No. _____

IN THE SUPREME COURT

OF THE STATE OF NEVADA

Electronically Filed
Feb 09 2021 03:50 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

EXHIBITS IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE, OR AN ALTERNATIVE WRIT OR OTHER APPROPRIATE RELIEF (VOLUME 3 of 5, EXHIBITS 10)

225

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EXHIBIT "10"

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10/19/2020 5:20 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES TODD, individually; RAPHAELA TODD, individually; Plaintiffs, vs. A HOME 4 SPOT ANIMAL RESCUE, a Nevada Domestic Non-Profit Corporation; JANE DOES EMPLOYEE; PETSMART, INC.; DOES I through X; and ROE CORPORATIONS I through X, Inclusive jointly and severally; Defendants. AND RELATED CROSS ACTIONS.	Case No.: A-19-788762-C Dept. No.: 16 **PLAINTIFFS' OPPOSITION TO DEFENDANT PETSMART'S SECOND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON ISSUES**

COMES NOW, Plaintiffs, James Todd and Raphaela Todd, by and through their attorneys of record, ASKEROTH LAW GROUP, and files this Opposition to Defendant Petsmart's Second Motion for Summary Judgment, or in the Alternative, Summary Adjudication on Issues, which was filed on October 5, 2020.

This Opposition is made and based upon the papers and pleadings on file herein, this memorandum of points and authorities, and such oral

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argument as may be heard by this Honorable Court.

DATED this 19th day of October, 2020.

ASKEROTH LAW GROUP

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Attorney for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND PROCEDURAL SETTING

On January 14, 2018, Plaintiff James Todd was attacked and viciously mauled by a mixed-breed dog weighing between 75 and 80 pounds. Plaintiffs adopted the dog "Chip" the day before the mauling, from Defendant A Home 4 Spot ("AH4S").

AH4S is a local dog rescue organization.

Before AH4S took possession of Chip, he was housed at The Animal Foundation ("TAF"). TAF unsuccessfully attempted to adopt Chip out to adopters on at least two separate occasions; personnel at TAF ultimately deemed Chip unfit for adoption because of his various behavioral issues. Thereafter, AH4S received Chip from TAF with the intent to put Chip up for adoption through AH4S' own adoption program, utilizing adoption day events at Petsmart locations.

Plaintiffs ultimately adopted Chip from AH4S at an adoption day events at a Petsmart store. Petsmart claims to vet and pre-qualify adoption partner charities, like AH4S, to ensure that the charities are qualified and pre-approved to provide safe adoption services on Petsmart property.

Shortly after Plaintiffs brought Chip home, Mr. Todd was violently

attacked by Chip. As a result of the January 14, 2018, dog attack, Mr. Todd suffered severe puncture wounds and lacerations to his right forearm, resulting in an infection and permanent impairment and nerve damage to his arm. Mr. Todd also sees a therapist for post-traumatic stress disorder associated with this traumatic event. He continues to suffer mentally and psychologically to this day.

On February 4, 2019, Plaintiffs filed suit against AH4S and Petsmart for damages Mr. and Ms. Todd suffered in this dog attack.

Defendant Petsmart initially filed a Motion for Summary Judgment, or in the Alternative, Summary Adjudication on Issues. In this Motion, PetSmart raised the same issues raised in the instant Motion for Summary Judgment. The hearing on Petsmart's original Motion took place on February 27, 2020. After hearing oral argument, this Court denied Petsmart's Motion for Summary Judgment and entered its Order on May 4, 2020.

Despite complications caused by the Covid-19 crisis, the Parties thereafter diligently conducted and completed discovery, including, exchanging substantial written discovery, depositions of Plaintiffs and other witnesses, and the deposition of Petsmart's NRCP 30(b)(6) witness, which took place on August 27, 2020.

Now, Defendant Petsmart renews its original Motion for Summary Judgment, reciting the same grounds for dismissal which this Court previously rejected after hearing Petsmart's first Motion for Summary Judgment.

Here, Petsmart once again argues:

- Petsmart owed no duty to Plaintiffs as Petsmart did not own or control Chip and was not involved in the adoption process, and there was no special relationship between Plaintiffs and Petsmart;

- Plaintiffs' Respondeat Superior claims against Petsmart are barred because the person that dealt with Plaintiff Raphaela Todd during the adoption was not a Petsmart employee or agent; and
- Plaintiff Raphaela Todd executed a document waiving all claims for negligence against Petsmart.

Based on the the argument below, Plaintiffs request that the Court deny Petsmart's renewed Motion for Summary Judgment, as the Court has already done; the record shows that genuine issues of material fact still exist as to all matters raised by Petsmart.

Justice requires that the matter of Petsmart's negligence in contributing to Plaintiffs' injuries should be heard, and decided, by a jury.

II.

FACTS

The following is a brief recitation of facts as they relate to Petsmart's Motion for Summary Judgment, presently before the Court.

A. The Subject Dog's Adoption History and the Attack.

Chip first arrived at TAF on July 29, 2017, as a surrendered animal. (Exhibit 1: Subpoenaed documents from TAF at TAF0135; Exhibit 2: Deposition of TAF 30(b)(6) Witness at 21:1-4).

Chip was previously adopted but on September 1, 2017, Chip was returned to TAF because Chip was not getting along with one the adopter's other dogs. The adopter informed TAF that Chip was food aggressive and attempted to attack the adopter's cousin. (Exhibit 1: Subpoenaed documents from TAF at TAF0114; Exhibit 2: Deposition of TAF 30(b)(6) Witness at 45:1 – 46:8). During this fight with the adopter's dog, Chip suffered a swollen hind leg. (Exhibit 1: Subpoenaed documents from TAF at TAF0137; Exhibit 2: Deposition of TAF 30(b)(6) Witness at 24:2-14, 50:1-11).

TAF's 30(b)(6) witness confirmed that their internal documents indicate that Chip was returned this first time because of aggressive behavior, and also because Chip got into a fight with the adopter's dog. (Exhibit 2: Deposition of TAF 30(b)(6) Witness at 46: 17-21)

Despite being returned for dangerous behavior, TAF again placed Chip for adoption. Chip was then adopted a second time.

On November 8, 2017, adopters returned Chip for a second time. These second adopters also expressed concern that Chip was aggressive, specifically stating that Chip was possessive over rooms and couches, and that he growls and lunges; the adopters were especially worried that Chip might escape from their yard and bite them. (Exhibit 1: Subpoenaed documents from TAF at TAF0119; Exhibit 2: Deposition of TAF 30(b)(6) Witness at 51:1 – 52:3).

TAF ultimately determined that Chip was unfit for adoption due to his aggressive behavioral history against dogs and other humans, and for being returned twice. (Exhibit 1: Subpoenaed documents from TAF at TAF0139; Exhibit 2: Deposition of TAF 30(b)(6) Witness at 82:12 – 83:1).

On November 19, 2017, an adoption charity group expressed interest in taking Chip from TAF in order to place him into their adoption program. However, after performing a due diligence review of Chip's behavioral history, this adoption charity group indicated they could not take Chip because of his aggressive tendencies. (Exhibit 1: Subpoenaed documents from TAF at TAF0008).

Notwithstanding Chip's prior incidents, on November 20, 2017, AH4S took possession of Chip from TAF and placed him into their adoption program. Despite Chip's long history of aggressive behavior, and at least two separate attacks on humans, AH4S decided to place Chip up for adoption to the general public through adoption day events at Petsmart.

These Petsmart events permit adoption charity groups, like AH4S, to use Petsmart property to conduct adoption day events and to solicit Petsmart customers for adoptions.

On November 25, 2017, Ryan Maffia adopted Chip from AH4S through an adoption day event at Petsmart in Centennial Hills. (Exhibit 3: Email from Ryan Maffia; Exhibit 4: Deposition of Christina Detisch at 56:2). Within a week of the adoption, Maffia had returned Chip to AH4S.

According to Maffia, after the adoption Chip became so aggressive that Maffia had to flee from Chip after Chip aggresively chased Maffia up the stairs of their home. *Id.* In fact, Maffia informed Christina Detisch, an employee of AH4S, that he was so scared of Chip that he hid in his room with a baseball bat until Chip could be picked up. (Exhibit 4: Deposition of Christina Detisch at 62:22-63:23).

At this point, adopters had now returned Chip at least three times for aggressive behavior towards humans. Yet, AH4S decided to put Chip up for adoption once again.

On approximately December 17, 2017 Yvonne Musolf adopted Chip from AH4S. (Exhibit 5: See Affidavit of Musolf). The Musolf adoption took place at a Petsmart adoption event on Petsmart property. *Id.* The AH4S employee at the adoption day event told Musolf that Chip had been adopted for one day and was returned after the one day. Musolf asked her why and she was not given an answer. *Id.*

Chip unfortunately attacked again. On Christmas day, December 25, 2017, Chip was at the Musolf home. After the family opened Christmas presents, Musolf's daughter, Chantal Cravello, was picking up wrapping paper from the floor and putting it into a bag when, without warning or provocation, Chip lunged at Chantal and bit her on her arm, right through her jacket. The force of the attack knocked Chantal to the. Musolf had to

struggle to pull Chip off of Chantal as he would not let go. The bite was so severe that Chantal suffered severe injuries, including substantial tendon damage, and had to undergo surgery on her hand. *Id.*

Needless to say, Musolf returned Chip to AH4S after the attack. Musolf spoke with an individual at AH4S and explained exactly what happened in the attack. Musolf stated that Chip lunged at Chantal while she was simply cleaning up Christmas paper and putting it into a bag. Musolf explained that no one was taunting, teasing or doing anything to scare or provoke Chip. Chip just lunged at Chantal for no reason. Musolf described the severity of Chantal's injuries to AH4S. Musolf told AH4S that they would not take Chip back into their home as they were too afraid of him. *Id.*

AH4S remained undeterred and decided, one again, to place Chip for adoption through their adoption day events at Petsmart. This decision would once again result in tragedy, this time to Plaintiffs.

Prior to their adoption of Chip, Ms. Todd was a staunch patron of Petsmart and loved going there. (Exhibit 6: Deposition of Raphaela Todd at 45:10-13, 23:19-20). When their family needed a companion for their dog at home, Ms. Todd decided to visit an adoption day event at Petsmart and adopt a rescue dog. (Exhibit 6: Deposition of Raphaela Todd at 45:10-13). Because Ms. Todd often frequented Petsmart, Ms. Todd knew that Petsmart often had adoption day events on the weekends and that this would be a good place to go to find a rescue dog. (Exhibit 6: Deposition of Raphaela Todd at 23:22-25).

On January 12, 2018, Ms. Todd went to Petsmart on West Lake Mead Boulevard in Las Vegas, at the Best of the West Shopping Center. Upon arriving at the Petsmart, Ms. Todd went directly to the adoption day event which was taking place at the back of the Petsmart store. (Exhibit 6:

Deposition of Raphaela Todd at 27:6-14).

Upon arriving at the adoption day event, Ms. Todd was greeted and assisted by AH4S employees. Although Ms. Todd only interacted with AH4S employees, she believed that there existed a partnership or collaboration between Petsmart and AH4S. For example, Ms. Todd stated during her deposition:

> Q All right. So you knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities in any way; is that correct?
>
> MR. ASKEROTH: I'm going to object to form of that question.
> You can answer.
>
> THE DEPONENT: You know, in all fairness, it was inside of a PetSmart. And I got this adoption starter kit that says, "PetSmart Adoption Starter Kit." And so you just kind of assume that they go hand in hand, that they're one and the same, that they work together, that they're together.
> And so, since PetSmart was one of my favorite places and I, you know -- I just -- I just assumed that you guys are kind of in the same boat with them, that you stand behind the pets that they let out. I mean, I -- I can't walk into a PetSmart right now without my skin crawling, because it brings back the memories.

(Exhibit 6: Deposition of Raphaela Todd at 27:6-14).

Ultimately, Ms. Todd decided to adopt Chip at the Petsmart adoption day event.

After adopting Chip, Ms. Todd received a free Petsmart adoption starter kit, or goody bag, along with Petsmart coupons. (Exhibit 6: Deposition of Raphaela Todd at 45:10-14, 93:5-10).

An employee of AH4S (not a Petsmart employee) reviewed the Petsmart adoption release/waiver form with Ms. Todd. (Exhibit 6:

Deposition of Raphaela Todd at 102:14 – 103:1).

Little did she know, Ms. Todd was bringing home a vicious animal with a violent history of attacks. Ms. Todd trusted Petsmart and, in turn, its adoption charity partner, AH4S. Even the Petsmart adoption release/waiver form signed by Ms. Todd stated that the adoption charity partners are vetted by Petsmart as "qualified, pre-approved animal welfare organizations." (Exhibit 7: Adoption Release Form at AHFS 8:001). All of this provided a sense of security to Ms. Todd in the adoption process.

On the evening of January 14, 2018, (one day after adopting Chip) Chip reverted to his vicious ways. The events of the evening are best summarized by Ms. Todd herself:

> Q What do you remember about the incident? Can you kind of share that with me?
>
> A I was sitting on the couch with my laptop, watching a movie. And out of one corner of my vision, I can see the dog laying on the floor. And Jim was sitting on the lounge chair next to me. And Jim got up at one point to go to the kitchen. And the dog I saw get up, and I thought the dog laid down, but apparently the dog followed Jim into the kitchen.
>
> Jim then finished what he was doing. He came back into the living room, but by then, the dog had laid down in front of the chair that Jim had been sitting in. And, again, I'm watching a movie. So, focused on the movie, but I can kind of see.
>
> Then at one point the dog started to growl at Jim, and I didn't hear it initially. So Jim, apparently, was calling my name to get the dog's attention. So I took my earbuds out because I realized Jim was trying to get my attention. And as I took my earbuds out, I can hear the dog growling.
>
> So I opened my mouth to call the dog's name, and the dog just jumped up and grabbed Jim on the right forearm. And Jim -- Jim just wedged himself between the lounge chair and the dog, because the dog was trying to

tackle him. The dog had my husband's forearm in his mouth, and he kept going like this (demonstrating). And he kept trying to get my husband on the ground, but my husband wedged the La-Z-Boy between him and the dog.

Q Were you able to pull the dog off of your husband?

A Just a minute.

Q Take your time.

A It -- it seemed like it happened in slow motion. That's the best way I can describe it to you. I got up, and I initially I went to pull the dog off by his collar, but I was afraid that if I did that, whatever injuries Jim had would be worse. So I stuck my fingers in the dog's mouth, and I pried his jaws open. And I got some puncture wounds on my finger, but that was nothing compared to what happened to Jim.

So I managed to pry his jaws open, and I yelled at Jim to get out of the house, because the dog was still trying to go after him. And so Jim ran through the kitchen, out into the backyard.

And I managed to get the dog into the garage. I don't know how I did it, because the dog was struggling, fierce. And then I was stuck in the garage with the dog for a while, because the dog kept trying to force himself back in.

Q So were you in the garage with the dog?

A Yeah. The dog wouldn't let me back in, because he kept trying to go back in the house after Jim.

Q All right. But you were able to pull the dog into the garage?

A Yeah.

Q And then you closed the door, but you were in it there with the dog?

A Yeah. And I couldn't get back in the house, because I wanted to see how Jim was, because I could hear Jim screaming and crying and yelling at my brother to call 911. And I couldn't get back in to see if he was okay.

Q And the dog was, like, right up against the door leading into the house?

A Every time I pushed the door to try to get back into the house, the dog kept pushing alongside of me to try to get in. And so my brother, Guy, was nervous, and he passed a big butcher knife through the crack of the door.

Q And then what happened next?

A Well, I didn't -- luckily, I didn't have to use the butcher knife, but I just basically was trapped in the garage. And Jim kept calling out. He was outside. The paramedics had come at this point. And my husband kept calling, through the vent outside, to get out of the garage. And I kept telling him, "I can't."

Q How long would you say you were in the garage for that time period?

A It was forever.

Q When the paramedics arrived, were you still in the garage?

A Yeah. I managed to trick the dog. I remembered that I had some dog treats in the garage. So I got a dog treat, and I threw it to the other side of the garage. And that's how I got into the house.

(Exhibit 6: Deposition of Raphaela Todd at 61:18-65:3).

Mr. Todd's injury photos illustrate the vicious and severe nature of this attack. (Exhibit 8: Injury Photos).

After the subject incident, Ms. Todd discovered documentation indicating that AH4S had information from TAF that Chip was deemed

"not an adoption or foster candidate" due to his behavioral history.

AH4S did not disclose this information to Ms. Todd, nor did it disclose the true nature of Chip's other attacks, prior to the adoption.

B. The Petsmart Charities Adoption Program.

In its Motion, Petsmart argues that it cannot be held liable because it is not involved in the adoption day events, other than providing the location for the adoptions to take place.

This is not entirely accurate.

Petsmart, in fact, tightly controls and monitors the conduct and activity of its adoption charity partners. Because of controlled nature of the adoption day events, Petsmart even admits that its customers might believe that the adoption charity partners' employees or volunteers are actually representatives of Petsmart. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 49:9-50:5).

Therefore, because of the likelihood of customer confusion in this regard, all adoption charity partner organizations must sign an "Agreement to Participate" before qualifying as an official adoption charity partner. This agreement specifically states that the public might view adoption charity volunteers as Petsmart employees. (Exhibit 10: Agreement to Participate at PETS0001). Accordingly, Petsmart requires that their adoption charity partners agree to adhere to no less than 27 provisions in the Agreement. (Exhibit 10: Agreement to Participate at PETS0001-PETS0003). These provisions govern areas such as customer service, volunteer conduct on Petsmart premises, the adoption process, and the nature, care, and presentation of the pets up for adoption. *Id.*

On an annual basis, approximately 650,000 animals are adopted through this Petsmart adoption program. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 33:1-2). Petsmart admits that all of these

adoption day events increase customer foot traffic in their stores. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 45:9-13).

Petsmart partners up with various charitable organizations to perform these adoption day events. AH4S is one of these official adoption charity partner organizations. Petsmart claims to use "only approved organizations once they've gone through the vetting process and signed an agreement with Petsmart Charities." (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 45:21-24).

Petsmart acknowledges that the health and safety of both the people and the animals is extremely important. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 50:6-12). However, Petsmart's entire vetting and pre-qualification process consists only of confirmation of the charity's 501(c)(3) status, a site visit, and a "google search" of the organization by a Petsmart associate. There is no written policy or procedure concerning the "google search." (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 39:3-22, 45:14-46:7, 47:4-11).

Moreover, Petsmart does not require that its adoption charity partners carry liability insurance. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 56:7-12).

The Petsmart Adoption Partner Manual (hereinafter the "Manual") is then provided to adoption charity partners after they pass the vetting and qualification process. The Manual provides official Petsmart guidance and "outlines how adoptions can take place in Petsmart stores..." (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 60:9-15). The Manual is a comprehensive set of instructions to Petsmart adoption charity partners on how they must perform adoptions inside Petsmart stores.

The Manual covers many aspects of the adoption process. For example, the Manual provides adoption charity partners with specific

guidance on how to perform customer service training for their employees and volunteers. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 61:2-4; Exhibit 11: Adoption Partner Manual PSMT0042-46).[1] The Manual governs numerous other details concerning the manner in which the adoption charity partners must conduct their adoptions. For example, the Manual provides direction on appropriate dress for the adoption charity's employees and volunteers. The Manual states that certain attire is specifically not permitted to be worn by adoption charity partners employees or volunteers. Clothing like shorts, skorts, sweatpants, sweatshirts, jogging suits, jean bib overalls, leggings, lycra, stirrup pants, min-skirts, spaghetti-strap dresses, tank tops, halter tops, slippers and flip flops or thong sandals is prohibited. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 61:18-25; Exhibit 11: Adoption Partner Manual PSMT0045-46).

The Manual also controls the actual adoption process, including the type of information provided on cage cards for each animal, the specific steps to be taken when a customer shows interest in an animal for adoption, and the specific type of pets allowed for adoption. (Exhibit 11: Adoption Partner Manual).

The Manual even permits employees of Petsmart to perform adoptions, under certain circumstances. (Exhibit 11: Adoption Partner Manual at PSMT0054).

This is not all. The pet return process, presentation of the pets (visual appeal, scent appeal, curb appeal), pet care and safety, and the demeanor of the employees and volunteers of the adoption charity partners is also covered extensively by the Manual. (Exhibit 11: Adoption Partner Manual).

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[1] The Manual will be provided to the Court for in-camera review as it is a Confidential Document.

Petsmart also reviews and maintains an "adoptable pet log" for each organization. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 62:1-12). This log tracks the date and time, and identity of each dog, adopted through adoption day events. *Id.*

Although Petsmart tracks adoptions through the adoptable pet log and adoption release form, Petsmart does not have a policy or procedure to determine if a given dog has been previously adopted, or returned, through an adoption day event. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 54:8-17).

Finally, both Petsmart and the adoption charity partners receive several benefits through the adoption of pets on Petsmart premises. As previously stated, customer foot traffic increases during adoption day events. Logically, this means more sales for Petsmart during an adoption day event. Also, Petsmart obtains the adopter's email addresses when an adopter signs the adoption release/waiver form. As indicated above, the adopter is also provided with a "goody bag" of Petsmart promotional items and coupons after the completion of a successful adoption. The adopter is also encouraged to join Petsmart loyalty program, Pet Perks. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 43:5-8)

For its part, the adoption charity partner receives a monetary award from Petsmart for every successful adoption it performs in a Petsmart store. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 43:12-18) The "cash reward" increases when the adoption charity partner reaches a certain threshold of adoption numbers. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 44:1-3). Theoretically, an adoption agency partner may be permitted to claim monetary awards for the same dog adopted on separate occasions through the adoption day events. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 44:4-21).

III.

LEGAL ARGUMENT

A. The Standard of Review to be Applied to Defendant's Motion for Summary Judgment.

Summary judgment is appropriate only when the moving party is entitled to judgment as a matter of law and there are no genuine issues in dispute. *Fire Ins. Exch. v. Cornell*, 120 Nev. 303, 305, 90 P.3d 979, 979 (2004).

When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence, must be viewed in a light most favorable to the nonmoving party. *Wood v. Safeway. Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Further, if the party opposing summary judgment would be entitled to prevail under any reasonable construction of the evidence, and any acceptable theory of law, summary judgment against that nonmoving party cannot be sustained. *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999).

All doubts should be resolved against the moving party and its supporting affidavits and depositions must be carefully scrutinized by the court even with respect to inferences drawn from such evidence. *Hoffmeister Cabiniets of Nev., Inc. v. Bivins*, 87 Nev. 282, 486 P.2d 57 (1971). Further, our Supreme Court has stated that, "a court should exercise great care in granting summary judgment; a litigant has a right to trial where there is the slightest doubt as to the facts." *Nehls v. Leonard*, 97 Nev. 325, 630 P.2d 258 (1981); *Mullis v. Nevada National Bank*, 98 Nev. 510, 654 P.2d 533 (1982).

Furthermore, Courts are reluctant to grant summary judgment in the context of negligence cases. Specifically, our Supreme Court has held that "[t]his court is reluctant to affirm summary judgment in negligence cases because negligence is ordinarily a question of fact for the jury." *Rodriguez v. Primadonna Co.*, LLC, 125 Nev. , 216 P.3d 793, 798 (2009). "In a negligence

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action, summary judgment should be considered with caution. In order to establish entitlement to judgment as a matter of law, a moving defendant must show that one of the elements of the plaintiff's prima facie case is "clearly lacking as a matter of law." *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993). Summary judgment is foreclosed when there is the slightest doubt as to the operative facts. *Washoe Medical Ctr., Inc. v. Churchill County*, 108 Nev. 622, 836 P.2d 624 (1992).

B. Petsmart Owes a Duty to Plaintiffs.

Petsmart contends that it bears no duty to Plaintiff in this action and, therefore, Plaintiffs negligence claims must be dismissed.

To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590 (1991)

In a negligence action, the question of whether a "duty" to act exists is a question of law solely to be determined by the court. *Scialabba v. Brandise Const. Co., Inc.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 37, at 236 (5th ed. 1984).

To find that a duty exists, Courts must first determine whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212, (2001).

Courts have imposed a duty where a "special relationship" exists between the parties, including landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient, and carrier-passenger. *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968-969, 921 P.2d 928, 930, 1996 Nev. LEXIS 129, *6

The rationale behind the imposition of duty in these situations is that:

> Since the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated.
>
> Thus, the element of control is the pivotal factor in the determination of liability arising from certain relationships.

Id. at 969, 921 P.2d at 930.

The issue of duty will turn on the extent and nature of defendant's control over the third party, and whether the injury was foreseeable. *Id.*

The existence of an agency relationship is generally a question of fact for the jury if the facts showing the existence of agency are disputed, or if conflicting inferences can be drawn from the facts. *Schlotfeldt v. Charter Hosp.*, 112 Nev. 42, 47, 910 P.2d 271, 274, (1996).

Courts look at several factors to determine the existence of an ostensible or apparent agency relationship, including, whether the principal engaged in misleading conduct that induces reliance by a third party, whether the principal selected the defendant to serve its patrons, whether a plaintiff entrusted its safety to the principal, whether an individual reasonably believed that the defendant was an employee or agent of the principal, and whether the individual was put on notice that the agent was an independent contractor. See *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 408 P.3d 149, 133 Nev. Adv. Rep. 115 (2017).

In an agency relationship, the principal possesses the right to control the agent's conduct. *Hunter Mining Lab. v. Management Assistance*, 104 Nev.

568, 570, 763 P.2d 350, 352, (1988). Ostensible agency exists when the principal intentionally, or by want of ordinary care, causes or allows a third person to believe another to be his agent. 26 Am J1st H & W § 237. A party claiming apparent authority generally must prove that he subjectively believed that the agent had authority to act for the principal and that his subjective belief in the agent's authority was objectively reasonable. *Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261, (1997).

Unfortunately, the Nevada Supreme Court has not specifically addressed the issue raised in this Motion regarding potential liability of a pet store for a dangerous dog being adopted on its premises through a charitable organization. However, based on the case law above, there is legal support for the existence of an apparent or ostensible agency relationship between Petsmart and AH4S based on the particular circumstances raised in this case.

On the issue of control, Petsmart attempts to avoid a legal duty by stating that it did not have control of the subject dog. This argument misses the mark. The issue is not whether Petsmart had control of the subject dog, but whether Petsmart exerted control over AH4S so as to create an agency relationship. As illustrated above, Petsmart certainly maintained tight control over its adoption charity partners. Petsmart regulated and controlled every aspect of the adoption process. It maintained guidelines covering the entire adoption process for customer service, presentation of the animals, checklists to ensure all documentation was completed, and even regulated the type of clothing that adoption charity partners could wear on Petsmart property.

Petsmart requires that their adoption charity partners must agree to adhere to no less than 27 provisions in the Petsmart Charity Agreement to

Participate. Petsmart also issues a Manual to all adoption charity partners which must be followed. Because of this tight control, Petsmart admits that their customers might mistake adoption charity partner employees for Petsmart employees. In fact, Ms. Todd did just this, and believed that Petsmart and AH4S worked in conjunction during the adoption process. Petsmart exerted so much control over the adoption process, and the policies and procedures governing its own employees and employees of the adoption charity partners are so intertwined, that its own employees are permitted to perform the charity's adoptions in place of the adoption charity partners employees and volunteers.

Furthermore, Petsmart clearly benefits from the adoption partner charities participation in adoption day events. These events increase foot traffic to Petsmart's stores and provide a method by which Petsmart obtains individual email information and provides customers promotional items such as coupons to encourage their continued patronage at their stores. In turn, the adoption partner charities receive monetary awards which increase based on the number of adoptions performed at the stores. This mutually beneficial business relationship strengthens Plaintiff's position that an apparent or ostensible relationship exists between Petsmart and its adoption charity partners, such AH4S.

Based on the foregoing, it was reasonable for Ms. Todd's to believe that the adoption, which was performed on Petsmart property by people looking and acting like Petsmart employees, and closely following Petsmart guidelines, was sanctioned and performed with the express permission and authority of Petsmart itself.

Additionally, it was foreseeable that an animal adopted by AH4S might cause harm to one of Petsmart's customers. Petsmart should have known that Chip had been previously returned and adopted through a

different adoption day event. Petsmart kept records pertaining to previously adopted dogs but did not have a policy in procedure in place to cross-reference dogs to determine if the dogs had been previously adopted before, and, if so, the reason for the dogs return.

Petsmart's inadequate vetting process also created the likelihood that an adoption charity, like AH4S, with prior complaints and other inadequate safety protocols, would slip through the cracks and adopt dogs on its premises.

As a final matter, none of the cases cited by Petsmart are analogous to this case. Note, these are the same cases raised by Petsmart in its initial Motion for Summary Judgment, which this Court denied.

- *Frank v. Animal Haven, Inc.*, 107 A.D.3d 574 (2013), is distinguishable as it involves a lawsuit filed by a third party against an animal shelter; there is no evidence that the dog in that case had violent propensities or a history of prior dog bites, as facts illustrate in this case.
- *Miles v. Rich*, 347 S.W.3d 477 (2011) is distinguishable because it is based on Missouri's strict liability dog bite statute which requires possession and control of the animal at the time of the dog bite; Nevada does not have a similar strict liability dog bite statute.
- *Menches v. Inglewood Humane Soc.*, 51 Cal. App. 2d 415 (1942) is distinguishable because in that case there was no evidence that the dog had violent propensities; also, the case did not address the issue of liability of a pet store permitting the adoption of a dog on its property.
- *Claps v. Animal Haven, Inc.*, 34 A.D.3d 715 (2006), the Court never addressed the issue of liability of Petco, the pet store

where the adoption took place; the analysis focuses on the liability of the Animal Shelter, only.

C. Genuine Issues of Material Fact Exist Concerning Petsmart's Vetting procedures.

Petsmart claims it cannot be held liable, as a matter of law, because it had reasonable vetting procedures.

Petsmart requires that every customer sign a form which states that the adoption charity partners are all "qualified, pre-approved animal welfare organizations." (Exhibit 7: Adoption Release Form at AHFS 8:001). Accordingly, Petsmart affirmatively states and reassures its customers that all adoption charity partners have undergone a vetting and pre-qualification process.

However, Petsmart's entire vetting and pre-qualification process is meager, at best. The process consists only of confirmation of the charity's 501(c)(3) status, a site visit, and a "google search" of the organization by a Petsmart associate. There is no written policy concerning the "google search." Clearly, a genuine issue of material facts exists concerning whether this is a reasonable vetting process for a national organization that permits 650,000 animals to be adopted through their stores, and whether this process is sufficient to protect the safety of its customers and the animals involved in these adoptions.

Obviously more could be done during the vetting process than a simple google search. In fact, Petsmart acknowledged that a more detailed background search is available. According to Petsmart, a background search could be performed through the Department of Agriculture, which would reveal if there had been any claims against the charity. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 34:17-20). Unfortunately, this search was only performed after a Complaint is filed by a customer against

an already approved adoption charity, which by that time is too late. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 34:97-23).

Perhaps more disturbing is the fact that Petsmart has no policy or procedures in place to review adoption charity partners for continued compliance. (Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 40:3-11). Once an adoption charity makes it into the program, they are in for good. Without a policy for continued review of its adoption charity partners, the vetting process is nothing more than a rubber stamp. In this case, AH4S was approved in 2011 and then again 2013, and then its status and ongoing compliance with the requirements of the program were not reviewed until after the subject dog attack.

The lack of policies or procedures regarding a periodic review process to ensure compliance of adoption charity partners creates another genuine issue of material fact concerning the adequacy of Petsmart's vetting and pre-qualification procedures.

D. Genuine issues of material fact exist concerning the validity of the waiver of liability.

Petsmart claims that Ms. Todd waived any claims by signing an adoption release/waiver form.

The Nevada Supreme Court clearly explained assumption of the risk in 1961, in *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 73 (1961). They said: "An essential element of assumption of risk is actual knowledge by the party of the danger assumed." As outlined above, that does not exist here. Plaintiff did not anticipate or know the danger to which she was being subjected to through the adoption of the subject dog at Petsmart. Moreover, she did not comprehend the inadequacies of Petsmart's vetting and prequalification process.

Further, the burden is on the Defendant to show that Plaintiff

actually knew of the dangers, as the Nevada Supreme Court made clear in *Agric. Aviation Eng'g Co. v. Bd. of Clark Cty. Comm'rs*, 106 Nev. 396 (1999). In *Agric*, they stated as follows:

> It is settled that even though an exculpatory clause may be generally valid, additional standards must be met before it will be interpreted so as to relieve a person of a liability that the law would otherwise impose. These standards are: (1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites of the law . . . ; (2) such contracts must spell out the intention of the parties with the greatest of particularity . . . and show the intent to release from liability beyond doubt by express stipulation and (n)o inference from words of general import can establish it . . . (3) such contracts must be construed with every intendment against the party who seeks the immunity from liability . . . (4) the burden to establish immunity from liability is upon the party who asserts such immunity . . .
>
> *Id.* at 106 Nev. 396, 399 (1990) (internal citations omitted)

Defendant bears the burden of overcoming the four factors above. First, the contract must be construed strictly as they are not favored. Second, the contract must spell out the intention of the parties with the greatest particularity and show the intent to release beyond doubt. No words of general import can establish such a release. Third, the contracts must be construed against the party seeking immunity. Fourth, the burden is on Defendant to show that they are entitled to such immunity. The waiver described by Petsmart fails these requirements, as their contract is not clear, does not explicitly and with particularity release injuries such as Plaintiff's, and is procedurally and substantively unconscionable. Further, it fails to meet the standards required by Nevada law for a release of liability, even if it were not unconscionable. Finally, Petsmart employees do not review the release with adopters but instead relies on employees or volunteers of the adoption charity to perform this task. (Exhibit 9: Deposition of Petsmart's

30(b)(6) Witness at 42:16-21).[2]

The Nevada Supreme Court has expressly stated that the existence of a signed release is not "sufficient to establish [that Plaintiff assumed the risk] of the injuries sustained." *Renaud v. 200 Convention Center*, 102 Nev. 500, 501 (1986). In *Renaud*, the Plaintiff was injured after signing a release, while using a free-fall simulator. The Nevada Supreme Court explained "assumption of the risk is based on a theory of consent." *Id.* They continue

> [I]n order for a litigant to have assumed the risk, two requirements must be met. First, there must have been voluntary exposure to the danger. Second, there must have been actual knowledge of the risk assumed. A risk can be said to have been voluntarily assumed by a person only if it was known to him and he fully appreciated the danger. As elucidated in *Sierra*, the essential element of the defense is the *actual knowledge* of the danger assumed. Id. (internal citations omitted) (emphasis in original)

In order to make a determination as to whether or not someone assumed a risk, the Court outlined several considerations to be taken into account, including: (1) the nature and extent of the injuries, (2) the haste or lack thereof with which the release was obtained, and (3) the understandings and expectations of the parties at the time of signing.

All of these factors are against Defendant in construing this release. The injuries caused by the subject dog attack in this case were unexpected (to the Plaintiffs) and would generally not be the type expected from adoption of a dog at a nationally pet store chain. The release was obtained in great haste and with significant procedural unconscionability. As stated, the release was not even presented or reviewed by an employee of Petsmart

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[2] This fact strengthens Plaintiff's agency argument. In this situation, Petsmart relies on adoption charity partners to act as their agents to review and explain the Petsmart waiver form to a customer and to secure the customer's signature; this waiver form does not protect the adoption charity partner, it protects Petsmart.

but instead Petsmart relied on an employee of AH4S to secure the signature of Ms. Todd on the release form. Finally, although there are inherent risks associated with adopting dogs, Plaintiffs had no reasons to expect that their adopted dog would go on a rampage and viciously attack them the day after they brought him to their home.

Subsequent to *Renaud*, in *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259 (1987), was decided in which a plaintiff was injured when she fell off a horse, after signing a waiver that purported to release the horse owner from liability. The Nevada Supreme Court stated that:

> assumption of risk is not favored. It continues to vex and confuse as a masquerade for contributory negligence. Moreover, it focuses on a lack of duty in the defendant rather than the more compelling issue of comparative breach of duty by the parties. In that regard, the doctrine faces backward, emphasizing escape more than accountability and inertia more than progress. Id. at 264

While *Mizushima* has been overruled on other grounds, it is still controlling law as it pertains to express assumption of the risk, as is the kind at issue here. In the case of express assumption of risk, the contracting party "has consented to bear the consequences of a voluntary exposure to a known risk." *Id.* at 262. Again, Plaintiff was not aware of the risk of Chip's violent propensities, and therefore has not voluntarily consented to bear the consequence of this risk. The Court in *Renaud* required Defendant to show Plaintiff's actual knowledge and determined that it was necessary "for the fact finder to hear testimony and assess credibility" on that issue. *Renaud, supra* at 502. Therefore, unless it were undisputed that Plaintiff appreciated the danger which caused his injury (and it is not), summary judgment is inappropriate.

The Nevada Supreme Court has gone further in explaining when an adhesion contract is procedurally unconscionable. In *Burch v. Second Judicial*

Dist. Court of State ex rel. Cty. of Washoe, 118 Nev. 438, (2002) the plaintiff had agreed to an arbitration provision as part of their home purchase. The Nevada Supreme Court explained the standard for holding such a provision unconscionable:

> This court has defined an adhesion contract as "a standardized contract form offered to consumers ... on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain." The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms. Here, the one-page "application" and the HBW were pre-printed, standardized contract forms. The Burches, the weaker party, were not given an opportunity to negotiate the HBW's terms with Double Diamond or its insurer, National Home Insurance Company (NHIC); they were required to "take it or leave it." Therefore, the HBW agreement between the Burches and Double Diamond is an adhesion contract. This court permits the enforcement of adhesion contracts where there is plain and clear notification of the terms and an understanding consent, and if it falls within the reasonable expectations of the weaker party. This court need not, however, enforce a contract, or any clause of a contract, including an arbitration clause, that is unconscionable.
>
> *Id.* at 442. (internal citations omitted)

There is no question that this is an adhesion contract. Plaintiff was given no opportunity to negotiate the terms of the contract. There is no dispute that Plaintiff could not adopt the subject dog without first signing the waiver. This was a "take it or leave it" contract, the most basic form of a contract of adhesion.

///

IV.

CONCLUSION

Based on the foregoing, Plaintiffs request that the Court maintain its prior denial of Petsmart's Motion for Summary Judgment and deny this second Motion for Summary Judgment, or in the Alternative, Summary Adjudication on Issues.

DATED this 19th day of October, 2020.

ASKEROTH LAW GROUP

Thomas W. Askeroth, Esq. (SBN 11513)
10785 W. Twain Ave #219
Las Vegas, NV 89135
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ASKEROTH LAW GROUP, and that on the 19th day of October, 2020, I caused the foregoing document to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

ASKEROTH LAW GROUP

EXHIBIT 1

Memo No: M17-090667 Memo ID: A0999658 Memo ID Type: ANIMAL_ID
Memo Date: 09/01/17 Memo Type: NOTE Memo Subtype:
Memo Text:
09/01/17 16:45 A972502/P638528
Returned stating dog was not getting along with their other male Mastiff. I asked where the first introduction was done and he stated in the front yard. He had the folder that was given to him at the time of adoption which included the dog to dog intro sheet and the canine rivalry sheets. I did remind him that he was counseled at the time of adoption on the proper way to introduce which would include doing it away from the house and yard. I asked if at the time the dogs went after each other if there was food/treats/toys etc present and he stated "no and he is food aggressive when people are near him" but he would not be very specific. Stated he was willing to work with that but today the dog lunged at and tried to bite his male adult cousin. I asked the circumstances and all he would say is that "we were all hanging out in the bedroom and he just went after him for no reason". He did state that he was better with female dogs that he was around. I told him to wait awhile before adopting again to give the other dog time to adjust. Adopted during CTS so no voucher. $10 voucher issued for CLV license. The adoption was done in the wifes name but she did not have time to wait to take care of return process. BL
Memo LISTBOX:
MEMO_NO MEMO_DATE MEMO_TYPE MEMO_SUBTYPE MEMO_RESTRICTED

Exhibit 1: Subpoenaed documents from TAF

Memo No: M17-115799 Memo ID: A0999658 Memo ID Type: ANIMAL_ID
Memo Date: 11/08/17 Memo Type: NOTE Memo Subtype:
Memo Text:
11/08/17 19:40 P728479 Elsa returned A972502 Chip due to behavior. I spoke to patron's daughter and boyfriend (?). Patron states the dog is aggressive. They stated the dog will be possessive over rooms & couches. He will growl and lunge. Some slight training has taken place but I advised the dog could benefit from intensive training as well as appropriate corrections. However, I understood if they were concerned due to the dog's size and behavior being displayed. Also, patron stated the dog was able to push through the fence in the yard and they were concerned the dog might bite. No fee was paid, no voucher. gg.
Memo LISTBOX:
MEMO_NO MEMO_DATE MEMO_TYPE MEMO_SUBTYPE MEMO_RESTRICTED

Exhibit 1: Subpoenaed documents from TAF

The Animal Foundation

Chip's Medical History

A0999658 - 78.20LBS - 6Y - DOG - BROWN / WHITE - N - MIXED BREED

Chip's microchip: 981020021710846

the animal foundation

All of us for all of them.

7/29/2017	Condition: NORMAL	Treated by:	Weight: 82.40

Visit Notes

Visual Exam
No concerns seen

Hands-On Exam
- Nose - wnl
- Mouth - wnl
- Eyes - wnl
- Ears - wnl
- Skin - wnl
- Neck, Chest, Respiration - wnl
- Abdomen - wnl
- Genitalia - wnl

Treatments

07/29/2017	BORDETELLA
07/29/2017	DAPPV
07/29/2017	DEWORM PYRANTEL

7/31/2017	Condition: NORMAL	Treated by: TC	Weight: 0.00

Visit Notes

07/31/17 13:47 Intact male dog, Appears to be 4 years old. Small scab healing on nose. No other concerns upon physical exam. No MC found. Okay to MTA. -TC

8/9/2017	Condition: GI	Treated by: IC	Weight: 0.00

Visit Notes

08/09/17 BAR, grade 6/7 stools in kennel. Starting on fortiflora for 3 days. CTM - IC

08/10/17 09:55 No stool in kennel. CTM - IP

08/11/17 11:35 BAR. No stool in kennel to observed. Last day of meds tonight 8/11.-en

08/12/17 10:12 BAR. Grade 4-5 stool in kennel. Closing clinic check.-SRR

Prescribed Medications

8/9/2017	FORTIFLORA DOG	1.00 PACKAGE 1 time(s) daily for 3 days

8/12/2017	Condition: NORMAL	Treated by: NB/AW	Weight: 0.00

Treatments

08/12/2017	DAPPV
08/12/2017	BORDETELLA
08/12/2017	DEWORM PYRANTEL

Exhibit 1: Subpoenaed documents from TAF

- no concerns seen

Hands-On Exam
- Nose - wnl
- Mouth - wnl
- Eyes - wnl
- Ears - wnl
- Skin - wnl
- Neck, Chest, Respiration - wnl
- Abdomen - wnl
- Genitalia - wnl

Treatments

09/01/2017	BORDETELLA
09/01/2017	DAPPV
09/01/2017	DEWORM PYRANTEL

9/3/2017 Condition: NORMAL Treated by: EA Weight: 0.00

Visit Notes

09/03/17 14:10 Estimated to be around 4 years of age. Microchip confirmed. Neuter male. Swollen rear hind leg. Will place on vet check. Remainder of PE appears to be wnl at this time.-ea

9/3/2017 Condition: OTHER Treated by: MJG Weight: 0.00

Visit Notes

09/03/17 14:12 Swollen rear hind leg. -ea

09/03/17 Examined in clinic - left medial thigh - red, slightly inflamed area appears to be healing by second intention. Front legs have been clipped for IV catheter and left rear leg is clipped. Per memo, adopters other dog got into a fight w/ this one. It appears they sought medical attention for this dog. The area is nonpainful, no discharge and no lameness. There is a small bleb of sq tissue protruding from the wound - it is healthy tissue and therefore cannot be excised. Cleaned w/ chlorhexi and applied SSD. Entering placement so dog can be returned to adoptions. Will include general waiver for the wound. Starting 5 days of Simplicef, although it is probably not necessary. Also starting SSD. Setting review in 5 days to recheck wound. mjg

09/09/17 - Left medial thigh wound is continuing to heal (showed picture to mjg for confirmation). Cleaned with chlorhexidine and applied SSD cream. Will continue to have cream applied SID. Review in 1 week. TJS

9/16/17- BAR, eating well. Thigh wound has healed, SQ bleb of tissue remains but appears healthy and unremarkable. Closing VC. MJP

Prescribed Medications

9/3/2017	SIMPLICEF 200MG	1.00 TABLET 1 time(s) daily for 5 days
9/3/2017	SILVER SULFADIAZINE 1% CREAM	1.00 DOSE 2 time(s) daily for 5 days
9/9/2017	SILVER SULFADIAZINE 1% CREAM	1.00 DOSE 1 time(s) daily for 5 days

9/3/2017 Condition: GENERAL WAIVER Treated by: Weight: 0.00

Visit Notes

The left medial thigh has a red, slightly inflamed area which appears to be healing by second intention. The area is nonpainful and there is no discharge and no lameness. There is a small bleb of sq tissue protruding from the wound - it is healthy tissue and therefore cannot be excised. If you have further questions or concerns, we recommend you consult a full service veterinarian.

9/28/2017 Condition: IRD CANINE Treated by: EH/EN Weight: 0.00

Visit Notes

09/28/17 13:23 During rounds, noted that there is dried yellow nasal discharge on the nostrils as well as mild eye discharge

VWRF0262

Exhibit 1: Subpoenaed documents from TAF

11/10/2017	Condition: NORMAL	Treated by: LK	Weight: 0.00

Visit Notes

Previously neutered male canine, approximately 4 years of age. Microchip found when scanned matches number currently on file. Waxy ear debris, cleaned during exam. Overweight, BCS 7/9. Broken carnassial 208, placed VC. OK to MTA when cleared by DVM. - LK

Your dog has been found to be overweight with a body condition score* of _____7/9____.

Being overweight or obese is a medical condition that can predispose your dog to a variety of other problems including diabetes, joint disease, increased arthritis later in life and difficulty moving around. You may want to ask your dog's full-service veterinarian about this and put your pet on a weight loss/ maintenance plan that will be appropriate for your dog's overall physical condition. Increased exercise and appropriate diet can significantly increase your pet's lifespan and reduce the likelihood of serious medical problems.

*Body condition score = 1 (thinnest possible) to 9 (heaviest possible)

Treatments

11/10/2017 EAR CLEANING

11/10/2017	Condition: FRACTURED TOOTH	Treated by: JB	Weight: 0.00

Visit Notes

Fractured carnassial 208 (very close to gumline). Appears chronic. - LK

11/11/17- Confirmed complete slab fracture with pulp exposure of 208. Surrounding gum tissue is mildly inflamed. This tooth will require extraction. Listing for t/m. If no transfer, possibly could be considered for care funds, but dog would have to pass behavior first. Recommend that CRIG team/head vet reviews this case if there is no transfer. ART department to re-open VC if no transfer. -JB

11/14/17 16:13 - TRANSFER - No inquiries from rescues. Unable to place at this time. Leaving on transfer / medical. Medical noted for disposition / mta / possible foster candidate / continued treatment at the shelter / euth. NEB

11/17/17 Confirmed slab fracture of 208 - per memo, CRIG caserounds, dog is friendly and should be easily adopted. Will send email to behavior to evaluate if dog is good candidate to use CARE funds to extract fractured tooth and MTA. Leaving open to monitor. mjg
UPDATE: Received email from behavior - dog is not a good candidate for CARE funds due to previous behavior HX and being returned 2x. Will keep this dog listed as TM only, not an adoption or foster candidate. Closing VC. mjg

1/15/2018	Condition: NORMAL	Treated by:	Weight: 0.00

Visit Notes

Due to animal's behavior at the time of intake, I was unable to complete a hands-on physical exam. Visual exam findings are below. If behavior improves, this animal will have a hands-on physical exam completed by our Clinic Team.

Visual Exam
- Gait - no concerns observed
- Nose - no concerns observed
- Mouth - no concerns observed
- Eyes - no concerns observed
- Ears - no concerns observed
- Skin - no concerns observed
- Neck, Chest, Respiration - no concerns observed
- Abdomen - no concerns observed
- Genitalia - no concerns observed

Exhibit 1: Subpoenaed documents from TAF

EXHIBIT 2

so the first entry is July 29th, 2017.

Would this be the first day that Chip came into The Animal Foundation?

A. Yes.

Q. All right. And so, to your knowledge, there's no records that The Animal Foundation has regarding Chip that predate July 29, 2017?

A. Not to my knowledge.

Q. Can you tell from this document how he arrived to The Animal Foundation? Was he a -- was he, like, a stray, or was he surrendered?

A. You cannot tell that from this document.

Q. All right. Down here on the next date of entry, July 31st, 2017, there's a note that says, 1347, intact male dog, appears to be four years old, small scab healing on nose, no other concerns upon physical exam, no MC found, okay to MTA -- and then there's a dash -- TC.

So there's a lot of acronyms here. I'm just going to kind of try and understand what some of these mean. So the MC -- No MC found, what does that refer to, the MC?

A. MC refers to microchip.

Q. All right. And the, Okay to MTA, is that move to adoption?

A. Yes, move to adoption.

Q. All right. And then the TC, is that the initials

Exhibit 2: Deposition of TAF 30(b)(6) Witness

next note of the same day, under Visit Note, it states that he was examined in clinic, left medial thigh, red, slightly inflamed, appears to be healing by second tension, and then it goes on.

Do you know, based on the review of the medical history here, how he obtained that injury?

A. According to this medical record, in the note from September 3rd, 2017, on the second line of the larger paragraph there, it says, Per memo, adopter's other dog got into a fight with this one.

Q. Okay. So is it your understanding that the injury was as a result of the -- of Chip getting in a fight with an adopter's dog?

A. Yes.

Q. And it -- and so it would be reasonable to assume that sometime prior to this entry date, Chip was adopted and then returned?

A. I wouldn't make that assumption just based on what I see in this record.

Q. Okay. Do you have -- based on your review of other documents, is it your understanding that he was adopted and returned during this time period, prior to September 3rd, 2017?

A. Yes.

Q. All right. Oh, there's a note here on 9/9/17,

Exhibit 2: Deposition of TAF 30(b)(6) Witness

Q. Okay. Understood. All right. And then -- let's see, make sure I'm not -- all right. The next note is from September 1st, 2017, and it states that, Returned, stating dog was not getting along with their other male mastiff. I asked where the first introduction was done, and he stated in the front yard.

He had the folder that was given to him at the time of adoption, which included the dog-to-dog intro sheet and the canine rivalry sheets. I did remind him that we -- that he was counseled at the time of adoption on the proper way to introduce, which would include doing it away from the house and yard.

I asked him, at the time the dogs went after each other, if there was food/treat/toys, et cetera, present. And he stated, quote, No, and he is food aggressive when people are near him, close quote, but he would not be very specific.

Stated he was willing to work with that, but today the dog lunged at and tried to bite his male adult cousin. I asked the circumstances, and all he would say is that, We were all hanging out in the bedroom, and he just went after him for no reason.

He did state that he was better with female dogs that he was around. I told him to wait a while before adopting again to give the dog time to adjust. Adopted

Exhibit 2: Deposition of TAF 30(b)(6) Witness

during CTS, so no voucher. $10 voucher issue for CLV license. The adoption was done in the wife's name, but she did not have time to wait to take care of return process.

So I just read the entry note that was in the system on this date, and there's initials BL. Do you know who BL is?

A. Not for certain, but we could find that out for you.

Q. Okay. And is this a typical note that's created when a dog is returned after being adopted?

A. It's typical, in the sense that anytime an animal is returned, we try to gather as much information as possible about why the adopter is returning the animal and anything they've learned about the animal while they were in their care to allow us to have more information as we make our decisions going forward for that animal.

Q. Okay. And so would it be fair to say that, based on this note, the dog was returned because of aggressive behavior?

A. That is what was reported by this gentleman and documented in this note, yes.

Q. And, also, what was reported by this gentleman was that the dog got in a fight with one of his other dogs. Correct?

A. Correct.

Q. Okay. And then just briefly, go back to this -- to the medical history form. This is page TAF137. This is the notation on September 3rd, 2017, regarding a hind leg wound in a fight with -- Per memo, adopter's other dog got into a fight with this one.

Is this -- according to your understanding, is this note in the medical history referencing the note that we just read regarding the dogfight that occurred in that initial adoption?

A. The timing would seem to indicate that, yes, of the exam note and the memo that you just read.

Q. Okay. And then -- all right. The next note is September 26, 2017. It looks like this is a DNA test result. And the DNA results are, Chip is an American Staffordshire Terrier, open parentheses, pit bull/German Shepherd/and Boxer, and then initials BA.

Is there -- other than this note, is there a document or a record showing the results of the DNA test, to your knowledge, for Chip?

A. Generally, when we receive the results, it's through, like, a log-in we can access through the computer -- on a computer, and then we print them out, and we place those on the kennel where the animal resides in our adoption area, but I don't believe that was part of this packet.

Exhibit 2: Deposition of TAF 30(b)(6) Witness

Q. Okay. All right. And then the next note -- we're skipping ahead in time to November 8, 2017. It appears that this is another memo documenting that Chip was returned for a second time. Is that fair to say?

A. Yes.

Q. All right. And the initials GG, do you know who that is off the top of your head?

A. Not off the top of my head. I would want to confirm.

Q. All right.

A. And we can get that for you.

Q. Okay. So this says that, Elsa returned A972502, Chip, due to behavior. I spoke to patron's daughter and boyfriend. Patron states the dog is aggressive. They stated the dog will be possessive over rooms and couches. He will growl and lunge.

Some slight training has taken place, but I advised the dog could benefit from intensive training, as well as appropriate corrections. However, I understood if they were concerned due to the dog's size and behavior being displayed.

Also, patron stated the dog was able to push through the fence in the yard, and they were concerned the dog might bite. No fee was paid and no voucher.

So this note -- fair to say that it states the

Exhibit 2: Deposition of TAF 30(b)(6) Witness

dog, specifically, is possessive over rooms and couches? Is that correct?

A. That's what is stated here, yes.

Q. All right. And it looks like -- did -- it looks like the individual, GG, recommended intensive training, as well as appropriate corrections.

Is that a typical recommendation made when someone brings a dog back to The Animal Foundation?

A. That's a good question. When somebody is returning an animal -- well, I should clarify. There are times that adopters will reach out to us to seek advice, and we always discuss with them, if they are trying to make that decision, what -- you know, what we might advise could assist them in allowing the adoption to be successful.

But we always leave it up to the adopter to make that choice. I don't personally know whether this conversation happened at the time of return or before then, but it sounds like the adoption counselor was trying to counsel them through and options that would have allowed them to keep Chip, but they elected to return him.

Q. Okay. And are you aware -- so in the -- so, so far, we've got two adoptions and two returns. Correct?

A. Correct.

Q. Are you aware of any documents referencing the contact information for the individuals involved in the

inquiry from A Home 4 Spot about this dog's behavioral history prior to them agreeing to accept Chip?

MS. REPORTER: I'm sorry, prior to them agreeing to?

MR. AMARO: Accept Chip. Sorry.

THE WITNESS: Not that I recall seeing.

Q. (By Mr. Amaro) So in this case, if somebody from A Home 4 Spot had, in fact, inquired about Chip's behavioral history, the information, as set forth on page 3 of Exhibit 2, would have been provided?

A. Yes.

Q. So from the records that I'm looking at here, Chip was attempted to be adopted or went through an adoption process, albeit returned twice. Would that be true?

A. Yes.

Q. So if you look at page 16 of Exhibit 2, at the very bottom, there -- looks like there's two dates that Chip was -- went through the adoption program at The Animal Foundation. There's a date 8/19 of '17 and another one of 10/20/17. Do you see that?

A. Yes.

Q. Are those the two dates that Chip went through the adoption program, albeit to be later returned on both occasions?

A. Yes, I believe those dates indicate the two dates

he was adopted and went home with those adoptive families.

Q. All right. In the normal protocol and procedures of Animal Foundation, when somebody from Animal -- I'm sorry, when somebody from A Home 4 Spot showed up to take physical possession of Chip, other than providing that person with the rabies vaccination certificate and the dog's medical history, would there have been any information provided about this dog's prior adoption history?

A. If it was requested.

Q. And in this case, if you know, was that information requested by A Home 4 Spot?

A. I do not know, and I do not believe that they requested that via e-mail, otherwise it would be included in the packet.

Q. We took the deposition of Diana England. Do you know who Ms. England is?

A. Yes.

Q. All right. So Ms. England testified in her deposition that she had read somewhere that Chip was in a fight with a previous adopted family's dog before agreeing to place him for adoption through our program.

Before she made the decision to accept him, how would she have read that the dog was in a previous fight if she had not received any materials as of that time?

A. That's a good question. I do not know.

EXHIBIT 3

Gmail

Thomas Askeroth <tom@askerothlaw.com>

Fwd:

1 message

Katie Brown <katie@askerothlaw.com> Tue, Jul 14, 2020 at 9:11 AM
To: Thomas Askeroth <tom@askerothlaw.com>

---------- Forwarded message ---------
From: **R. Maffia** <rmaffia702@gmail.com>
Date: Mon, Jul 13, 2020 at 10:49 PM
Subject:
To: <katie@askerothlaw.com>

My wife and I adopted a large dog from home for spot. They had an adoption day at a pet smart in Centennial hills. We adopted 2 dogs. A small dog and a very large dog. We took the dogs home and all seemed fine. Within a week, the large dog became very aggressive towards me. One morning as I was getting ready for work, the large dog became so aggressive towards me that he chased me up the stairs. The dog began to growl at the children. My wife contacted a home for spot and returned the dog explaining the aggressive nature that the dog had suddenly acquired. No issues were had at the time of return.

Ryan Maffia.

Sent from my iPhone

--
Katie Brown | Paralegal

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Exhibit 3: Email from Ryan Maffia WRIT 275

WRIT 276

EXHIBIT 4

Q. -- event?
A. I believe this was at PetSmart.
Q. And do you recall that, or is there any indication on the paperwork?
A. Well, I signed my name right here. This is my signature to the right, saying that I -- that I processed $50 on credit card.
Q. And if he -- if Mr. Maffia adopted the dog through Caring Hands, would it be the same form?
A. Yes.
Q. And would it be the same signature with the 50 dollar credit card fee?
A. I don't quite understand. Well, if he paid with a credit card, then I would have signed off on it, yeah.
Q. Right. But if it -- would it be the exact same paperwork, the exact same notations, if it was --
A. Sure.
Q. -- PetSmart --
A. Nothing would be any different, huh-uh.
Q. I'm sorry?
A. Our -- our -- our procedure would be the same.
Q. Okay. Do you have a specific recollection of Mr. Maffia adopting that dog initially at an adoption

A. I believe that dog, that's when the dog went to Animal Foundation. I instructed him to send the dog to Animal Foundation.

Q. So did he bring the -- Mr. Maffia, did he bring it back to you, or --

A. No.

Q. -- did he bring it back to the Animal Foundation?

A. AF.

Q. I'm sorry?

A. Animal Foundation.

Q. So did you get a phone call about -- from Mr. Ryan initially, is --

A. I did.

Q. -- that how it started?

A. I did. Uh-huh.

Q. All right. So he called you.

A. Uh-huh.

Q. What did --

A. I was --

Q. -- he say?

A. -- in a car. I was not -- I gave my number to every adopter.

And he told me that the dog was up on the counter, and he yelled at him and tried to yank him

down, and Chip turned to him and -- and growled.

And it scared him, and he went upstairs and shut the door.

And I said well, if you are afraid of this dog, I'm not -- I'm not where I can get to you at this time.

Please call Animal Control immediately and do not come out until they arrive.

I believe I was actually on my way out of town at that time. So I didn't handle the aftermath of that. That was the extent.

Q. Okay. Did Mr. Maffia tell you that the dog chased him up the stairs?

A. I don't recollect that, no.

Q. All right.

A. I --

Q. Specific --

A. I do know that he went upstairs. He had a base -- he said I'm going to -- you know, I have a baseball bat up here, and -- and so on.

And then he did call me later on and said I was just -- you know, I was a little nervous, and Chip's a good dog and so on.

And he asked if he could adopt another dog from me.

EXHIBIT 5

AFFIDAVIT OF YVONNE MUSOLF

Yvonne Musolf, being first duly sworn, deposes and says:

1. I am a resident of Clark County, State of Nevada, am over eighteen years of age, and have personal knowledge of the facts set forth herein.

2. In December, 2017, I adopted a large dog named "Chip" from A Home For Spot which was conducting a dog adoption event at a PetSmart location. A Home For Spot charged me $275.00 to adopt Chip. He had a microchip with the number 981020021710846.

3. The person working with A Home for Spot told me that Chip had been adopted for one day and was returned after the one day. I asked her why and was given no answer. I just thought he must have been unlucky.

4. I took Chip into my home and he was in my home on Christmas day, December 25, 2017. After we opened Christmas presents my daughter, Chantal Cravello, was picking up wrapping paper from the floor and putting it into a bag when, without warning or provocation, Chip lunged at Chantal and bit her on her arm right through her jacket knocking her to the ground and also injuring her thumb. I had to struggle to pull Chip off of Chantal as he would not let go. The bite was severe and Chantal had to undergo surgery on her thumb. She is still undergoing physical therapy for the injury.

5. At no time was Chantal taunting Chip or shaking the paper at or near him. She was simply cleaning up the paper and putting it into the bag.

6. Chantal ran to our neighbor's house to get away from the dog and called 911. The officers arrived, took a report, and told us that we would have to quarantine Chip for ten days. I explained that I would not keep Chip in my home as I was too afraid after what we had just experienced. I told the officers that I was returning Chip to A Home For Spot.

7. I called A Home For Spot to let them know what happened and that I was told that Chip needed to be put on ten days quarantine per the officers. A Home For Spot told me to bring Chip

Exhibit 5: See Affidavit of Musolf

to their vet, Caring Hands, which I did on December 26, 2017.

8. Chantal's husband took her to the Emergency Room for her injuries. She had a number of puncture wounds. Her thumb was severely injured as well and she is still treating with physical therapy for that injury. Chantal's medical bills for her treatment as a result of Chip's attack already exceed $4,000.00.

9. I spoke with A Home For Spot after the bite and explained exactly what happened. I explained that Chip lunged at Chantal while she was simply cleaning up Christmas paper and putting it into a bag. I explained that no one was taunting, teasing or doing anything to scare or provoke Chip. He just lunged at her for no reason. I explained how serious Chantal's injuries were. I told them that we would not take Chip back into our home as we were too afraid of him.

10. A Home For Spot took possession of Chip on January 4, 2018 after his quarantine was over. They told me that they were going to take Chip to be placed in a home with a "trainer" for evaluation before they would adopt him out again to another family. I was shocked then to see that Chip was back on their website as being available for adoption right after his January 4, 2018 release from quarantine.

11. If sworn as a witness I can competently testify to the truth of the facts set forth herein.

Further deponent sayeth not.

YVONNE MUSOLF

SWORN and SUBSCRIBED to
before me this 13th day of February, 2018.

NOTARY PUBLIC in and for said
County and State

RENEE M. CHATMAN
Notary Public State of Nevada
No: 00-64631-1
My Appt. Exp. August 10, 2020

Exhibit 5: See Affidavit of Musolf