

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETSMART, INC.

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT
COURT FOR THE STATE OF
NEVADA, COUNTY OF CLARK
AND THE Honorable Timothy D.
Williams

Respondents,

and

JAMES TODD and RAPHAELA
TODD

Real Parties in Interest

COURT OF APPEAL CASE NO.
82454
DISTRICT COURT CASE NO.
788762-C
Electronically Filed
May 10 2021 02:08 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONER, PETSMART, INC'S
REPLY IN SUPPORT OF
PEREMPTORY WRIT OF
MANDATE IN THE FIRST
INSTANCE, OR AN
ALTERNATIVE WRIT OR OTHER
APPROPRIATE RELIEF**

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NRAP 26.1 DISCLOSURE

JAMES E. TODD, individually;
RAPHAELA TODD, individually

Plaintiffs,

v.

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

Defendants.

COURT OF APPEAL CASE NO.
82454

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

**NRAP 26.1 DISCLOSURE
STATEMENT**

Complaint Filed: February 7, 2019
Trial Date: October 25, 2021


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

Parties and Ownership:

1. Petitioner and Defendant, PetSmart, Inc., a Delaware Corporation.
2. Real Party in interest and Plaintiff, James Todd, an individual.
3. Real Party in interest and Plaintiff, Raphaela Todd, an individual.
4. Defendant, Cross-Defendant, Counter Claimant, A Home 4 Spot Animal Rescue.

DATED: May 10, 2021

AMARO | BALDWIN LLP


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

DATED: May 10, 2021

LAW OFFICES OF LANE S. KAY

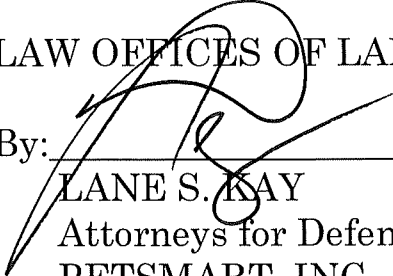

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**REPLY IN SUPPORT OF PETSMART, INC.'S PETITION FOR
PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE,
OR AN ALTERNATIVE WRIT OR OTHER APPROPRIATE
RELIEF**

I. INTRODUCTION

The undisputed facts of this dog bite case prove that Petitioner, PETSMART, INC.'s ("PetSmart" and "Petitioner"), a retailer who did not participate in the possession, adoption, or transfer of the pet dog at issue, owed no duty of care to Plaintiffs and Real Parties in Interest, JAMES TODD and RAPHAELA TODD ("Plaintiffs").

Plaintiffs, James Todd was bitten in his home, by his pet dog "Chip", whom he and his wife, Raphaela Todd adopted from an independent animal adoption agency, Defendant, A HOME 4 SPOT ("A Home 4 Spot"). When Plaintiffs adopted their pet dog from A Home 4 Spot, Plaintiff, Raphaela Todd signed a contract acknowledging that A Home 4 Spot was "not affiliated with Petsmart or PetSmart Charities in any way." (Appx. 2:137, "Adoption Release Form"). Plaintiff, Raphaela Todd also signed a contract whereby she released PetSmart from any liability related to the Plaintiffs' adoption of the dog from A Home 4 Spot. (Appx. 2:137, "Adoption Release Form").

During Plaintiffs' dog adoption process, A Home 4 Spot employee spent over an hour with Plaintiff, Raphaela Todd explaining the provisions on the adoption and release of liability form. (Appx. 2:160-163, 165-166, Depo. of Christine Detisch, pages 89 – 93; 98 - 99).

PetSmart had no interactions with Plaintiffs, and never had possession of, or any knowledge of the subject dog's behavioral history prior to the adoption. (Appx. 2:196, 206, Depo. Lindsay Del Chiaro, pages 35; 51). Plaintiff, Raphaela Todd knew that she only dealt with a representative of A Home 4 Spot and was never involved with any PetSmart personnel in relation to her pet adoption. (Appx. 2:171, Depo. Plaintiff, Raphaela Todd, page 29).

In their Answer to PetSmart's instant Writ Petition, Plaintiffs/ Real Parties in Interest offer an abundance of unrelated facts and evidence that point to Defendant, A Home 4 Spot's alleged negligence, in an attempt to distract from the issues presented in the instant Petition. However, none of the purported "disputed" facts presented in the Answer support a finding of liability against PetSmart, as a matter of law.

Indeed, Plaintiffs' claim of direct negligence against PetSmart fails because PetSmart was not involved in the sale or adoption of the subject dog to Plaintiffs, and owed no legal duty of care to Plaintiffs, under *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989) and *Wiley v. Redd* 885 P.2d 593, 596 (1994). It is undisputed that Plaintiffs allege injuries caused by a pet dog that they adopted from A Home 4 Spot. It is further undisputed that PetSmart did not have knowledge of the animal's behavioral propensities and did not make any affirmative acts or omissions regarding the adopted dog. At the time of the incident, Plaintiffs were not conducting business transactions with PetSmart. Based upon the undisputed facts and evidence, as a matter of law, PetSmart did not owe Plaintiffs a duty of care.

Plaintiffs' claim for negligence under a theory of *respondent superior* liability also fails because there are no triable issues of facts regarding agency. Plaintiffs' Answer fails to address that Plaintiff, Raphela Todd expressly acknowledged, via an executed Adoption Release agreement, that PetSmart was not in an agency relationship with the defendants that held the dog adoption event. Plaintiff, Raphaela Todd specifically "initialed" the following provision:

"Adoption Program. PetSmart and PetSmart Charities supports the adoption process by donating in-store space . . . These organizations are not affiliated with Petsmart or PetSmart Charities in any way. (Appx. 2: 137, "Adoption Release Form").

Plaintiff, Mrs. Todd further agreed that based upon the language in the document, she knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities prior to the adoption process. (Appx. 2: 179, Depo. of Plaintiff, Raphaela Todd, page 54).

Again, based upon the undisputed facts and evidence, as a matter of law, PetSmart did not owe Plaintiffs a duty of care.

II. PETSMAART MET THE REQUISITE ELEMENTS FOR EXTRAORDINARY RELIEF

In their Answer, Plaintiffs/Real Parties in Interest ask that this Court deny writ review, on the grounds that PetSmart may appeal any error related to the denial of summary judgment, following a jury trial. While such a remedy does exist in every single case where a summary judgment is wrongfully denied, that argument does not preclude

granting the relief requested by PetSmart, and is certainly not a speedy or expeditious remedy.

Whether to issue an extraordinary writ lies entirely and exclusively within the discretion of the issuing court. *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (mandamus and prohibition); *Dangberg Holdings Nev., LLC v. Douglas Cnty.*, 115 Nev. 129, 138, 978 P.2d 311, 316 (1999) (certiorari).

An appellate court will exercise its original jurisdiction to issue an extraordinary writ only when the petitioner does not have a plain, *speedy* and adequate remedy in the ordinary course of law. *Club Vista Fin. Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

The appellate court may review an order that denies a dispositive motion: (1) “where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action”; or (2) where “an important issue of law requires clarification.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1344-45, 1348, 950 P.2d 280, 281, 283 (1997).

The reviewing court will exercise its discretion to grant writ relief when “an important issue of law requires clarification.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). “[T]he primary standard” in the determination of whether to entertain a writ petition is “[t]he interests of judicial economy.” *Smith v. Eighth Jud. Dist. Ct.*, supra, 113 Nev. 1343 at 1345. The granting of a writ petition is appropriate where a party will suffer serious and irreparable harm absent intervention. *Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

The matters presented by this writ are urgent, since Petitioner will suffer irreparable injury, and have no other plain, speedy and adequate remedy in the ordinary course of law, because Petitioner will be forced to continue to defend against Plaintiff's ordinary negligence-based causes of action at great expense, when Defendant has submitted substantial, uncontroverted evidence that it owed no legal duty to Plaintiffs, and its conduct was not a substantial factor in causing Plaintiffs' alleged injuries.

Moreover, in negligence based personal injury matters, the legal issue of whether the defendant owed a duty to the plaintiff must be

determined by the Court, and not the jury. *See Lee GNLV Corp.*, 117 Nev 291, 295. This legal issue must be determined before trial. Since the summary judgment was improperly denied, this Writ is the appropriate procedural vehicle. This will save PetSmart substantial expense.

III. REAL PARTIES IN INTEREST FAILED TO RAISE A TRIABLE ISSUE OF FACT REGARDING THE ISSUE OF DUTY, BASED ON A SPECIAL RELATIONSHIP WITH PLAINTIFFS

The central issue involved in this writ is whether the District Court erred in denying Petitioner's motion for summary judgment, without identifying any legal duty of care that PetSmart owed Plaintiffs, when it is undisputed that PetSmart lacked prior actual knowledge of an animal's behavioral propensities and made no affirmative acts or omissions regarding the subject dog.

As presented in Petitioner's motion for summary judgment, PetSmart did not owe a legal duty to Plaintiffs, since, under Nevada law, there was no special relationship between PetSmart and Plaintiffs, and PetSmart was not involved in the adoption process for the pet dog.

Here, District Court, erred in relying on *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142, in its cart-before-the-horse "duty" analysis, and, further erred in determining that there was a triable issue of fact concerning PetSmart's "vetting" process for A Home 4 Spot. (Appx. 5:349-362, Court Order). Since there is no legal duty owed in the first instance, then the question of whether or not PetSmart acted reasonably in the vetting of the adoption partner, should not even be reached.

A. PetSmart Did Not Assume a Duty to Plaintiffs

Plaintiff, James Todd was bit inside his home, by "Chip", the pet dog his wife adopted from A Home 4 Spot's pet adoption drive. (Appx. 2:142-143, Plaintiffs' Responses to Interrogatory, Response to Interrogatory No, 2). PetSmart did not own, possess, harbor, or control the dog at any time – much less when the dog bit Plaintiff, James Todd days after the adoption. It would be an error of law to find PetSmart directly liable for any negligence.

In their Answer, Plaintiffs, nonetheless, allege that PetSmart “assumed a duty” to prevent injury to Plaintiffs. More specifically, Plaintiffs claim that PetSmart *should have* assumed a duty to screen

the dogs that A Home 4 Spot put up for adoption. Plaintiffs argue that the potential of harm in adopting the dog was foreseeable, and that PetSmart's duty arises from the foreseeability, even though the dog's alleged dangerous propensities were unknown to PetSmart. (Answer, Page 20-21). Plaintiffs have not cited to any case law, or statute, or other legal authority to support their position regarding foreseeability, or PetSmart's duty.

Indeed, Plaintiffs' contention that PetSmart had a duty to undertake an investigation into the history of the pets placed for adoption by A Home 4 Spot, based on foreseeability of harm, were soundly rejected by the Nevada Supreme Court in a similar dog bite case, *Wiley v. Redd* 885 P.2d 593, 596 (1994).

In *Wiley*, the plaintiff was a police officer who was bit by a dog while responding to a residential alarm. The plaintiff brought a negligence claim against the alarm company, on the theory that the alarm company failed to investigate whether dogs were at the residence and failed to warn of the dog. *Id.* The alarm company received an alarm call from a residence, and then called the police to investigate. *Id.* In finding that the trial court's grant of summary judgment in

favor of the alarm company was proper based on lack of duty, the Nevada Supreme Court rejected the theory that a duty of care arose from an obligation to investigate potential, hazardous conditions. In *Wiley*, the Nevada Supreme Court cautioned that a duty to warn should not arise from an "obligation to become aware".

If we were to recognize such a duty, a reasonable standard of conduct against which a breach of that duty would be judged would arguably embrace a plethora of obligations including awareness, the obligation to become aware, and foreseeability that would adversely impact the ability of alarm companies to provide services at reasonable cost to the public. The burdens associated with imposing such a duty on Alarmco and those similarly situated are obvious and appear to us to be socially undesirable. *Wiley v. Redd*, 885 P.2d 593, 596,

Similarly, here, PetSmart did not have an obligation to become aware of the adoption history of dogs that a third-party, A Home 4 Spot, placed for adoption in A Home 4 Spot's adoption drives. Moreover, while the Todds were previously business invitees of PetSmart, on the occasion where they adopted Chip, it is undisputed that the Todds were not conducting business with PetSmart. Mrs. Todd went to the adoption drive solely for the purposes of adopting a pet dog, and not for conducting any business transactions with PetSmart.

Accordingly, Plaintiffs' position that PetSmart had a duty to undertake a search to determine that Plaintiffs' dog Chip had been adopted and returned in prior adoption drives should be rejected, pursuant to *Wiley v. Redd*, 885 P.2d 593, 596.

Notably, Plaintiff, Mrs. Todd did acknowledge in the Adoption Release Form that "animals for adoption through the Adoption Program often come from a shelter environment and little is known about their past . . . all questions regarding your pet's health should be directed to the adoption group." (Appx. 2:137, "Adoption Release Form.") She agreed to place her adopted pet dog into a home quarantine and monitor any possible signs of aggression. (Appx. 2:137, "Adoption Release Form.") Plaintiffs did not complete such home quarantine – the dog bite to Plaintiff, James Todd occurred two days after the adoption, while the dog was laying the home's living room with both Plaintiffs present. (Appx. 2:143).

Plaintiffs claim, without any citation to legal authority, that a "special relationship" existed between Plaintiffs and PetSmart because the dog bite incident was "reasonably foreseeable". In their hollow argument, Plaintiffs fail to cite to any legal authority that required

PetSmart to undertake a vetting role in the adoption process. Foreseeability is insufficient to establish a legal duty. "There must also be some right or obligation to control the activity that presents the danger of injury. . . . Recognition of danger 'is certainly not, on its own, a basis for a negligence action'." See *Miles ex rel. Miles v. Rich*, 347 S.W.3d 477, 483 (2011) (citation omitted). Here, under *Wiley v. Redd*, 885 P.2d at 596, PetSmart did not have a right or obligation to control the process through which Plaintiffs adopted Chip from A Home 4 Spot.

Moreover, pursuant *Wright v. Schum*, 05 Nev. 611, 781 P.2d 1142 (1989), to be held liability for Plaintiffs' injuries, PetSmart was required to make an affirmative promise to prevent injury to the Plaintiffs. In *Wright*, the Court of Appeal determined that the landlord owed plaintiff a duty of care because (1) the landlord was aware of the dog's dangerous propensities, and (2) the landlord made affirmative statements acknowledging his duty of care to prevent the dog from injuring third parties. *Wright v. Schum*, 05 Nev. 611, 615.

Unlike in *Wright*, where the landlord had **actual knowledge** that the Pit Bull dog had attacked other dogs, in the instant case, there was no evidence whatsoever that PetSmart was aware of any behavioral

propensities related to the adopted dog that bit Plaintiff. PetSmart did not have any knowledge of the history of the dog, nor did PetSmart have access to any of the Animal Foundation documents before the adoption by A Home 4 Spot. Appx. 2: 206, Depo. Lindsay Del Chiaro, page 51.) Further, at no time did PetSmart ever take possession of the dog. The decision about whether or not the dog was eligible for adoption in the first instance, was made by A Home 4 Sport, and not PetSmart, since PetSmart had no access to Chip's documentation before the adoption. (Appx. 2:131-132, Depo. Diana England, pages 86 – 87).

PetSmart did not perform any affirmatively act concerning the subject dog and did not control the adoption process related to the same. PetSmart's employee, Ms. Del Chiaro testified that PetSmart did not control how A Home 4 Spot conducted its adoptions, nor how A Home 4 Spot carried on its business operations (such as what to charge, how to staff the event, etc.) (Appx. 2: 204, Depo. Lindsay Del Chiaro, page 49). Ms. Del Chiaro clearly testified that the adoption companies are independent contractors, and PetSmart did not get involved in any of the operative details of the business. (Appx. 2: 208, Depo. Lindsay Del Chiaro, page 60).

In this matter, any finding of a triable issue of fact regarding the issue of duty is an error. Indeed, the issue of duty is purely a question of law, and not an issue suited for the weighing procedures of a jury. Moreover, the District Court erred in finding that PetSmart may be liable for negligence, as a matter of law, pursuant to *Wright v. Schum*. As such, the requested writ relief should be granted to cure the undue prejudice to PetSmart.

IV. REAL PARTIES IN INTEREST FAILED TO RAISE A TRIABLE ISSUE OF FACT REGARDING VICARIOUS LIABILITY

In their Answer, Plaintiffs claim that PetSmart and A Home 4 Spot were in an agency relationship, under the theory of ostensible agency. Real Party in Interests' claim of *respondeat superior* liability fails on multiple grounds. Tellingly, the person that dealt with Plaintiff, Mrs. Todd, for the adoption of the subject dog, was an employee or agent of Defendant, A Home 4 Spot, and not, an employee or agent of PetSmart. Second, Real Party in Interest, Raphaela Todd undisputedly executed a Release of Liability provision agreeing that she

understood that no agency relationship existed between PetSmart and A Home 4 Spot.

Apparent agency is an application of equitable estoppel, of which reasonable reliance is a necessary element. *Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 352, 934 P. 2d 257, 261 (1997). The element of reasonable reliance can be determined, as a matter of law on summary judgment, by the existence of a contract whereby the parties agree as to whether any agency relationship existed. *Id.*

The Adoption Release Form at Appendix, Volume 2, Pages 135-139 was signed by Plaintiff, Raphaela Todd and contained the following provisions:

Adoption Program

Thank you for choosing to adopt a pet. PetSmart and PetSmart Charities supports the adoption process by donating in-store space for use by qualified, pre-approved animal welfare organizations. These organizations are not affiliated with PetSmart or PetSmart Charities in any way. We cannot, and do not, guarantee the health of any of the pets available for adoption.

Your Pet's History

The animals available for adoption through the Adoption Program often come from a shelter environment and little is known about their past. Each participating animal welfare organization is concerned about the health of the animals in its care. . .

I hereby release PetSmart, Inc., PetSmart Charities, Inc., the adoption agency, and their agents of any liabilities related to the adoption of this pet from the adoption program. (Emphasis added).

Plaintiffs do not meaningfully dispute that the foregoing terms are unambiguous. Plaintiff, Raphaela Todd initialed her full understanding of the same. She agreed that PetSmart supported pet adoption by donating store space to pre-approved animal welfare organizations. She further agreed that "these organizations are not affiliated with PetSmart or PetSmart charities in any way." (Appx. 2: 137, "Adoption Release Form")

The terms of the Adoption Release Form are clear, understandable, demonstrate consent, and should be found within Plaintiff's "reasonable expectations." *Burch v. Second Judicial District Court of State ex rel. County of Washoe*, 118 Nev. 438 (2002).

In Nevada, it is well-settled that exculpatory clauses are a valid exercise of the freedom of contract. *Miller v. A & R Joint Venture, et al.*, 97 Nev. 580 (1981) (citation omitted). In deference to the freedom of contract, Nevada courts will only refuse to enforce exculpatory contractual provisions if compelled to do so for public policy reasons.

Public policy supports the enforcement of the contractual provision here. Plaintiffs made a choice of adopting a dog, by signing an agreement. Plaintiffs had the choice to not adopt the dog, or to go to another agency to adopt. Here, Plaintiff, Raphaela Todd, made a fully informed decision to sign the document, with full knowledge of the terms and provisions, including the “release of liability” provision.

Notably, Plaintiff, Mrs. Todd further agreed that based upon the language in the document, **she knew that A Home 4 Spot was not affiliated with PetSmart or PetSmart Charities prior to the adoption process.** (Appx. 2: 179, Depo. of Plaintiff, Raphaela Todd, page 54). Plaintiff, who has a professional background as a legal assistant in a prominent Nevada defense law firm, admitted that she fully understood the language of the document. (Appx. 2:177-181, Depo. of Plaintiff, Raphaela Todd, pages 52 – 56).

As such, Plaintiffs' claim of any ostensible agency is disingenuous, given that Plaintiff, Ms. Todd admits that she could not have reasonably believed that PetSmart was in any agency relationship with the dog adoption defendants.

Additional evidence against Plaintiffs' claim of agency exists in the

written signage posted at PetSmart. As the record demonstrates, PetSmart also had signs posted inside the subject store, which stated that the adoption companies, like A Home 4 Spot, were separate from PetSmart. (Appx., 2:213, Depo. Lindsay Del Chiaro, Appx. page 69).

Accordingly, there are no triable issues of fact as to Plaintiffs' vicarious liability/*respondeat superior* claims.


V. CONCLUSION

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

DATED: May 10, 2021

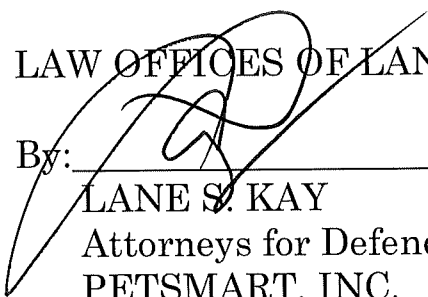
Respectfully submitted,

AMARO | BALDWIN LLP

By: 

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

DATED: May 10, 2021

LAW OFFICES OF LANE S. KAY
By: 

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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in an proportionally spaced typeface using Microsoft Word 2010, in Century Schoolbook font, in 14 point font size.

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 3,411 and does not exceed 15 pages.

3. Finally, I hereby certify that I have read this Reply 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 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 Nevada Rules of Appellate Procedure.

DATED: May 10, 2021

AMARO | BALDWIN LLP



By: _____

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

CERTIFICAT OF SERVICE

I hereby certify that the foregoing **PETITIONER, PETSMART, INC'S
REPLY IN SUPPORT OF PEREMPTORY WRIT OF MANDATE
IN THE FIRST INSTANCE, OR AN ALTERNATIVE WRIT OR
OTHER APPROPRIATE RELIEF** were filed electronically with the
Supreme Court of Nevada on the 10th day of May 2021. Electronic
service of the foregoing document shall be made in accordance with the
Master Service List as follows:

Real Parties in Interest, James Todd and Raphaela Todd
Thomas W. Askeroth (CLAGGETT & SYKES LAW FIRM)

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

Honorable Timothy D. Williams, District Judge
Eighth Judicial District Court, Department XVI
dept16lc@clarkcountycourts.us

/s/ Chantal Murillo _____
Chantal Murillo, employee of
Law Offices of Layne S. Kay