second step which would have required the Willick Parties to demonstrate that there was prima facie evidence supporting their claims. PA 001-006.

The Sanson Parties promptly appealed on April 3, 2017. The appeal

[1] Where the relevance of filings in this case is the fact of filing and not the substance, only their reference in the case docket is included.

remained with the Nevada Supreme Court until remittitur was issued on April 30, 2020. In its remand order, the Nevada Supreme Court reversed the district court's order denying the anti-SLAPP motion finding that the Sanson Parties had met their first-step burden and instructing the district court to determine whether the Willick Parties could show the minimal merit necessary to meet their second-step burden in order to proceed in the case. *Veterans in Politics Int'l, Inc. v. Willick*, 457 P.3d 970 (Nev. 2020).

During the entire time of the appeal, the case had been stayed pursuant to the Sanson Parties' request. PA 033-034. As a result, this case was stayed as of May 9, 2017. The stay was not lifted until the Nevada Supreme Court reversed the decision previously in the Willick Parties' favor and remanded the case on April 30, 2020.

On remand, the parties stipulated to defer further briefing on remand to allow them to engage in mediation. PA 007-010. The parties failed to reach a resolution. The Willick Parties considered the future of the case, including the fact that successfully prevailing on the second prong of the anti-SLAPP analysis on remand (as the Willick Parties anticipate), would result in ***another*** immediate appeal under the anti-SLAPP statute—perhaps forcing them to wait years and incur even more fees before they ever had a chance to begin discovery, let alone come to trial. Therefore, the Willick Parties decided to voluntarily dismiss the action.

At the time the Willick Parties filed their notice of voluntary dismissal, the Sanson Parties had not filed an answer, had not filed a summary judgment motion, and the anti-SLAPP motion to dismiss was still pending because it had not been determined. The dismissal was valid.

IV. STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

Even in the context of writ petitions, questions of law, including those regarding the scope of a district court's jurisdiction after the filing of a notice of voluntary dismissal, are reviewed de novo. *Helfstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015); *Berberich on behalf of 4499 Weitzman Place Tr. v. S. Highlands Cmty. Ass'n, No. 72689*, 2018 WL 2041492, at *2 (Nev. App. Apr. 20, 2018).

This Court has made clear that plaintiffs have an absolute right to dismiss a lawsuit prior to their adversary serving an answer or a summary judgment motion:

> 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).

Only one Nevada case has ever deviated from this rule. In *Matter of the*

Petition Phillip A.C., 122 Nev. 1284, 149 P.3d 51 (2006), a clearly distinguishable case, the court determined that a voluntary dismissal would be deemed invalid if the case had reached an advanced stage because "the district court addressed the merits of the case." *Id.* at 1298, 149 P. 3d at 60. No other appellate court has relied on *Phillip A.C.* for its outlying rule. Indeed, the case on which the *Phillip A.C.* court relied is a nearly 70 year-old case from the United States Court of Appeals for the Second Circuit that has since been criticized and questioned by that very Circuit and which the Ninth Circuit explained "stands alone in Rule 41 case law." *Am. Soccer Co. v. Score First Enterprises, a Div. of Kevlar Indus.*, 187 F.3d 1108, 1111 (9th Cir. 1999).

In deciding to strike the Willick Parties' voluntary dismissal, the district court made three errors. First, it incorrectly concluded that because this Court has recognized that a special motion to dismiss under the anti-SLAPP statute "functions" like a summary judgment motion when considering the standard of review on appeal, an anti-SLAPP motion also constitutes a summary judgment motion for Rule 41 purposes. This was legal error. The district court's determination is contrary to the plain language of Rule 41. It also is inconsistent with prior dismissals considered by this Court when anti-SLAPP motions were pending. Finally, it imputes to the Legislature a specific intent when a prior version of the anti-SLAPP statute clearly demonstrates a contrary intent. The 2013

version of the NRS 41.660 (the anti-SLAPP statute) expressly instructed a district court to "[t]reat the motion as a motion for summary judgment." PA 047-048. There is no such directive in the current version of the law. Simply, the filing of an anti-SLAPP motion does not constitute a summary judgment motion and does not preclude a voluntary dismissal under NRCP 41(a)(1)(A)(i).

The district court's second error was in concluding that a party may lose the right to dismiss pursuant to NRCP 41(a)(1)(A)(i) if the case has reached an "advanced stage," even if no answer or summary judgment motion has been filed. The overwhelming weight of Nevada and federal authority supports the conclusion that Rule 41 means what is says—a party may voluntarily dismiss without leave of court if no answer or summary judgement motion has been filed.

The district court's third error was in determining that this case has reached an advanced stage. Even if one were to adopt the *Phillip A.C.* court's analysis, the voluntary dismissal in that case was only invalid because the district court had already ruled on the merits. *Phillip A.C.*, 122 Nev. at 1298, 149 P. 3d at 60. Here, the only substantive motions that had been filed were the anti-SLAPP motion and the motions to dismiss. The district court denied the anti-SLAPP motion on the first prong (deciding that the Sanson Parties had not met their burden to show the anti-SLAPP statute applied). The Sanson Parties appealed, and the Willick Parties responded to the appeal. This Court only considered the first prong (the procedural

prong) of the anti-SLAPP analysis and expressly remanded for consideration of the *prima facie* merits of the Willick Parties' claims on the second prong of the analysis. After subsequent mediation failed, the Willick Parties voluntarily dismissed before any merits determination was made. Therefore, even if there were an "advanced stage" exception to the Willick Parties' right to voluntarily dismiss, this case had not reached that stage.

V. ARGUMENT

A. The Voluntary Dismissal Was Effective Because It Was Filed Before An Answer Or Motion For Summary Judgment Was Served.

NRCP 41(a)(1)(A)(i) expressly allows a party to voluntarily dismiss their complaint if no answer or motion for summary judgment has been served. The district court determined that the Willick Parties' voluntary dismissal was invalid because an anti-SLAPP motion "functions as a motion for summary judgment." PA 015-022, ¶ 31. Therefore, the district court concluded that the Willick Parties "may not voluntarily dismiss this case as a 'summary judgment' has been filed under the rule [Rule 41(a)(1)(A)(1)]." PA 015-022, ¶ 35.

However, the applicable rule does not permit a court to invalidate a voluntary dismissal simply because a motion that "functions" like a summary judgment has been filed.

It is worth initial note that the authority on which the district court relied was

concerned with the standard of review that applied on anti-SLAPP appeals in light of the changing burden between *prima facie* evidence and clear and convincing evidence that had developed in different versions of the anti-SLAPP statute. *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 468 P.3d 820, 824 (2020) (citing *Coker v Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019)). These varying similarities and differences between an anti-SLAPP motion and a summary judgment motion had significant impact on whether the Nevada Supreme Court would review such motions using a *de novo* or abuse of discretion standard. They had nothing to do with Rule 41.

If the Court wishes to know what the Legislature intended, it need only compare the 2013 version of the anti-SLAPP statute (PA 047-048) and the current version. The former anti-SLAPP statute expressly directed a district court to "treat the motion as a motion for summary judgment." There is no such directive in the current statute. Substantive changes to a statute are indicative of legislative intent. *Metz v. Metz*, 120 Nev. 786, 792, 101 P.3d 779, 784 (2004).

This Court also has recognized that voluntary dismissals are valid even after an anti-SLAPP motion has been filed. Just last year the Court issued its decision in *Padda v. Hendrick*, 461 P.3d 160 (2020). In that case, while defendant's anti-SLAPP motion was pending, the plaintiff filed a voluntary dismissal under Rule 41(a). Defendant insisted that the Court was still required to consider his motion

for attorneys' fees. The critical issue in the case was whether the voluntary dismissal was valid because, "when [a] plaintiff voluntarily dismissed the alleged SLAPP suit before a special motion to dismiss is…granted" a defendant cannot recover attorneys' fees under the anti-SLAPP statute.

The *Padda* court rejected the defendant's argument that "the anti-SLAPP statute operates as an exception to the automatic dismissal of a case under NRCP 41(a)(1)." *Id*. at *2. Citing *Lerer*, *infra*, the Court confirmed that a plaintiff need do nothing more than file a notice of dismissal for a case to be effectively dismissed, despite the fact that an anti-SLAPP motion is pending. *Id*. at 3.

The *Padda* decision was wholly consistent with this Court's prior decisions. An anti-SLAPP motion is a special motion to ***dismiss***. *See*, NRS 41.660(1)(a). In *Gallen v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 112 Nev. 209, 911 P.2d 858 (1996), the Court unambiguously held that the bar to dismissal pursuant to "NRCP 41(a), by its express terms, applies only to a motion for summary judgment or an answer, ***not to a motion to dismiss***." *Id.* at 212, 911 P. 2d at 859 (emphasis added). The Court went on to explain:

> While a motion to dismiss is pending, the plaintiff retains the right to dismiss the complaint voluntarily pursuant to NRCP 41(a). If the defendant wishes to protect herself from the plaintiff's right to dismiss her voluntarily, she may file an answer or a ***formal*** motion for summary judgment.

Id. at 212, 911 P. 2d at 860 (emphasis added). Regardless of whether a district

court might determine that an anti-SLAPP motion "functions" as a summary judgment motion or is "similar to" a summary judgment motion, it ***is not*** a motion for summary judgment.[2]

Other courts have reached the same conclusion regarding Rule 41 and procedures that function like summary judgment motions. For example, in *Am. Soccer Co.*, a federal district court consolidated a preliminary injunction hearing and the trial on a matter and announced "this matter is going to proceed as a motion for summary judgment." *Am. Soccer Co.*¸ 187 F.3d at 1109. After the parties conducted discovery, motions in limine were filed and the court conducted two days and seven hours of an evidentiary hearing, the plaintiff filed a notice of voluntary dismissal. *Id.* Noting that FRCP 41 provides an "absolute right" to dismiss before service of an answer or motion for summary judgment, the court explained:

> [S]ummary judgment "in the air" simply does not satisfy the explicit Rule 41 requirement that a defendant follow one of two specified courses of action in order to terminate plaintiff's right to dismiss his action without prejudice." *Thorp*, 599 F.2d at 1174; *see Merit Ins. Co.*, 581 F.2d at 142 (motion to stay proceedings and compel arbitration is not the "equivalent" of answer or motion for summary judgment); *Foss*, 808 F.2d at 659–60 (findings and consideration of matters outside pleadings in Rule 11 inquiry does not convert it into

[2] One important difference is the discovery stay triggered by an anti-SLAPP motion that does not exist when a summary judgment motion is filed. Non-moving parties are routinely allowed sufficient time to conduct necessary discovery to oppose a summary judgment motion. A court can only allow discovery to oppose an anti-SLAPP motion under narrow circumstances.

> equivalent of summary judgment motion); *see also Scam Instrument Corp. v. Control Data Corp.*, 458 F.2d 885, 889–90 (7th Cir.1972) (where motion denominated as partial summary judgment is actually motion to dismiss, plaintiff may voluntarily dismiss under 41(a)(1)).

Id. at 1112. Therefore, the Ninth Circuit determined that plaintiff's voluntary dismissal was valid even though the district court treated the motion like a summary judgment motion.

Because the Sanson Parties neither filed an answer nor a formal summary judgment motion, the Willick Parties' voluntary dismissal was timely.

B. The Court Should Not Recognize An "Advanced Stage" Exception To NRCP 41(a).

The rules of civil procedure adopted by this Court and by the federal courts could have included a provision granting a district court discretion to deny a voluntary dismissal if a case has reach an "advanced stage." But the rule has no such provision and district courts are not free to write in such a provision. Instead, where there has been no answer or summary judgment motion, the rule is self-executing, ending a case as soon as a notice of voluntary dismissal is filed.

What was set out in the summary of this argument is worth repeating here:

> 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).

Courts across the country agree that in the absence of the opposing party serving the requisite answer or summary judgment motion, neither timing nor motive matter. *Concha v. London*, 62 F3d 1493, 1506 (9th Cir. 1995) (after motion to dismiss); *In re Skinner & Eddy Corp.*, 265 US 86, 93-94, 44 S.Ct. 446, 448 (1924); *Pilot Freight Carriers, Inc. v. International Brotherhood of Teamsters*, 506 F2d 914, 917 (5th Cir. 1975) (to "shop" for friendlier judge); *Plain Growers, Inc. By & Through Florists' Mut. Ins. Co. v. Ickes-Braun Glasshouses, Inc.*, 474 F2d 250 (5th Cir. 1973) (to avoid discovery).

The *Phillip A.C.* case is not in line with any other appellate case in this jurisdiction or the federal circuits other than the case on which the *Phillip A.C.* court relied—a case decided seven decades ago in the Second Circuit—*Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953). Both the *Phillip A.C.* court and the *Harvey Aluminum* court determined that when a case reached an "advanced stage" where a court had made a merits determination, a party could no longer voluntarily dismiss their case, even though no answer or summary judgment motion had been filed. *Id.* at 108 (several days of argument and testimony comprising 420 page record and district court had reached the conclusion that chances of success on the merits was small); *Phillip A.C.*, 122 Nev.

at 1291, 149 P.3d at 56 (hearing on motion to intervene and invalidate adoption occurred and merits of motion ***decided*** by district court).

As stated above, the *Am. Soccer Co.* court demonstrated that *Harvey Aluminum* "stands alone in Rule 41 case law." Indeed, it provided an extensive survey of cases rejecting *Harvey Aluminum*:

> As the Seventh Circuit has noted, "Harvey has been considered, distinguished, and criticized in many subsequent cases." *Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 141–42 (7th Cir.1978). Courts have refused to weigh the amount of effort expended by the defendant or the district court, instead holding that "rule 41(a)(1) means what it says." *Carter v. United States*, 547 F.2d 258, 259 (5th Cir.1977); *see, e.g., Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 2 F.3d 544, 547 (4th Cir.1993) ("With the issue squarely before us, we reject the *Harvey Aluminum* exception to the plain meaning of Rule 41(a)(1)(i)'s text."); *Manze v. State Farm Ins. Co.*, 817 F.2d 1062, 1066 & n. 4 (3d Cir.1987) ("only an answer or a summary judgment motion can extinguish a plaintiff's right to dismiss the complaint without prejudice," and *Harvey Aluminum* retains little vitality); *Foss v. Federal Intermediate Credit Bank of Saint Paul*, 808 F.2d 657, 659–60 (8th Cir.1986) ("Rule 41(a)(1)(i) must not be stretched beyond its literal terms if it is to serve its intended purpose," and questioning the continued validity of *Harvey Aluminum*); *Universidad Central Del Caribe, Inc. v. Liaison Comm. on Medical Educ.*, 760 F.2d 14, 18–19 (1st Cir.1985) ("*Harvey Aluminum* has not been well-received," and Rule 41(a)(1) should be applied literally except in the "extreme" case); *Winterland Concessions Co. v. Smith*, 706 F.2d 793, 795 (7th Cir.1983) (Rule 41(a)(1) "simplifies the court's task by telling it whether a suit has reached the point of no return," and *Harvey Aluminum* "has been repudiated"); *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 662 (5th Cir.1979) (Rule 41(a)(1)(i) "operates peremptorily without regard to the amount of effort expended in a particular case"); *D.C. Elecs., Inc. v. Narton Corp.*, 511 F.2d 294, 297–98 (6th Cir.1975) (*Harvey Aluminum* may no longer be good law, and the "far more persuasive argument" is that "Rule 41(a)(1)(i) is clear and unambiguous on its face and admits of

> no exceptions that call for the exercise of judicial discretion by any court."); *Eastalco Aluminum Co. v. United States*, 995 F.2d 201, 203–04 (Fed.Cir.1993) (Rule 41(a)(1)(i) "***unambiguously*** " gives plaintiff right to voluntary dismissal before answer or motion for summary judgment, and "the drafters ... did not phrase the rule in vague terms or ... by calling for judicial involvement or the exercise of judicial discretion" (emphasis in original) (internal quotations omitted)).

Am. Soccer Co., 187 F.3d at 1111. The Ninth Circuit went on to explain that even the Second Circuit has disavowed *Harvey Aluminum's* rationale, citing *Thorp v. Scarne*, 599 F.2d 1169, 1175–76 (2d Cir.1979): "'*Harvey Aluminum* has not been well received,' noting the 'wisdom of the bright-line test established by the rule' and that a broad reading of *Harvey Aluminum* would amend Rule 41(a)(1)(i))." *Id.*

The Ninth Circuit's reasoning is consistent with the weight of Nevada authority and should be adopted by this Court as the final word on the subject:

> We agree that Rule 41 does not authorize a court to make a case-by-case evaluation of how far a lawsuit has advanced to decide whether to vacate a plaintiff's voluntary dismissal. The literal terms of the rule apply: if the defendant has not served an answer or a motion for summary judgment, the plaintiff may voluntarily dismiss the suit without interference from the district court. This does not prejudice defendants. If defendants desire to prevent plaintiffs from invoking their unfettered right to dismiss actions under rule 41(1)(a) they may do so by taking the simple step of filing an answer.

Id. at 1112. To the extent that *Phillip A.C.* holds differently, it should be overruled.

C. Even If There Was An Advanced Stage Exception To The Right To Voluntarily Dismiss, This Case Had Not Reached An Advanced Stage

Unlike in *Phillip A.C.* and *Harvey Aluminum*, where the courts determined

that a Rule 41(a) voluntary dismissal was not permissible because the merits of the cases had largely already been decided, here, the merits of the case have not yet been reached or litigated. As the Supreme Court noted in the appeal, the initial decision on the anti-SLAPP motion was based only on the first step of the analysis. *Veterans in Politics Int'l, Inc.*, 457 P.3d at *3, n.1.

Indeed, the Supreme Court recognized that the merits portion of the motion had not yet be determined, directing the district court on remand to consider "[w]hether Willick qualifies as a public figure," which "relates to the ***merits*** of Willick's defamation claim." *Id.* (emphasis added). At this juncture, "the burden shifts from the defendant to the plaintiff, who must then show a probability of prevailing on the claim." In other words, the merits of this case have not yet been presented, considered, or decided.

Additionally, although significant time has passed since the filing of the Amended Complaint due to the appeal, the case is still in its infancy. No answer has been filed, no initial disclosures have been served, and no discovery has been conducted. The parties have only litigated the first prong of the anti-SLAPP analysis on a motion to dismiss. The district court has neither considered nor ruled on the merits of the claims.

Therefore, even if a voluntary dismissal could be deemed invalid if the cases had reached the "advanced stage" of a merits determination, that has not occurred

in this case.

VI. CONCLUSION

NRCP 41(a)(1)(A)(i) is clear on its face. If an adversary has not served an answer or a summary judgment motion, a party has the absolute right to voluntarily dismiss their lawsuit. Filing a notice of dismissal is all that need be done.

Because the Sanson Parties did not file an answer or summary judgment motion and because an anti-SLAPP motion is not a summary judgment motion, the Willick Parties' Notice of Voluntary Dismissal was valid and effective and the district court erred by striking it.

Therefore, the Willick Parties respectfully request that this Court issue a writ of mandate and prohibition requiring the district court to vacate its order striking the dismissal and prohibiting the district court from proceeding further in this matter.

DATED this 23rd day of February, 2021.

THE ABRAMS AND MAYO LAW FIRM
Jennifer V. Abrams, Esq.

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Attorney for Petitioners, MARSHAL S. WILLICK and WILLICK LAW GROUP

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 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 23rd day of February, 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 5,132.

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 23rd day of February, 2021.

THE ABRAMS AND MAYO LAW FIRM
Jennifer V. Abrams, Esq.

BROWNSTEIN HYATT FARBER
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Attorney for Petitioners, MARSHAL S. WILLICK and WILLICK LAW GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 23rd day of February, 2021, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **PETITION FOR WRIT OF MANDAMUS AND PROHIBITION** properly addressed to the following:

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STEVE SANSON

U.S. Mail Copy to:

Honorable Nancy Becker
Senior District Court Judge
Eighth Judicial District
Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ DeEtra Crudup
An employee of Brownstein Hyatt Farber Schreck, LLP