

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETSMART, INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE
OF NEVADA IN AND FOR THE
COUNTY OF CLARK; AND THE
HONORABLE TIMOTHY D.
WILLIAMS, DISTRICT JUDGE,

Respondents,

and

JAMES TODD; AND RAPHAELA
TODD,

Real Parties in Interest,

Case No. 82454

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**REAL PARTIES IN
INTEREST'S ANSWER TO
PETITION FOR
PEREMPTORY WRIT OR
MANDATE IN THE FIRST
INSTANCE, OR AN
ALTERNATIVE WRIT OR
OTHER APPROPRIATE
RELIEF**

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NRAP 26.1 DISCLOSURE

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

Real Party in Interest, James Todd is an individual.

Real Party in Interest, Raphaela Todd is an individual.

1. Real Parties in Interest are or have been represented by Claggett & Sykes Law Firm, Askeroth Law Group, and Callister Law Group.

Dated this 26th day of April 2021.

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Real Parties in Interest,

James Todd and Raphaela Todd

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I. ROUTING STATEMENT

This Petition does not raise issues within the category of cases retained by the Nevada Supreme Court under NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

II. ISSUES PRESENTED FOR REVIEW

- A. WHETHER THE COURT SHOULD REFUSE TO INTERVENE AS PETITIONER HAS NOT ESTABLISHED THE REQUISITE ELEMENTS FOR EXTRAORDINARY RELIEF**
- B. WHETHER PETSMART OWES A DUTY TO REAL PARTIES IN INTEREST BECAUSE OF THE SPECIAL RELATIONSHIP CREATED BY PETSMART'S CONDUCT**
- C. WHETHER WRIGHT V. SCHUM SUPPORTS THE DISTRICT COURT'S FINDING THAT A DUTY EXISTS IN THIS CASE**

III. INTRODUCTION AND SUMMARY OF ARGUMENT

In its writ petition, Petitioner, Petsmart, Inc. (“Petsmart” and “Petitioner”), asserts that this writ “arises out of the District Court’s failure to determine whether or not Petsmart owed a duty of care to Plaintiffs.” Pet. at 3. Petsmart further argues that it owed no legal duty of care to Real Parties in Interest, James Todd and Raphaela Todd, (“Todds” and “Real Parties in Interest”). *Id.* at 3.

Contrary to Petsmart's argument, the District Court did make a finding regarding Petsmart's duty. The District Court, in fact, specifically held that Petsmart owed a duty to Plaintiffs because of the special relationship created by its acts and omissions involving the subject adoption and its relationship with A Home 4 Spot ("AH4S"), the adoption charity partner conducting the adoption on Petsmart property. In a well-reasoned and lengthy order, the Court set forth its findings and conclusions of law finding that Petsmart owed a duty to the Todds, specifically citing to *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989).

Petsmart's argument hinges on its inaccurate contention that that it had nothing to do with the adoption process. However, the evidence shows that Petsmart tightly controls and monitors the adoption charities and adoption day events in its stores, which is discussed at length in the Court's Order and in this Answer. Petsmart actively undertakes to protect its patrons by enforcing policies and procedures concerning the adoption process, including, maintaining adoption logs and limiting the type of animals adopted on the premises.

Finally, Petsmart affirmatively represents to its patrons that it has properly vetted and prequalified the adoption charities. As noted by

the District Court, this undertaking by Petsmart to protect its patrons to assure their safety results in the imposition of a legal duty. Also, a genuine issue of material fact remains as to whether Petsmart's vetting process was adequate or sufficient to protect its patrons.

In sum, Petsmart's argument that it had "no involvement" in the adoption process is contradicted by the overwhelming evidence which actually shows that it was intimately involved in the adoptions. As illustrated below, Petsmart's affirmative conduct and undertaking in relation to the adoption process creates a duty to the public, and in particular, to the Todds. Therefore, the Court correctly denied Petsmart's Motion for Summary Judgment.

IV. STANDARD OF REVIEW

Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies within the discretion of this Court. *See Poulos v. Eighth Judicial Dist. Court of State of Nev. In & For Clark Cty.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no

plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.*

Writ petitions are not appropriate to resolve outstanding factual issues. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981). Writ relief is typically available only when there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Generally, an appeal is an adequate legal remedy precluding writ relief. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. *See County of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602 (1961). This Court avoids piecemeal appellate review and seeks to review possible errors only after a final judgment has been entered. *Moore v. Eighth Judicial Dist. Court*, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980). Further, it is within the complete discretion of this Court to determine if a petition will be considered. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

V. FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2018, Real Party in Interest, James Todd, (“James”) was attacked and viciously mauled by a Mastiff mixed-breed dog in his own home. (4 Petitioner’s Appendix (“PA”) 288-299 – Exhibit 6: Deposition of Raphaela Todd at 27:6-14).

The Todds adopted the dog, named Chip, on January 12, 2018, from AH4S, which is a local dog rescue organization. The adoption occurred at a Petsmart store location in Las Vegas, Nevada, during an adoption day event sponsored by Petsmart. Two days after the Todds brought Chip home, Chip violently attacked James. As a result, James suffered severe injuries. (4 PA 302-312 – Exhibit 8: Injury Photos).

On September 30, 2019, the Todds filed suit against AH4S and Petsmart. (1 PA 5-16 – Plaintiffs’ First Amended Complaint).

A. CHIP’S ADOPTION HISTORY AND THE ATTACK.

A basic overview of Chip’s history prior to the subject adoption is essential to understanding why Petsmart owed a duty to the Todds. Chip’s prior history goes to the foreseeability of the attack and supports the contention that the attack could have easily been prevented by Petsmart.

The first documentation in the record relating to Chip is his arrival to The Animal Foundation (“TAF”) on July 29, 2017, as a surrendered animal. (3 PA 258-263 – Exhibit 1: Subpoenaed documents from TAF at 261; 3 PA 264-273 – Exhibit 2: Deposition of TAF 30(b)(6) Witness at 21:1-4). Initially, TAF was able to adopt Chip, but on September 1, 2017, he was returned to TAF because Chip got in a fight with one of the adopter’s other dogs, resulting in an injury to Chip. The adopter informed TAF that Chip was food aggressive and attempted to attack the adopter’s cousin. (3 PA 258-263 – Exhibit 1: Subpoenaed documents from TAF at 260, 262; 3 PA 264-273 – Exhibit 2: Deposition of TAF 30(b)(6) Witness at 45:1 – 46:8).

Despite being returned for dangerous behavior, TAF put Chip up for adoption a second time. Again, that adoption was not successful. On November 8, 2017, adopters returned Chip. These adopters said Chip was aggressive, 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 someone. (3 PA 258-263 – Exhibit 1: Subpoenaed documents from TAF at 260; 3 PA 264-273 – Exhibit 2: Deposition of TAF 30(b)(6) Witness at 51:1 – 52:3).

Consequently, TAF determined that Chip was unfit for adoption due to his aggressive behavioral, and for being returned twice. (3 PA 258-263 – Exhibit 1: Subpoenaed documents from TAF at 263; 3 PA 264-273 – Exhibit 2: Deposition of TAF 30(b)(6) Witness at 82:12 – 83:1).

Notwithstanding Chip's prior incidents, on November 20, 2017, AH4S took Chip from TAF and placed him into their adoption program. AH4S placed Chip up for adoption to the general public through Petsmart's adoption day events.

On November 25, 2017, Ryan Maffia adopted Chip from AH4S through an adoption day event at Petsmart. (3 PA 274-275 – Exhibit 3: Email from Ryan Maffia; 3 PA 276-279 – Exhibit 4: Deposition of Christina Detisch at 56:2). Within a week of the adoption, Maffia returned Chip to AH4S. According to Maffia, soon after bringing Chip home, the dog became aggressive and chased Maffia up the stairs of their home. *Id.* Maffia was so scared of Chip that he hid in his room with a baseball bat until Chip was picked up. (3 PA 276-279 – 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. Inexplicably, AH4S put Chip

up for adoption once again, placing him at another adoption day event at a Petsmart store.

Around December 17, 2017, Yvonne Musolf adopted Chip from AH4S at a Petsmart store. (3 PA 280-282 – Exhibit 5: See Affidavit of Musolf). On Christmas day, December 25, 2017, Chip attacked Musolf's daughter, while she was picking up wrapping paper. Chip lunged at her daughter and bit her on her arm. The force of the attack knocked her daughter to the ground and Musolf had to struggle to pull Chip off as he would not let go. The bite was so severe that her daughter suffered severe injuries, including substantial tendon damage, and had to undergo surgery on her hand. *Id.* Musolf returned Chip to AH4S after the attack. Afterwards, Musolf spoke with an individual at AH4S and explained exactly what happened in the attack. *Id.*

Incredulously, AH4S decided, once again, to place Chip for adoption through another adoption day event at Petsmart. Unfortunately for the Todds, they were next in line to adopt Chip.

Prior to her adoption of Chip, Real Party in Interest, Raphaella Todd, ("Raphaella") was a loyal patron of Petsmart and enjoyed visiting its stores. (4 PA 288-299 – Exhibit 6: Deposition of Raphaela Todd at 45:10-13, 23:19-20). When her family needed a new canine companion

for their own dog, Raphaella decided to visit an adoption day event at Petsmart. (4 PA 288-299 – Exhibit 6: Deposition of Raphaella Todd at 45:10-13). Because Raphaella often frequented Petsmart, she knew that Petsmart had adoption day events on the weekends and that this would be a good place to find a rescue dog. (4 PA 288-299 – Exhibit 6: Deposition of Raphaella Todd at 23:22-25).

On January 12, 2018, Raphaella went to Petsmart on West Lake Mead Boulevard in Las Vegas. Upon arriving at the Petsmart, Raphaella went directly to the adoption day event at the back of the Petsmart store. (4 PA 288-299 – Exhibit 6: Deposition of Raphaella Todd at 27:6-14). Although Raphaella only interacted with AH4S employees, she believed that there existed a partnership or collaboration between Petsmart and AH4S. For example, Raphaella stated:

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?

...

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.

(4 PA 288-299 – Exhibit 6: Deposition of Raphaela Todd at 27:6-14).

Ultimately, Raphaela decided to adopt Chip at the PetSmart adoption day event. After adopting Chip, Raphaela received a PetSmart adoption starter kit, or goody bag, along with PetSmart coupons. (4 PA 288-299 – Exhibit 6: Deposition of Raphaela Todd at 45:10-14, 93:5-10).

Unbeknownst to Raphaela, Chip had already been returned twice after being adopted at PetSmart adoption day events because of violent behavior. Raphaela trusted that any dog she adopted at PetSmart would be reasonably fit for adoption, for good reason. The PetSmart adoption release/waiver form signed by Raphaela stated that the adoption charity partners were vetted by PetSmart as “qualified, pre-approved animal welfare organizations.” (4 PA 300-301 – Exhibit 7: Adoption Release Form).

On the evening of January 14, 2018, two days after adopting Chip, he attacked again. The events of the evening are best summarized by Raphaela 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.

(4 PA 288-299 – 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. (4 PA 302-312 – Exhibit 8: Injury Photos).

B. THE PETSMART CHARITIES ADOPTION PROGRAM.

In its Petition, 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. Petsmart's argument is not supported by the evidence in the record. Petsmart, in fact, tightly controls and monitors the conduct and activity of its adoption charity partners.

Because of the controlled nature of the adoption day events, Petsmart admits that its customers might believe that the adoption

charity partners' employees or volunteers are actually Petsmart employees. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 49:9-50:5). Therefore, because customers might easily confuse adoption charity employees for actual Petsmart employees, all adoption charity partner organizations must follow strict guidelines and sign an "Agreement to Participate" before qualifying as an official adoption charity partner. This agreement acknowledges that the public might view adoption charity volunteers as Petsmart employees. (4 PA 330-333 – Exhibit 10: Agreement to Participate at 331). Petsmart requires that the adoption charity partners agree to adhere to 27 provisions in the Agreement. (4 PA 330-333 – Exhibit 10: Agreement to Participate at 331-333). 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.*

Petsmart adoption day events are an integral part of Petsmart's business. On an annual basis, approximately 650,000 animals are adopted through the Petsmart adoption program. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart's 30(b)(6) Witness at 33:1-2).

Petsmart admits that these adoption day events increase customer foot

traffic in their stores. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 45:9-13).

Petsmart further claims to use “only approved organizations once they’ve gone through the vetting process and signed an agreement with Petsmart Charities.” (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 45:21-24). And Petsmart acknowledges that the health and safety of both the people and the animals are extremely important. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 50:6-12). However, Petsmart’s adoption charity vetting and pre-qualification process consists only of confirming 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 nature or extent of the “google search.” (4 PA 313-329 – 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. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 56:7-12).

After the vetting process, Petsmart provides the adoption charity partner with the Petsmart Adoption Partner Manual (hereinafter the

“Manual”). The Manual provides official guidance and instruction to the adoption charity and “outlines how adoptions can take place in Petsmart stores...” (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 60:9-15).

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. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 61:2-4; 1 Real Parties in Interest’s Appendix “RA” 1-56 – Exhibit 11: Adoption Partner Manual at 11-15). The Manual even provides rules on appropriate dress for the adoption charity’s employees and volunteers. Certain attire is specifically not permitted to be worn by adoption charity employees inside the stores. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 61:18-25; 1 RA 1-56 – Exhibit 11: Adoption Partner Manual at 14-15).

The Manual also controls the actual adoption process, including the type of information to be 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 types of pets allowed for adoption. (1 RA 1-56 – Exhibit 11: Adoption Partner Manual). The Manual even permits

employees of Petsmart to perform adoptions, under certain circumstances. (1 RA 1-56 – Exhibit 11: Adoption Partner Manual at 23). 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 tightly controlled by the Manual. (1 RA 1-56 – Exhibit 11: Adoption Partner Manual).

Petsmart also maintains an “adoptable pet log” for each adoption charity partner. (4 PA 313-329 – 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 periodically review the log to determine if a specific dog has been previously adopted, or returned, through an adoption day event. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 54:8-17).

Finally, both Petsmart and the adoption charity partners receive benefits from this partnership. As noted, customer foot traffic increases at the store during adoptions. Also, Petsmart obtains the adopter’s

email addresses after an adoption. The adopter is also provided with a “goody bag” of Petsmart promotional items and coupons after the completion of a successful adoption, thereby encouraging future patronage at the store. The adopter is also encouraged to join Petsmart’s loyalty program, Pet Perks. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 43:5-8).

In turn, Petsmart pays a sum to the adoption charity partner for every completed adoption at a Petsmart store. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 43:12-18). This “cash reward” increases when the adoption charity partner reaches a certain threshold of adoptions. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 44:1-3). Finally, there is nothing to prevent adoption charity partners from claiming an award for the same dog adopted, but later returned, on separate occasions through different adoption day events. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 44:4-21).

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VI. LEGAL ARGUMENT

A. THE COURT SHOULD REFUSE TO INTERVENE IN THE DISTRICT COURT'S DENIAL OF PETSMART'S MOTION FOR SUMMARY JUDGMENT

As a general rule, the Supreme Court does not consider writ petitions challenging an order denying summary judgment. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997).

The Court has adopted this policy because “very few writ petitions warrant extraordinary relief...”. *Id.* at 1344. 950 P.2d at 281. Very few exceptions are allowed, and only when considerations of sound judicial economy and administration weigh in favor of granting such petitions. *Id.*

Here, Petsmart has failed to explain why its writ petition warrants extraordinary relief. This case is rife with genuine issues of material fact (such as the sufficiency of Petsmart's vetting process and other issues of agency). Moreover, there is no clear authority under a statute or rule which obligates the trial court to dismiss the claims against Petsmart.

Accordingly, Petsmart has failed to establish a compelling reason to overturn the Court's long-standing practice of declining to exercise its

discretion to consider writ petitions that challenge orders of the district court denying motions for summary judgment.

**B. PETSMART OWES A DUTY TO PLAINTIFFS
BECAUSE OF THE SPECIAL RELATIONSHIP
CREATED BY PETSMART'S CONDUCT**

Petsmart contends that it owes no duty to the Todds.

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. *See 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. *See Scialabba v. Brandise Const. Co., Inc.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

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." *See 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 in numerous situations, 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).

The Court's rationale in imposing a 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.

In situations involving a third party, such as the present case, the existence of duty will often turn on the extent and nature of defendant's control over the third party, and whether the injury was foreseeable. *Id.*

As illustrated herein, Petsmart exerted significant control over the adoption charity partner, AH4S, and controlled nearly aspect of the adoption process.

Moreover, this dog attack was reasonably foreseeable. Petsmart should have known, through a reasonable search of its adoption logs and further inquiry with AH4S, that Chip had been adopted and

returned twice through adoption day events at Petsmart prior to the Todds adoption. Although Petsmart did not conduct this search, presumably because it has no written policies concerning maintain and reviewing the adoption logs, a reasonably jury could find that it should have done so. Therefore, a special relationship certainly existed between Petsmart and its patrons, like the Todds. The issue of Petsmart's duty to a third party is also further explored below under the *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989) analysis.

Petsmart further alleges that no agency relationship existed between it and AH4S.

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. *See 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. See *Hunter Mining Lab. v. Management Assistance*, 104 Nev. 568, 570, 763 P.2d 350, 352, (1988). The elements of ostensible agency can be reduced to a manifestation or holding out by the ostensible principal and a reasonable belief and reliance by a third party.” *Mansoor v. Am. Med. Sys.*, No. 2:08-CV-01117-RCJ-LRL, 2009 U.S. Dist. LEXIS 148526, at 12-13 (D. Nev. Sep. 17, 2009). A party claiming apparent authority generally must prove that she subjectively believed that the agent had authority to act for the principal and that her 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).

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.

First, 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. Because of this, Petsmart admits that their customers might mistake adoption charity partner employees for Petsmart employees. In fact, Raphaella 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 as AH4S.

Additionally, it was reasonable for Raphaella 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.

On the issue of its lack of control of Chip, 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 employees could wear.

Lastly, it was reasonably 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 twice through prior adoption day events. Petsmart kept records pertaining to adopted dogs but did not have a policy or procedure in place to review the records to determine if a dog had previously been adopted, and, if so, the reason for the dog's return. Petsmart's inadequate vetting process (which is explored in further detail below) 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 for the following reasons.

- *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.

Even if these cases were applicable to the present matter, they are not Nevada cases and are not binding on the Court.

C. GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING PETSMART'S VETTING PROCEDURES

Petsmart also claims it cannot be held liable, as a matter of law, because it had reasonable vetting and prequalification procedures in place for its adoption charity partners.

As noted, Petsmart requires that every customer sign a form which states that the adoption charity partners are all “qualified, pre-approved animal welfare organizations.” (4 PA 300-301 – Exhibit 7: Adoption Release Form). Accordingly, Petsmart affirmatively 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 woefully inadequate, or, at least, a reasonable jury could find that it was insufficient to protect store patrons. 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.” (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 39:3-22, 45:14-46:7, 47:4-11).

Thus, a genuine issue of material facts exists concerning whether Petsmart’s vetting process was reasonable, considering it is 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, Pestmart could have done more during the vetting process. In fact, Petsmart acknowledged that an alternative and more detailed background search was 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. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 34:17-20). Unfortunately, this search is only performed after a complaint is filed by a customer against an already approved adoption charity. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 34:97-23).

Moreover, Petsmart has no policy or procedures to review adoption charity partners for continued compliance while in the program. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 40:3-11). Apparently, once an adoption charity makes it into the program, they are in program 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. Petsmart did not review its status and ongoing compliance with the requirements of the program until after the subject dog attack in 2018. 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. WRIGHT V. SCHUM SUPPORTS THE DISTRICT COURT'S ORDER

In its Order, the District Court found that *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989) was specifically applicable in this case.

In *Wright*, an escaped pit bulldog attacked an eleven-year-old boy. *Id.* at 612, P.2d at 1142. Although the jury entered a verdict against the owner of the pit bulldog, the lower court dismissed the case against the landlord and owner of the premises from which the dog escaped. *Id.* The Supreme Court reversed the lower court and reinstated the negligence claims against the landlord.

The Court held that that merely because an entity is a landlord under the law, such entity does not enjoy absolute immunity from tort liability. *Id.* at 613, P.2d at 1143. The court emphasized that landlords must still “exercise reasonable care not to subject others to an unreasonable risk of harm.” *Id.* at 614, P.2d at 1143 (internal citations and quotations omitted). The Court then reframed the question presented by the case, stating that the relevant inquiry is not whether defendant is liable as a landlord but “[i]s there evidence in this record

which, if believed by a jury or fact finder, would support a finding that [the landlord] failed to exercise due care in subjecting [plaintiff] and others to an unreasonable risk of harm.” *Id.*

After reviewing the facts, the Court held that the landlord’s conduct in relation to the escaping pit bulldog could be viewed as creating an unreasonable risk of harm to plaintiff and others who were open to attack by the dog. *Id.* Specifically, the Court found that the landlord could be held liable in a dog bite case under general tort obligations when it had assumed such a duty by voluntarily taking action to secure the neighborhood from harm. *Id.* at 615-6, P.2d at 1144-5. By voluntarily taking action to protect the public, the landlord “became a collaborator in the necessary precautionary steps needed in order to make a dangerous dog safe and became responsible for exercising due care in doing so.” *Id.* at 617, P.2d at 1146.

The *Wright* Court cites *Garrison Retirement Home Corp. v. Hancock*, 484 So.2d 1257 (Fla.App. 1985) in support of its position that a landlord owes a duty to the general public in certain situations. *Id.* In that case, a retirement home assumed the duty of care by supervising elderly tenants driving vehicles on the premises. The Court noted that once the owners exert control over the drivers it had to do so in a

reasonable manner. *Id.* at 617-8, P.2d at 1146. Its failure to control in a prudent manner, once control was undertaken, made the owner liable for negligent undertaking to control its tenants. *Id.* Accordingly, the Court found that a jury could have found that the landlord was at least partially legally responsible for the dog attack.

Here, once Petsmart engaged in the control and supervision of the adoption charity partners, it was now in the position of engaging in an undertaking to assure performance of the charity partners' duty to protect the public from dangerous dogs. As noted by the *Wright* court, this is a duty of an ordinary person, not the duty of a landlord.

Here, like in *Wright*, Petsmart took affirmative action or engaged in an undertaking, resulting in the imposition of a duty. For example, Petsmart regulated and controlled many aspects of the adoption process, allegedly to assure that its patrons are safe. 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 further affirmatively represented to its patrons that the adoption agencies, like AH4S, were vetted and prequalified and preapproved by Petsmart.

Moreover, like in *Wright*, Petsmart took affirmative action to protect the public, by developing and enforcing safety guidelines and protocols governing the adoption process on their property, however inadequately. For example, Petsmart undertook a vetting and prequalification process to prevent such animal attacks and ensure the safety of the animals and patrons. As noted, Petsmart acknowledges that that it has an obligation to protect the health and safety of both the people and the animals at their stores. (4 PA 313-329 – Exhibit 9: Deposition of Petsmart’s 30(b)(6) Witness at 50:6-12).

Like in *Wright*, there is evidence adduced in this case which could lead a jury to find that Petsmart was at least partially responsible for the dog attack. For example, a reasonable jury could find that Petsmart’s vetting and pre-qualification process is insufficient as it only consists 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.” Petsmart has no policy or procedures in place to review adoption charity partners for continued compliance with their program. In this case, for example, Petsmart approved the application of AH4S in 2011 and then again 2013. After that, Petsmart did not review AH4S’s status and ongoing

compliance with the requirements of the program until after the subject attack.

Most importantly, Petsmart also engaged in an undertaking to track dogs being adopted through their program by maintaining an “adoptable pet log” for each organization. This log tracks the date and time, and identity of each dog, adopted through adoption day events. 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. Here, the evidence shows that Chip was adopted through Petsmart adoption day events on two separate occasions prior to the the Todds’ adoption. These previous adoptions resulted in Chip being returned due to violent behavior and a separate attack and biting incident resulting in substantial injury to the adopter.

Because these prior adoptions took place at Petsmart adoption day events, and Petsmart maintains a log of prior adoptions, there is sufficient evidence for a jury to determine that Petsmart knew, or should have known, of these prior unsuccessful adoptions as a result of Chip’s violent propensities and attacks, or at least investigated the reasons for Chips prior unsuccessful adoptions. Therefore, there is

sufficient evidence to support a jury's finding that Petsmart is partially liable for the adoption, because if it had a policy or procedures in place to review the adoption logs, it would have discovered that Chip had previously been adopted which would have invited further inquiry.

Finally, Petsmart's contends that it did not have "actual" knowledge of Chip's violent propensities and therefore it did not owe a duty to the Todds. However, actual knowledge is not a pre-requisite to liability. As the *Wright* Court noted that the inquiry not only looks at what the landlord knew about the dog but what the landlord "should have known about the dog." *Id.* at 619, P.2d at 1147. Constructive knowledge is generally sufficient to impose a duty under tort law, and this is case is no different. As mentioned above, a jury could reasonably find that Petsmart should have known about Chip's history if it had conducted a reasonable search of the adoption logs and/or conducted a reasonable vetting and prequalification procedure.

Accordingly, under *Wright*, the issue of Petsmart's negligence should be heard by the jury as a duty clearly exists in this case.

VII. CONCLUSION

In summary, the Court should deny Petsmart's writ petition because a legal duty exists under the particular circumstances of this case, consistent with this Court's holding in *Wright v. Schum*.

Dated this 26th day of April 2021.

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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 typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook font.

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 proportionally spaced, has a typeface of 14 points or more and contains 6907 words.

3. Finally, I hereby certify that I have read this brief, 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 this 26th day of April 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR PEREMPTORY WRIT OR MANDATE IN THE FIRST INSTANCE, OR AN ALTERNATIVE WRIT OR OTHER APPROPRIATE RELIEF** and **REAL PARTIES IN INTEREST'S APPENDIX (VOLUME 1)** were filed electronically with the Supreme Court of Nevada on the 26th day of April 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Petitioner, PetSmart, Inc.

Michael L. Amaro (Amaro Baldwin, LLP)

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I further certify that the foregoing documents were emailed to the following:

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