

No. _____

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Electronically Filed
Feb 09 2021 03:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETSMART, INC.

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF
NEVADA,
COUNTY OF CLARK

Honorable Timothy D. Williams

Respondent,

JAMES TODD and RAPHAELA TODD

Real Parties in Interest.

County of Clark, Case No. A-19-788762-C

Honorable Timothy D. Williams (702) 671-4406

PETITION FOR PEREMPTORY WRIT OF MANDATE
IN THE FIRST INSTANCE, OR AN ALTERNATIVE WRIT
OR OTHER APPROPRIATE RELIEF

Michael L. Amaro, Esq. (Cal Bar No. 109514) (Pro Hoc Vice)

AMARO | BALDWIN LLP

180 E. Ocean Blvd., Suite 850, Long Beach, CA 90802

(562) 912-4157

Lane S. Kay, Esq. (Bar No. 5031)

LAW OFFICES OF LANE S. KAY

819 S. 6th Street, Las Vegas, NV 89101

702-384-1504

Attorneys for Petitioner, PETSMART, INC.

LANE S. KAY
*ADMITTED IN
CALIFORNIA & NEVADA

LAW OFFICE OF
LANE S. KAY
A PROFESSIONAL CORPORATION

819 SOUTH SIXTH STREET
LAS VEGAS, NEVADA 89101-6923

AREA CODE 702
TELEPHONE 384-1504
FAX 384-4322
EAMIL: LSKESQ2I@AOL.COM

February 9, 2021

Supreme Court of Nevada
408 E. Clark Ave.
Las Vegas, NV 89101

Attn: Linda
Deputy Clerk

COVER SHEET

PETITION FOR WRIT OF MANDATE

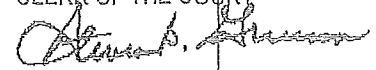
Dear Deputy Clerk Linda:

Per your instructions, we have included a copy of the Notice of Entry of Order and Order Admitting to Practice Michael L. Amaro, Esq. and placed before the NRAP 26.1 Disclosure. The Pro Hac Vice order allowing Attorney Amaro to practice before the Courts of Nevada is also attached as Exhibit 14 to the Petition for Writ of Mandamus, pages 408-411.

Very truly yours,


LANE S. KAY

LSK:cm



1 NEOJ
2 LANE S. KAY, ESQ.
3 Nevada Bar No. 5031
4 LAW OFFICE OF LANE S. KAY
5 *A Professional Corporation*
6 819 South Sixth Street
7 Las Vegas, Nevada 89101
8 e-mail LSKESQ21@aol.com
9 Ph.: (702) 384-1504
10 Fax:(702) 384-4322
11 Attorney for Defendant,
12 PETSMART, INC.

13 EIGHTH JUDICIAL DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 JAMES E. TODD, individually;)
16 RAPHAELA TODD, individually,)
17 Plaintiffs,)
18 vs.)
19 A HOME 4 SPOT ANIMAL RESCUE, a Nevada)
20 Domestic Non-Profit corporation; JANE DOE)
21 EMPLOYEE, PETSMART, INC., DOES 1 through)
22 X; and ROE CORPORATIONS 1 through X,)
23 inclusive jointly and severally,)
24 Defendants.)

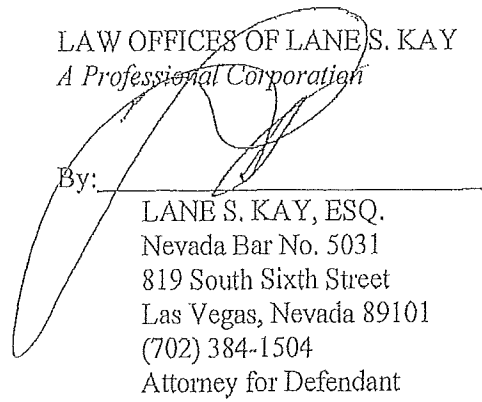
Case No.: A-19-788762-C
Dept. No.: 16

25 AND RELATED CROSS-ACTION

26 NOTICE OF ENTRY OF ORDER

27 PLEASE TAKE NOTICE that an Order in the above-entitled action was entered and filed
28 on the 29th day of August, 2019, a copy of which is attached hereto.

29 LAW OFFICES OF LANE S. KAY
30 *A Professional Corporation*

31 By: 

32 LANE S. KAY, ESQ.
33 Nevada Bar No. 5031
34 819 South Sixth Street
35 Las Vegas, Nevada 89101
36 (702) 384-1504
37 Attorney for Defendant

1 CERTIFICATE OF SERVICE

2 I certify that on this 29th day of August, 2019, the foregoing **NOTICE OF ENTRY**
3 **OF ORDER** was served via the Court's Odyssey eFile NV system on the following counsel(s) of
4 record:
5

6 **Thomas W. Askeroth, Esq.**
7 *Askeroth Law Group*
8 1980 Festival Plaza Dr., #300
9 Las Vegas, NV 89135
10 **Attorney for Plaintiffs**
11 James E. Todd & Raphaela Todd

12 **Matthew Q. Callister, Esq.**
13 *Callister Law Group*
14 330 E. Charleston Blvd., #100
15 Las Vegas, Nevada 89104
16 **Attorney for Plaintiffs**
17 James E. Todd & Raphaela Todd

18 **Jay Kenyon, Esq.**
19 *Jan Kenyon*
20 7881 W. Charleston Blvd., Ste. 165
21 Las Vegas, NV 89117
22 **Attorney for Defendant/Cross-Defendant/Counter Claimant**
23 A Home 4 Spot Animal Rescue

24 **Michael L. Amaro, Esq.**
25 *Amaro Baldwin, LLP*
26 180 E. Ocean Boulevard, Suite 850
27 Long Beach, CA 90802
28 **Attorney for Defendant/Cross-Claimant/Cross-Defendant**
PetSmart, Inc.


An Employee of
LAW OFFICE OF LANE S. KAY



1 LANE S. KAY, ESQ.
2 Nevada Bar No. 5031
3 LAW OFFICE OF LANE S. KAY
4 *A Professional Corporation*
5 819 South Sixth Street
6 Las Vegas, Nevada 89101
7 e-mail LSKESQ21@aol.com
8 Ph.: (702) 384-1504
9 Fax:(702) 384-4322
10 Attorney for Defendant,
11 PETSMART, INC.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

12 JAMES E. TODD, individually;)
13 RAPHAELA TODD, individually,)
14)
15)
16 Plaintiffs,)
17 vs.)
18 A HOME 4 SPOT ANIMAL RESCUE, a Nevada)
19 Domestic Non-Profit corporation; JANE DOE)
20 EMPLOYEE, PETSMART, INC., DOES 1 through)
21 X; and ROE CORPORATIONS 1 through X,)
22 inclusive jointly and severally,)
23 Defendants.)

Case No.: A-19-788762-C
Dept. No.: 16

24 AND RELATED CROSS-ACTION

ORDER ADMITTING TO PRACTICE

25 MICHAEL L. AMARO, ESQ., a member of the law firm of Amaro Baldwin, LLP,
26 having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together
27 with a Verified Application for Association of Counsel, a Certificate of Good Standing for the
28 State of California, and the State Bar of Nevada Statement; said application having been noticed,
no objections having been made, and the Court being fully apprised in the premises, and good
cause appearing, it is hereby

NRAP 26.1 DISCLOSURE

JAMES E. TODD, individually;
RAPHAELA TODD, individually

Plaintiffs,

v.

A HOME 4 SPOT ANIMAL
RESCUE, a Nevada Domestic Non-
Profit corporation; JANE DOE
EMPLOYEE, PETSMART, INC.,
DOES I through X; and ROE
CORPORATIONS 1 through X,
inclusive jointly and severally,

Defendants.

COURT OF APPEAL CASE NO.

DISTRICT COURT CASE NO. A-19-
788762-C

**NRAP 26.1 DISCLOSURE
STATEMENT**

Complaint Filed: February 7, 2019
Trial Date: January 19, 2021

The undersigned counsel of record certifies that the following are persons and entities as described by NRAP 26.1 (a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. NRAP 26.1(d)(2)

Parties and Ownership:

1. Petitioner and Defendant, PetSmart, Inc., a Delaware Corporation.
2. Real Party in interest and Plaintiff, James Todd, an individual.

3. Real Party in interest and Plaintiff, Raphaela Todd, an individual.

DATED: February 5, 2021

AMARO | BALDWIN LLP

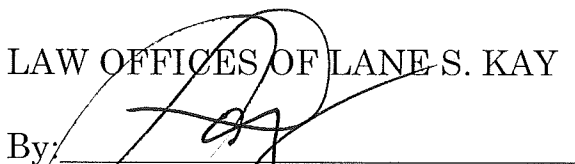


By: _____

MICHAEL L. AMARO
Attorneys for Defendant,
PETSMART, INC.

DATED: February 5, 2021

LAW OFFICES OF LANE S. KAY



By: _____

LANE S. KAY
Attorneys for Defendant,
PETSMART, INC.

TABLE OF CONTENTS

PETITION FOR WRIT OF MANDATE

I. ROUTING STATEMENT 3

II. INTRODUCTION..... 5

III. PERTINENT FACTUAL BACKGROUND 6

IV. BASIS FOR RELIEF 12

V. URGENCY..... 13

VI. AUTHENTICITY OF EXHIBITS 14

VII. BENEFICIAL INTEREST OF PETITIONER; CAPACITIES
OF RESPONDENT AND REAL PARTIES IN INTEREST 15

VIII. STANDARD OF REVIEW 15

IX. ABSENCE OF OTHER REMEDIES 16

X. REQUEST FOR RELIEF 17

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS 19

II. PETSMART DID NOT OWE A DUTY TO PLAINTIFFS, AS
A MATTER OF LAW, BECAUSE PETSMART DID NOT
OWN OR CONTROL THE SUBJECT DOG AND WAS NOT
INVOLVED IN THE ADOPTION PROCESS 25

III. PETSMART DID NOT OWE PLAINTIFFS A DUTY OF
CARE UNDER WRIGHT v. SCHUM, 05 Nev. 611, 781 P.2d
1142 (1989) 31

IV. CONCLUSION..... 38

CERTIFICATE OF COMPLIANCE..... 39
AFFIDAVIT OF VERIFICATION 40

TABLE OF AUTHORITIES

Cases

<i>ANSE, Inc. v. Eighth Jud. Dist. Ct.</i> 124 Nev. 862, 867, 192 P.3d 738, 742 (2008)	16
<i>Badger v. Eighth Jud. Dist. Ct.</i> 132 Nev. Adv. Op. 39, 373 P.3d 89, 93 (2016).....	18
<i>Buckwalter v. Eighth Jud. Dist. Ct.</i> 126 Nev. 200, 201, 234 P.3d 920, 921 (2010)	17
<i>Claps v. Animal Haven, Inc.</i> 34 A.D.3d 715 (2006)	31
<i>Club Vista Fin. Servs. v. Eighth Jud. Dist. Ct.,</i> 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)	14
<i>Cote H. v. Eighth Jud. Dist. Ct.</i> 124 Nev. 36, 39, 175 P.3d 906, 908 (2008)	4
<i>D.R. Horton, Inc. v. Eight Jud. Dist. Ct.</i> 125 Nev. 449	16
<i>Dangberg Holdings Nev., LLC v. Douglas Cnty.</i> 115 Nev. 129, 138, 978 P.2d 311, 316 (1999)	4
<i>Frank v. Animal Haven, Inc.</i> 107 A.D.3d 574 (2013)	30
<i>Fulbright & Jaworski LLP v. Eighth Jud. Dist. Ct.</i> 131 Nev. Adv. Op. 5, 342 P.3d 997, 1005-06 (2015).....	17
<i>Int’l Game Tech. v. Second Jud. Dist. Ct.</i> 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)	17

<i>Lee GNLV Corp.</i>	
117 Nev 291, 295	15
<i>Libby v. Eighth Jud. Dist. Ct.</i>	
130 Nev. Adv. Op. 39, 325 P.3d 1276, 1281-82 (2014).....	16
<i>Menches v. Inglewood Humane Society</i>	
51 Cal.App.2d 415 (1942)	31
<i>Miles ex rel. Miles v. Rich</i>	
347 S.W.3d 477 (2011).....	31
<i>Mona v. Eighth Jud. Dist. Ct.,</i>	
132 Nev. Adv. Op. 72, 380 P.3d 836, 840 (2016)	14
<i>National Convenience Stores v. Fantauzzi</i> (1978)	
94 Nev. 644	32
<i>Office of the Attorney Gen. v. Justice Court of Las Vegas Twp.</i>	
133 Nev. Adv. Op. 12, 392 P.3d 170, 172 (2017).....	18
<i>Pan v. Eighth Jud. Dist. Ct.,</i>	
120 Nev. 222, 223, 88 P.3d 840, 841 (2004)	13
<i>Poulos v. Eighth Jud. Dist. Ct.</i>	
98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982)	19
<i>Scialabba v Brandise Construction Co.</i> (1996)	
112 Nev. 96	28
<i>Sims v General Telephone & Electronics</i> (1991)	
107 Nev. 516	29
<i>Smith v. Eighth Jud. Dist. Ct.</i>	
113 Nev. 1343, 1344-45, 1348, 950 P.2d 280, 281, 283 (1997). 17, 18, 28	
<i>Sparks v. Alpha Tau Omega Fraternity, Inc.,</i> (2011)	
127 Nev. 287, 289	29

<i>State v. Eighth Jud. Dist. Ct.</i>	
116 Nev. 127, 133, 994 P.2d 692, 696 (2000)	1, 4, 18
<i>Thomas v. Bokelman</i>	
86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)	39
<i>Turner v Mandalay Sports Ent., LLC</i> (2008)	
124 Nev. 213	28
<i>Wright v. Schum</i>	
05 Nev. 611, 781 P.2d 1142	passim
Statutes	
<i>Nev. Const. art. 6, § 4</i>	4

**PETITION FOR PEREMPTORY WRIT OF MANDATE IN THE
FIRST INSTANCE, OR AN ALTERNATIVE WRIT OR OTHER
APPROPRIATE RELIEF**

I. ROUTING STATEMENT

1. The petition is not a matter that falls within the category of cases retained by the Supreme Court pursuant to NRAP 17(a), or presumptively assigned to the Court of Appeal pursuant to NRAP 17(b).

II. INTRODUCTION

2. This litigation presents a compelling case for immediate writ review to resolve an issue of whether the District Court committed prejudicial error, when it denied Petitioner, PETSMART, INC.'s ("PetSmart" and "Petitioner") motion for summary judgment. This request for writ review arises out of the District Court's failure to determine whether or not PetSmart owed a duty of care to Plaintiffs, which is always a question of law for the Court to decide. Here, PetSmart was not involved in the sale or adoption of the subject animals to Plaintiffs, and owed no legal duty of care to Plaintiffs, under *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142. It is undisputed that Plaintiffs in the Court below alleged injuries caused by a dog that they

adopted from a third-party (another defendant in the case below). It is further undisputed that PetSmart did not have knowledge of the animal's dangerous propensities and did not make any affirmative acts or omissions regarding the adopted dog. Based upon the undisputed facts and evidence, as a matter of law, PetSmart did not owe Plaintiffs a duty of care.

3. The appellate courts have original jurisdiction to issue writs of mandamus, prohibition and certiorari. *Nev. Const. art. 6, § 4*; see *State v. Eighth Jud. Dist. Ct.*, 116 Nev. 127, 133, 994 P.2d 692, 696 (2000) (noting that “[t]he power to issue such writs is part of this court’s original jurisdiction; it is not merely auxiliary to our appellate jurisdiction”). Whether to issue an extraordinary writ lies entirely and exclusively within the discretion of the issuing court. *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (mandamus and prohibition); *Dangberg Holdings Nev., LLC v. Douglas Cnty.*, 115 Nev. 129, 138, 978 P.2d 311, 316 (1999) (certiorari).

4. The central issue involved in this writ is whether the District Court erred in denying Petitioner's motion for summary judgment, without identifying any legal duty of care that PetSmart

owed Plaintiffs, when it is undisputed that PetSmart lacked prior actual knowledge of an animal's dangerous propensities and made no affirmative acts or omissions regarding the subject dog. As presented in Petitioner's motion for summary judgment, PetSmart did not owe a legal duty to Plaintiffs, since, under Nevada law, there was no special relationship between PetSmart and Plaintiffs, and PetSmart was not involved in the adoption process for the pet dog.

5. Here, District Court, erred in relying on *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989), in its "duty" analysis, and, further erred in determining that there was a triable issue of fact concerning PetSmart's "vetting" process for A Home 4 Spot. (Appx. 5:349-362, Court Order). Since there is no legal duty owed in the first instance, then the question of whether or not PetSmart acted reasonably in the vetting of the adoption partner, should not even be reached. In fact, the District Court previously granted Defendant, The Animal Foundation's Motion to Dismiss since that entity did not owe Plaintiffs a legal duty (for the same reasons argued in Petitioner's motion).

III. PERTINENT FACTUAL BACKGROUND

6. Plaintiffs, JAMES E. TODD and RAPHAELA TODD filed a First Amended Complaint for Negligence, Negligent Infliction of Emotional Distress, and "Respondeat Superior," against various Defendants, including Moving Party, PetSmart, Inc., for injuries JAMES E. TODD sustained when he was bit at home, by "Chip," a "rescue dog" adopted by his wife, Plaintiff RAPHAELA TODD. (Appx. Vol. 1:4-5, Complaint at para. 9 and 19, a true and correct copy attached to Appendix of Exhibits as "Ex. 1").

7. RAPHAELA TODD adopted Chip from Defendant "A HOME FOR SPOT" at a pet adoption event held at in the rear of a PETSMA RT, INC. store. Chip was previously acquired by A HOME FOR SPOT from THE ANIMAL FOUNDATION (Ex. "1", Appx. 1:4).

8. Defendant/Petitioner, PETSMA RT was named in the Complaint simply because it provided the location for the adoption event (Ex "1" at para. 9) through its non-profit affiliate "PETSMA RT CHARITIES." The dog bite to RAPHAELA TODD'S husband, Plaintiff JAMES E. TODD, happened at their home, after the dog was adopted and brought home by RAPHAELA TODD (Appx. 1:4, paras. 9 and 19).

9. PETSMART/PETSMART CHARITIES was not directly involved with "adoption days" events other than the providing of a location for non-profit animal rescue companies to hold adoption events. The subject pet adoption was conducted outside of the PetSmart store, in its rear loading dock area (Appx. 2:157, Deposition of Christine Detisch). None of PetSmart employees were in any way involved with the adoption (Appx. 2:171, 182-183, Depo. of Plaintiff, page 29; and pages 102-103), and PetSmart never took possession of the subject dog any point in time. (Appx. 2:131, Deposition of Diana England of A Home 4 Spot, page 86). The decision as to whether or not the dog was eligible for adoption, in the first instance, was made by A Home 4 Spot, and not PetSmart; and the entire process of placing the dog with Plaintiffs, was 100% through A Home 4 Spot and not PetSmart. (Appx. 2:132, Deposition of Diana England of A Home 4 Spot, page 87).

10. The only individuals that Raphaela Todd dealt with for the subject pet adoption, was an employee and volunteer of Defendant, A Home 4 Spot. (Appx. 2:156-159, Depo. Detisch, pages 83 – 85; Appx. 2:171, 182-183, Depo. Plaintiff, page 29; and pages 102-103). Defendant, PETSMART had no interactions with Plaintiffs, and never

had possession of, or any knowledge of the subject dog's behavioral history prior to the adoption. (Appx. 2:196, 206, Depo. Lindsay Del Chiaro, pages 35; 51).

11. PetSmart did not have any role in the way that A Home 4 Spot conducted its business and pet adoption operations (Appx. 2:196, 204, Depo. Lindsay Del Chiaro, pages 35; 49). The adoption agencies, like A Home 4 Spot, were independent contractors, and not part of, or affiliated with PetSmart. (Appx. 2:196, 204, Depo. Lindsay Del Chiaro, pages 35; 49).

12. Prior to the adoption, and as part of the paperwork filled out by Plaintiff RAPHAELA TODD, she signed an "Adoption Release Form" dated 1/13/18 (Appx. 2:160-164, Depo. Christine Detisch, pages 89 - 94). In such document (which was Exhibit 4 to the Detisch deposition) and attached hereto as part of Exhibit "3" (second document), Plaintiff (Mrs. Todd) was advised, and she acknowledged that PetSmart was not affiliated with the adoption company. Such document provides in pertinent part:

*"Adoption Program. PetSmart and PetSmart Charities supports the adoption process by donating in-store space . . . **These***

organizations are not affiliated with Petsmart or PetSmart Charities in any way. We cannot, and do not, guarantee the health of any of the pets available for adoption."

"Your Pet's History. The animals available for adoption through the Adoption Program often come from a shelter environment and little is known about their past. . . . Any questions regarding your pet's health should be directed to the adoption group. In addition, we strongly encourage a quarantine period for newly adopted pets . . . This will let the pet adapt to the new environment and allow monitoring for any possible signs of . . . aggression."

(emphasis added).

13. A specific acknowledgement and acceptance of these contractual provisions was made by RAPHAELA TODD, when she placed her initials next to the same. Ms. Detisch of A Home 4 Spot explained each section of the document, and saw Mrs. Todd sign the form, and she spent at least an hour with Plaintiff explaining the provisions on the form. (Appx. 2:160-163, 165-166, Depo. of Christine Detisch, pages 89 – 93; 98 - 99).

14. Plaintiff, RAPHAELA TODD read the document, and verified her signature and initials on the same. (Appx. 2:173-179, Depo. of Plaintiff, Raphaela Todd, pages 48 -54). Plaintiff, Mrs. Todd further agreed that based upon the language in the document, she knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities prior to the adoption process. (Appx. 2:179, Depo. of Plaintiff Raphaela Todd, page 54). Plaintiff understood the language of the document, and based upon her long-time employment as a legal assistant for a prominent defense firm, there was nothing that she did not understand in the document. (Appx. 2:177-181, Depo. of Plaintiff, Raphaela Todd, pages 52 – 56).

15. When the dog was adopted, RAPHAELA TODD also signed an agreement with Defendant pet rescue A HOME 4 SPOT, wherein she again acknowledged that the dog was "a rescue animal" and the need for an allowance of time and accommodation for the dog to acclimate to its new home (Appx. 2:135-139, a true and correct copy of the A HOME 4 SPOT ANIMAL RESCUE agreement signed by Plaintiff RAPHAELA TODD).

16. In Plaintiffs' First Amended Complaint, the only allegations

directed at Moving Party, PETSMART, INC. are as follows: (1) The subject dog adoption took place at PETSMART store (Exhibit "1", at para. 9); (2) That a "JANE DOE EMPLOYEE" of A HOME FOR SPOT and/or PETSMART made certain representations regarding the dog (Appx. 1:5-16, Complaint paras. 9; 53).

17. However, in Plaintiffs' Responses to Interrogatories, Set One, Plaintiffs acknowledge that they never spoke with any PETSMART employee about the subject dog's adoption, prior to the adoption; and the only two people Mrs. Todd spoke with, were "with the animal rescue group". (Appx. 2:145-146, Interrogatory Number 3, a true and correct copy of pertinent portions of Plaintiff's Responses to Interrogatories, incorporated herein by reference.) Ms. Detisch of A Home 4 Spot, confirmed that the only two people that spoke to Plaintiff (Mrs. Todd) about the pet adoption, were a volunteer named Desirea, and Mrs. Detisch (Appx. 2:159, Depo. Christine Detisch, page 85). And finally, Plaintiff testified in deposition that she knew that she was only dealing with a representative of A Home 4 Spot, and not PetSmart personnel. (Appx. 2:171, Depo. Plaintiff, Raphaela Todd, page 29).

18. Additionally, Plaintiffs responded to Interrogatory Number

14, which asked "Please state what information or representations were made to you, for the subject dog's adoption." Interrogatory Number 15 then inquired, "With reference to your response to the previous interrogatory, please state the name of the company or entity that such person worked for or represented." After objecting, Plaintiffs responded, "A Home for Spot." As such, these discovery responses reveal that the "JANE DOE EMPLOYEE" referenced in the Complaint, particularly at paragraph 53, was not an employee of Defendant, PETSMART (Appx. 2:147-148, Interrogatory Numbers 14-15.)

IV. BASIS FOR RELIEF

19. The issues presented in this Petition are:

(a) Whether a store owner has a legal duty to third persons, to prevent injuries caused by animal bites, when (a) the injured persons do not conduct business with the store owner; (b) the store owner did not sell or otherwise provide the animal to the plaintiffs, and (3) the store owner did not have any knowledge of the animal's dangerous propensities.

(b) Whether the District Court erred in denying PetSmart's motion for summary judgment, when PetSmart did not

affirmatively undertake a duty of care to the Plaintiffs, and there was no special relationship between Plaintiffs and Petsmart.

V. URGENCY

20. Writ petitions are “extraordinary” because they are issued outside of the ordinary course of a case and only in limited circumstances. *See Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 223, 88 P.3d 840, 841 (2004). An appellate court will exercise its original jurisdiction to issue an extraordinary writ only when the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law. *Club Vista Fin. Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). Courts “will examine each case individually, granting extraordinary relief if the circumstances reveal urgency or strong necessity.” *Mona v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 72, 380 P.3d 836, 840 (2016).

21. The matters presented by this writ are urgent, since Petitioner will suffer irreparable injury, and have no other plain, speedy and adequate remedy in the ordinary course of law, because Petitioner will be forced to continue to defend against Plaintiff's ordinary

negligence-based causes of action, when Defendant has submitted substantial, uncontroverted evidence that its conduct was not a substantial factor in causing Plaintiffs' alleged injuries. Moreover, in a negligence based personal injury matter, the legal issue of whether the defendant owed a duty to the plaintiff must be determined by the Court, and not the jury. *See Lee GNLV Corp.*, 117 Nev 291, 295 . This legal issue must be determined before trial, and since the summary judgment was improperly denied, this Writ is the appropriate procedural vehicle. This will save the parties substantial expense. Trial is currently scheduled for June 7, 2021.

VI. AUTHENTICITY OF EXHIBITS

22. All exhibits accompanying this Petition are true and correct copies of original documents on file with the Respondent Court relative to the motion, and a true and correct copy of the Reporter's Transcript of Proceedings of the hearing on Petitioners' Motion for Summary Judgment, held on November 18, 2019.

**VII. BENEFICIAL INTEREST OF PETITIONER;
CAPACITIES OF RESPONDENT AND REAL PARTIES
IN INTEREST**

23. Petitioner is the Defendant in an action now pending in Respondent Court, entitled *James E. Todd, et. al. v. A Home 4 Spot Animal Rescue, et. al.*, Case No. A-19-788762-C.

24. Plaintiffs are named herein as the Real Party in Interest.

VIII. STANDARD OF REVIEW

25. A motion for summary judgment, or in the alternative, summary adjudication, examines pure matters of law. A reviewing court will grant extraordinary writ relief if "summary judgment is clearly required by statute or rule..." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 125 Nev. 449, 453 (quoting *ANSE, Inc. v. Eighth Jud. Dist. Ct.*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008)); accord *Libby v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 39, 325 P.3d 1276, 1281-82 (2014) (issuing writ of mandamus directing district court to grant summary judgment as required by statute).

IX. ABSENCE OF OTHER REMEDIES

26. The appellate court may review an order that denies a dispositive motion: (1) “where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action”; or (2) where “an important issue of law requires clarification.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1344-45, 1348, 950 P.2d 280, 281, 283 (1997); accord *Buckwalter v. Eighth Jud. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010); *Int’l Game Tech. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008); see *Fulbright & Jaworski LLP v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1005-06 (2015) (granting petition for writ of prohibition to vacate district court order denying motion to dismiss to allow additional discovery into personal jurisdiction).

27. The reviewing court will exercise its discretion to grant writ relief when “an important issue of law requires clarification.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); see also *State Office of the Attorney Gen. v. Justice Court of Las Vegas Twp.*, 133 Nev. Adv. Op. 12, 392 P.3d 170, 172 (2017) (“This court will exercise its discretion to consider petitions for extraordinary writs ...

when there ... are ... important legal issues that need clarification in order to promote judicial economy and administration.”); *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89, 93 (2016) (“We exercise our discretion to consider this writ petition because the petition involves a significant and potentially recurring question of law ...”). “[T]he primary standard” in the determination of whether to entertain a writ petition is “[t]he interests of judicial economy.” *Smith v. Eighth Jud. Dist. Ct.*, supra, 113 Nev. 1343 at 1345. The granting of a writ petition is appropriate where a party will suffer serious and irreparable harm absent intervention. *Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

X. REQUEST FOR RELIEF

28. Petitioner prays that this Court:


1. Issue a preemptory writ directing the trial court to vacate its order issued on December 11, 2020, and enter an order granting summary judgment on the basis of the absence of a legal duty owed by PetSmart to Plaintiffs;

2. Grant such other relief as may be just and proper.

Respectfully submitted,

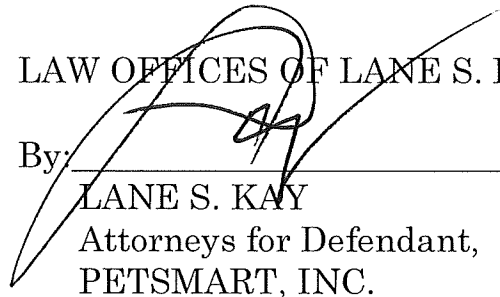
DATED: February 5, 2021

AMARO | BALDWIN LLP

By: 
MICHAEL L. AMARO
Attorneys for Defendant,
PETSMART, INC.

DATED: February 5, 2021

LAW OFFICES OF LANE S. KAY

By: 
LANE S. KAY
Attorneys for Defendant,
PETSMART, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

[NRCP 21 (a)(3)]

I. STATEMENT OF FACTS

Plaintiffs, JAMES E. TODD and RAPHAELA TODD filed a First Amended Complaint for Negligence, Negligent Infliction of Emotional Distress, and "Respondeat Superior," against various Defendants, including Moving Party, PetSmart, Inc., for injuries JAMES E. TODD sustained when he was bit at home, by "Chip," a "rescue dog" adopted by his wife, Plaintiff RAPHAELA TODD. (see Appx. Vol. 1:4-5, Complaint at para. 9 and 19, a true and correct copy of which attached to the Appendix of Exhibits as "Ex. 1").

RAPHAELA TODD adopted Chip from Defendant "A HOME FOR SPOT" at a pet adoption event held at in the rear of a PETSMA RT, INC. store. Chip was previously acquired by A HOME FOR SPOT from THE ANIMAL FOUNDATION (Ex. "1", Appx. 1:4).

Defendant/ Petitioner, PETSMA RT was named in the Complaint simply because it provided the location for the adoption event (Ex "1" Appx. 1:4) through its non-profit affiliate "PETSMA RT CHARITIES." The dog bite to RAPHAELA TODD'S husband, Plaintiff JAMES E.

TODD, happened at their home, after the dog was adopted and brought home by RAPHAELA TODD (Appx. 1:4, paras. 9 and 19).

PETSMART/PETSMART CHARITIES was not directly involved with "adoption days" events other than the providing of a location for non-profit animal rescue companies to hold adoption events. The subject pet adoption was conducted outside of the PetSmart store, in its rear loading dock area (Appx. 2:157, Depo. Christine Detisch, page 83). None of PetSmart employees were in any way involved with the adoption (Appx. 2:171, 182-183, Depo. of Plaintiff, page 29; and pages 102-103), and PetSmart never took possession of the subject dog any point in time. (Appx. 2:131, Depo. of Diana England of A Home 4 Spot, page 86). The decision as to whether or not the dog was eligible for adoption, in the first instance, was made by A Home 4 Spot, and not PetSmart; and the entire process of placing the dog with Plaintiffs, was 100% through A Home 4 Spot and not PetSmart. (Appx. 2:132, Depo. Diana England of A Home 4 Spot, page 87).

The only individuals that Raphaela Todd dealt with for the subject pet adoption, was an employee and volunteer of Defendant, A Home 4 Spot. (Appx. 2:156-159, Depo. Detisch, pages 83 – 85; Appx. 2:171, 182-

183, Depo. Plaintiff, page 29; and pages 102-103). Defendant, PETSMART had no interactions with Plaintiffs, and never had possession of, or any knowledge of the subject dog's behavioral history prior to the adoption. (Appx. 2:196, 206, Depo. Lindsay Del Chiaro, pages 35; 51).

PetSmart did not have any role in the way that A Home 4 Spot conducted its business and pet adoption operations (Appx. 2:196, 204, Depo. Lindsay Del Chiaro, pages 35; 49). The adoption agencies, like A Home 4 Spot, were independent contractors, and not part of, or affiliated with PetSmart. (Appx. 2:196, 204, Depo. Lindsay Del Chiaro, pages 35; 49).

Prior to the adoption, and as part of the paperwork filled out by Plaintiff RAPHAELA TODD, she signed an "Adoption Release Form" dated 1/13/18 (Appx. 2:160-164, Depo. Christine Detisch, pages 89 - 94). In such document (which was Exhibit 4 to the Detisch deposition and attached to the Appendix of Exhibits as part of Exhibit "3" (second document), Plaintiff (Mrs. Todd) was advised, and she acknowledged that PetSmart was not affiliated with the adoption company. Such document provides in pertinent part:

"Adoption Program. PetSmart and PetSmart Charities supports the adoption process by donating in-store space . . . **These organizations are not affiliated with Petsmart or PetSmart Charities in any way.** We cannot, and do not, guarantee the health of any of the pets available for adoption."

-"Your Pet's History. The animals available for adoption through the Adoption Program often come from a shelter environment and little is known about their past. . . Any questions regarding your pet's health should be directed to the adoption group. In addition, we strongly encourage a quarantine period for newly adopted pets . . . This will let the pet adapt to the new environment and allow monitoring for any possible signs of . . . aggression."
(emphasis added).

A specific acknowledgement and acceptance of these contractual provisions was made by RAPHAELA TODD, when she placed her initials next to the same. Ms. Detisch of A Home 4 Spot explained each section of the document, and saw Mrs. Todd sign the form, and she spent at least an hour with Plaintiff explaining the provisions on the form. (Appx. 2:160-163, 165-166, Depo. of Christine Detisch, pages 89 – 93; 98 - 99).

Plaintiff, RAPHAELA TODD read the document, and verified her signature and initials on the same. (Appx. 2:173-179, Depo. of Plaintiff, Raphaela Todd, pages 48 -54). Plaintiff, Mrs. Todd further agreed that

based upon the language in the document, she knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities prior to the adoption process. (Appx. 2:179, Depo. of Plaintiff Raphaela Todd, page 54). Plaintiff understood the language of the document and based upon her long-time employment as a legal assistant for a prominent defense firm, there was nothing that she did not understand in the document. (Appx. 2:177-181, Depo. of Plaintiff, Raphaela Todd, pages 52 – 56).

When the dog was adopted, RAPHAELA TODD also signed an agreement with Defendant pet rescue A HOME 4 SPOT, wherein she again acknowledged that the dog was "a rescue animal" and the need for an allowance of time and accommodation for the dog to acclimate to its new home (Appx. 2:135-139, a true and correct copy of the A HOME 4 SPOT ANIMAL RESCUE agreement signed by Plaintiff RAPHAELA TODD).

In Plaintiffs' First Amended Complaint, the only allegations directed at Moving Party, PETSMART, INC. are as follows:

- The subject dog adoption took place at PETSMART store (Appx. 1:5-16, Complaint paras. 9; 53);

- That a "JANE DOE EMPLOYEE" of A HOME FOR SPOT and/or PETSMART made certain representations regarding the dog (Appx. 1:5-16, Complaint paras. 9 and 53).

However, in Plaintiffs' Responses to Interrogatories, Set One, Plaintiffs acknowledge that they never spoke with any PETSMART employee about the subject dog's adoption, prior to the adoption; and the only two people Mrs. Todd spoke with, were "with the animal rescue group". (Appx. 2:145-146, Interrogatory Number 3, a true and correct copy of pertinent portions of Plaintiff's Responses to Interrogatories, incorporated herein by reference.) Ms. Detisch of A Home 4 Spot, confirmed that the only two people that spoke to Plaintiff (Mrs. Todd) about the pet adoption, were a volunteer named Desirea, and Mrs. Detisch (Appx. 2:159, Depo. Christine Detisch, page 85). And finally, Plaintiff testified in deposition that she knew that she was only dealing with a representative of A Home 4 Spot, and not PetSmart personnel. (Appx. 2:171, Depo. Plaintiff, Raphaela Todd, page 29).

Additionally, Plaintiffs responded to Interrogatory Number 14, which asked "Please state what information or representations were made to you, for the subject dog's adoption." Interrogatory Number 15

then inquired, "With reference to your response to the previous interrogatory, please state the name of the company or entity that such person worked for or represented." After objecting, Plaintiffs responded, "A Home for Spot."

As such, these discovery responses reveal that the "JANE DOE EMPLOYEE" referenced in the Complaint, particularly at paragraph 53, was not an employee of Defendant, PETSMART. (Appx. 2:147-148, Interrogatory Numbers 14-15.)

On December 11, 2020, the District Court issued its Order denying PetSmart's motion for summary judgment. The Court found that there was a question of fact regarding whether PetSmart's vetting and prequalification was sufficient. (Appx. 5:359-360, Order on Motion for Summary Judgment, Page 10, Lines 25-16; Page 11, Lines 3-28).

II. PETSMART DID NOT OWE A DUTY TO PLAINTIFFS, AS A MATTER OF LAW, BECAUSE PETSMART DID NOT OWN OR CONTROL THE SUBJECT DOG AND WAS NOT INVOLVED IN THE ADOPTION PROCESS

Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. *Harry v. Smith*, 111 Nev. 528 (1995).

In Nevada, the elements for a claim of negligence are:

1. Defendant owed a duty of care to Plaintiff;
2. Defendant breached that duty;
3. The breach was the legal cause of plaintiff's injuries; and
4. Plaintiff suffered damages.

See *Turner v Mandalay Sports Ent., LLC* (2008) 124 Nev. 213; [consistently holding that as far back as 2001, that whether a duty exists is a question of law determined only by the court]; *Scialabba v Brandise Construction Co.* (1996) 112 Nev. 96; and Nevada Jury Instructions 4.02 and 4.03; BAJI 3.10.

In this case, it is uncontroverted that Moving Party was not in any way involved with the subject pet adoption. Absent such involvement, PetSmart owed no legal duty to Plaintiffs, in connection with the subject dog, its history, or any disclosure of the dog's propensities. There was no special relationship between Plaintiffs and PetSmart, and absolutely no privity of contract between them. It is well accepted that absent some sort of well-defined special relationship, there can be found to be no legal duty owed. See *Sparks v. Alpha Tau Omega Fraternity*,

Inc., (2011) 127 Nev. 287, 289; *Sims v General Telephone & Electronics* (1991) 107 Nev. 516, 521).

As the Nevada Supreme Court held, in *Wiley v Redd* (1994) 885 P.2d 593, at 596:

"in failure to warn cases, defendant's duty to warn exists only where there is a special relationship between the parties, and the danger is foreseeable." citing *Sims v. General Telephone & Electronics*, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991).

In *Wiley*, a police officer, who was bit by a dog during a call from an alarm company, to investigate a possible burglary, brought a negligence claim against the alarm company. The alarm company received an alarm call from a residence, and then called the police to investigate. The alarm company did not, however, notify the police that the customer had guard-dogs on duty.

The Nevada high court declined to extend a legal duty to the alarm company, since there was no prior special relationship between plaintiff and the alarm company. The Court found:

"Alarmco calls the police each time a client's alarm sounds, not unlike any other citizen who calls the police to report a burglary or other social disturbance. Without question, there is at least a germ of relationship between Alarmco and the police department, as Alarmco benefits economically from the police response to its alarms. We nevertheless do not perceive a sound advancement in

social policy by imposing a legal duty to warn on Alarmco. If we were to recognize such a duty, a reasonable standard of conduct against which a breach of that duty would be judged would arguably embrace a plethora of obligations including awareness, the obligation to become aware, and foreseeability that would adversely impact the ability of alarm companies to provide services at reasonable cost to the public. The burdens associated with imposing such a duty on Alarmco and those similarly situated are obvious and appear to us to be socially undesirable". *Id.* at 596.

Indeed, research revealed no case in Nevada or anywhere else finding liability for a dog bite on the part of the host of a pet adoption event for an injury on a different day at a different place. A review of persuasive authority from other states is therefore warranted and illustrative.

In *Frank v. Animal Haven, Inc.*, 107 A.D.3d 574 (2013), a New York court denied recovery to the plaintiff on analogous facts. There a non-profit shelter adopted out a dog that later bit a third party. The third party unsuccessfully sued the shelter who was found to have no liability because it was not the dog's owner.

In *Miles ex rel. Miles v. Rich*, 347 S.W.3d 477 (2011), a Missouri case, a humane society adopted out a dog who bit a third party who sued the dog's owner. The dog owner then sued the humane society.

The humane society was found to have no liability because it did not own, possess, harbor, or control the dog when the bite happened.

In *Menches v. Inglewood Humane Society*, 51 Cal.App.2d 415 (1942) a California humane society adopted out a dog that later bit its adopter, who then sued the humane society. Again, no liability was found.

Claps v. Animal Haven, Inc., 34 A.D.3d 715 (2006) is analogous. There a dog was available for adoption at an event held outside of a Petco store. One of the dogs bit a Petco customer walking by and the customer sued the adopting agency. Petco had no liability since it was not involved in the adoption process.

Here, PETSMAART CHARITIES, had no actual or constructive knowledge of the subject dog's behavioral history. (Appx., 2:196, 206, Depo. of Lindsay Del Chiaro, pages 35 and 51). Further, unlike Defendant, A HOME 4 SPOT, Moving Defendant played absolutely no role in the pet adoption process.

As to the "vicarious liability" claim, vicarious liability applies between an employer and its employee, when there is an employee under the control of the employer, for acts within the course and scope

of employment. *National Convenience Stores v. Fantauzzi*, (1978) 94 Nev. 644. Here, as set forth above, Plaintiffs conceded in discovery, and again in deposition, that the JANE DOE defendant (later determined to be Christina Detisch of A Home 4 Spot) was not, and never had been an employee of PETS MART, INC. (See also, Appx., 2:156, Depo. Christine Detisch, page 10). As such, there is no triable issue of material fact, as to the “actual” agency issue.

Also, as to any *potential* claim of “ostensible” or “apparent” agency, Plaintiff, Raphaela Todd was the one involved in the adoption of the dog, and she signed a form specifically acknowledging that PetSmart was not in any way involved in the adoption day, and that the company that was putting on such adoption program, was not affiliated with PetSmart. Such form is attached to the Appendix, Vol. 2, Pages 135-139, and Plaintiff, Raphaela Todd specifically “initialed” the following provision:

"Adoption Program. PetSmart and PetSmart Charities supports the adoption process by donating in-store space . . . These organizations are not affiliated with Petsmart or PetSmart Charities in any way.

Plaintiff, Mrs. Todd further agreed that based upon the language in the document, she knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities prior to the adoption process. (Appx. 2:179, Depo. of Plaintiff, Raphaela Todd, page 54). Plaintiff understood the language of the document and based upon her long-time employment as a legal assistant for a prominent defense firm, there was nothing that she did not understand in the document. (Appx. 2:177-181, Depo. of Plaintiff, Raphaela Todd, pages 52 – 56).

And, in addition to the document that Plaintiff was presented with, and signed, PetSmart also had signs posted inside the subject store, which stated that the adoption companies, like A Home 4 Spot, were separate from PetSmart. (Appx., 2:213, Depo. Lindsay Del Chiaro, Appx. page 69).

Accordingly, there are no triable issues of fact as to the vicarious liability/respondeat superior cause of action (third cause of action).

III. PETSMART DID NOT OWE PLAINTIFFS A DUTY OF CARE UNDER WRIGHT v. SCHUM, 05 Nev. 611, 781 P.2d 1142 (1989)

The District Court's order on PetSmart's motion for summary

judgment cites to the case of *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989), for the proposition that PetSmart owed a duty of care to Plaintiffs. *Wright* held that a landlord who knew of the danger posed by a tenant's pit bull, and who made an affirmative promise to keep the dog from escaping, could be held liable for injuries caused to a third person when the dog escaped from the premises.

In *Wright*, plaintiff, an eleven-year-old boy, was walking on a public street, when an escaped pit bull dog attacked the plaintiff, and injured him. The landlord defendant, Schum claimed that he could not be responsible for the injured caused to third persons not injured on the leased premises.

The Court of Appeal found that, under Nevada law, "Schum is correct in this assertion that he cannot be held liable *as a landlord*." *Wright v. Schum*, 05 Nev. 611, 613 (emphasis in original). The Court of Appeal noted:

The trial court, in dismissing landlord Schum from the lawsuit, wisely observed that holding landlords liable for the actions of their tenants' vicious dogs by requiring them to evict tenants with dangerous dogs would merely result in the tenants' moving off to another location with their still dangerous dogs." *Id.* The Court of Appeal further found that, as a general rule relating to law of landlor liability,

Schum could not be held liable by reasons of his failure to evict a tenant with a dog known by him to be dangerous. *Id.*

However, the appellate court determined that Schum, personally, failed to exercise due care in subjecting plaintiff and others to unreasonable risk of harm. *Id.* at p. 614. The Court of Appeal explained:

We come to the conclusion that Schum's conduct with respect to the escaping pit bulldog could be viewed as creating an unreasonable risk of harm to Jason and others who were open to attack by this dog when he escaped from the custody of his owners. Let us now examine the facts that support this conclusion. The owners of the pit bulldog, the Pitzers, were month-to-month tenants of Schum at the time the dog escaped from the yard and mangled Jason. When the Pitzers moved into the house, they did not tell Schum that they had a pit bulldog. Schum found this out only when a neighbor, Denise Austin, complained to him that the Pitzers had a pit bulldog and that it had escaped from its yard on two occasions and attacked their dogs, seriously injuring one and killing the other. In addition to his attacks on the Austins' dogs, the Austins observed that the Pitzers' pit bulldog, Buddy, would become agitated and very aggressive when he saw the Austins in their own backyard. On such occasions, Buddy would lunge at the Austins, often wedging his head between the boards of the fence, in an apparent attempt to break through to get at the Austins. Denise Austin and her family were so afraid that the pit bulldog would break into their yard again and injure them that they gave up the use of their backyard. . .

According to Denise Austin, Schum agreed that he would make the Pitzers get rid of the dog or move out. It certainly

can be argued that if he did not think the dog was dangerous, he would not have so agreed. Under these circumstances, a jury could have properly concluded that Schum knew that the dog could be dangerous to others if the dog escaped from the yard. This conclusion is further supported by the fact that Schum allowed the Pitzers to stay on only on their promise that they would at all times keep the dog in the house or in the yard on a chain. Had he not some apprehension about the dog's dangerous nature he would not have insisted, at pain of losing a tenant, that the Pitzers secure the dog in some manner. Shortly after Schum gave this ultimatum to the Pitzers, the pit bulldog, unchained, broke through the fence and attacked the dog of another neighbor, the Andersons. *Wright v. Schum*, 05 Nev. 611, 614-15.

In sum, the Court of Appeal determined that the landlord owed plaintiff a duty of care because (1) the landlord was aware of the dog's dangerous propensities, and (2) the landlord made affirmative statements acknowledging his duty of care to prevent the dog from injuring third parties. *Wright v. Schum*, 05 Nev. 611, 615. The court emphasized that: "Schum as landlord had no initial duty to protect Jason and others from injuries caused by his tenants' escaped pit bulldog. However, once he was cajoled by Denise Austin into *doing* something about the dog and then *did* something by way of enforcing a rather specific plan for securing the dog, he was in a position of having

engaged in an undertaking to assure performance of Pitzers' duty to protect others against the risk of dog attack." *Id.* at 618.

Here, the trial court erred in determining that PetSmart owed a duty of care to Plaintiffs, under *Wright v. Schum*. Under *Wright*, the first inquiry is whether the landlord defendant had knowledge of the animal's dangerous propensities. Unlike in *Wright*, where the landlord had actual knowledge that the pitbull dog had attacked other dogs, in the instant case, there was no evidence whatsoever that PetSmart was aware of any dangerous propensities related to the adopted dog that bit Plaintiff. PetSmart did not have any knowledge of the history of the dog, nor did PetSmart have access to any of the Animal Foundation documents before the adoption by A Home 4 Spot.

As noted in the deposition of PetSmart's 30(b)(b)(6) witness, Lindsay Del Chiaro, she testified that PetSmart had no knowledge of the subject dog's history. (Appx. 2: 206, Depo. Lindsay Del Chiaro, page 51.) Further, at no time did PetSmart ever take possession of the dog, and the decision about whether or not the dog was eligible for adoption in the first instance, was made by A Home 4 Sport, and not PetSmart, since PetSmart had no access to Chip's documentation before the

adoption. (Appx. 2:131-132, Depo. Diana England, pages 86 – 87).

Moreover, contrary to *Wright*, in this case, PetSmart did not affirmatively act to prevent injuries caused by a third-parties' dog to Plaintiffs. PetSmart did not control the adoption process related to the subject dog. PetSmart's employee, Ms. Del Chiaro testified that PetSmart did not control how A Home 4 Spot conducted its adoptions, nor how A Home 4 Spot carried on its business operations (such as what to charge, how to staff the event, etc.) (Appx. 2: 204, Depo. Lindsay Del Chiaro, page 49). Ms. Del Chiaro clearly testified that the adoption companies are independent contractors, and PetSmart did not get involved in any of the operative details of the business. (Appx. 2: 208, Depo. Lindsay Del Chiaro, page 60). PetSmart never told the non-profit companies how to conduct their adoptions, or the operative details of the business operations. (Appx. 2: 208, Depo. Lindsay Del Chiaro, page 60).

The Nevada Supreme Court has unequivocally stated that "[n]egligence is not actionable unless, without the intervention of an intervening cause, it proximately causes the harm for which the complaint was made." *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d

1020, 1022 (1970). An intervening cause is defined as one "which is itself the natural and logical cause of the harm." *Id.* Therefore, in Nevada, where an allegedly negligent act or omission occurs that is the natural and logical cause of a plaintiff's injury, the injured plaintiff cannot sustain an action against any party for actions that took place *prior* to the intervening cause. *Id.* (emphasis added). Here, PetSmart never took possession of the dog, had no knowledge of its behavioral history, and was not involved in the subject adoption. As such, had no legal duty, as a matter of law since there was no special relationship between Plaintiffs and the store.

And finally, several months before PetSmart's Motion for Summary Judgment was heard, the trial court below granted a Motion to Dismiss filed by the Animal Foundation. The Animal Foundation had possession of the dog that Plaintiffs adopted, before A Home 4 Spot took possession of the dog. The trial court found in part, that the Animal Foundation owed Plaintiffs no legal duty since A Home 4 Spot was the agency involved in dealing with Plaintiffs and the adoption process. Such ruling is entirely inconsistent, insomuch as PetSmart, like the Animal Foundation lacked any special relationship with Plaintiffs, and

hence, owed no legal duty to them.

IV. CONCLUSION

For the reasons stated herein, and as set forth in the record, Petitioners, respectfully request that this Court grant its request for a preemptory writ of mandate. Petitioner respectfully requests that this Court issue a preemptory writ directing the trial court to vacate its order issued on December 11, 2020, and issue a preemptory writ of mandate entering an order granting summary judgment; and grant such other relief as may be just and proper.

Respectfully submitted,

DATED: February 5, 2021

AMARO | BALDWIN LLP



By: _____
MICHAEL L. AMARO
Attorneys for Defendant,
PETSMART, INC.

DATED: February 5, 2021

LAW OFFICES OF LANE S. KAY

By: _____
LANE S. KAY
Attorneys for Defendant,
PETSMART, INC.

CERTIFICATE OF COMPLIANCE

1. 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 Microsoft Word 2010, font size 14-point, Century Schoolbook style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6,991 words.

3. Finally, I hereby certify that I have read this Petition for Issuance of A Peremptory Writ of Mandate, and 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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 Nevada Rules of Appellate Procedure.

DATED: February 5, 2021

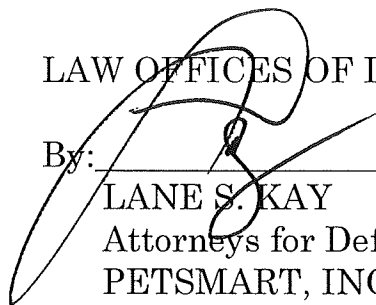
AMARO | BALDWIN LLP



By: _____
MICHAEL L. AMARO
Attorneys for Defendant,
PETSMART, INC.

DATED: February 5, 2021

LAW OFFICES OF LANE S. KAY



By: _____
LANE S. KAY
Attorneys for Defendant,
PETSMART, INC.

AFFIDAVIT OF VERIFICATION

I, Michael L. Amaro, Esq. am counsel for Petitioner, PetSmart, Inc., and was admitted on a pro hoc vice basis. Pursuant to *Nevada Rules of Appellate Procedure* 21 (a)(5), I swear that the facts stated in the Petition herein are within the knowledge of Petitioner's attorney and are verified.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on this 5th day of February 2021, in Huntington Beach, California.



MICHAEL L. AMARO, Declarant

CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 2021, the forgoing **PETITION FOR PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE, OR AN ALTERNATIVE WRIT OR OTHER APPROPRIATE RELIEF** was served by placing a copy of the same in the U.S. Mail with postage fully prepaid thereon and addressed as follows:

Thomas W. Askeroth, Esq.
Askeroth Law Group
10785 W. Twain Ave., Ste. 219
Las Vegas, NV 89135
Attorney for Plaintiffs
James E. Todd & Raphaela Todd

Michael L. Amaro, Esq.
Amaro Baldwin, LLP.
180 E. Ocean Boulevard, Ste. 850
Long Beach, CA 90802
Attorney for Defendant/Cross-Claimant/Cross-Defendant
PetSmart, Inc.

Jay Kenyon, Esq.
Yan Kenyon
7881 W. Charleston Blvd., Ste. 165
Las Vegas, NV 89117
Attorney for Defendant/Cross-Defendant/Counter Claimant
A Home 4 Spot Animal Rescue

Regional Justice Center
Eighth Judicial District Court – Department 16
Honorable Timothy D. Williams
200 Lewis Avenue
Las Vegas, NV 89155


An Employee of
LAW OFFICE OF LANE S. KAY, P.C.