

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401</p>	
<p>WILLIAM MONTGOMERY, Plaintiff, v. BEST BUY, L.P., Defendant.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Best Buy, L.P.: Lori K. Bell, Reg. No. 31714 Sarah K. Vogel, Reg. No. 58381 Montgomery Amatuzio 720 S. Colorado Blvd., Suite 1200-N Denver, CO 80246 Telephone: 303-592-6600 lbell@mac-legal.com svogel@mac-legal.com</p>	<p>Court of Appeals' Case No: 2025CA327 Case No.: 2023CV00226 Division: 6</p>
<p style="text-align: center;">DEFENDANT-APPELLEE BEST BUY, L.P.'S ANSWER BRIEF</p>	

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<p style="text-align: center;">DEFENDANT-APPELLEE BEST BUY, L.P.'S CERTIFICATE OF COMPLIANCE</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) or C.A.R. 28.1(g).

- This brief contains 6,427 words, which is not more than the 9,500 word limit.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

- For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precision location in the record where the issue was raised and ruled on, not to an entire document.
- In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Sarah K. Vogel

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I. ISSUES ON APPEAL

1. Did the District Court properly consider exhibits attached to Defendant's Reply and Response to Plaintiff's Cross Motion for Summary Judgment in issuing its order granting Defendant's Motion for Summary Judgment?
2. Did the District Court properly consider the appropriate evidence in issuing its order denying Plaintiff's Cross Motion for Summary Judgment?

II. STATEMENT OF THE CASE

A. Description of Underlying Case

This case stems from a November 25, 2022 incident involving Plaintiff-Appellant (hereinafter “Plaintiff”) and Defendant-Appellee/Cross-Appellant Best Buy Stores, L.P. (hereinafter “Defendant”), and Plaintiff’s allegations of false imprisonment, defamation *per se*, and assault which he alleges stem from an event in which he was stopped by retail service employees at a Best Buy store located at 9369 Sheridan Boulevard, Westminster, Colorado, 80031. CF, p. 3. On November 25, 2022, Plaintiff alleges he was standing outside the Best Buy store location when he was approached by three retail service employees of Best Buy. *Id.* Plaintiff alleges he was then surrounded and prevented from leaving while the employees accused Plaintiff of stealing and threatened to harm Plaintiff around the corner and off camera. *Id.*

Plaintiff has established a history of filing lawsuits against Defendant and other retail companies following Plaintiff’s patterned targeting of such entities. CF, p. 13 – 19; 71; 79; 91 – 238.

B. Course of Proceedings

Plaintiff filed suit on November 21, 2023, in the Jefferson County District Court, and the matter was assigned to Judge Christopher C. Zenisek. CF, p. 1-4, and

CF, p. 6-7. Plaintiff additionally filed a motion to proceed *In Forma Pauperis* on this same date, which was granted. CF, p. 5.

The District Court issued its *Civil Procedure Order* on November 22, 2023. CF, p. 6-7. The Order stated that Returns of Service on all defendants were to be filed within 63 days from the date of the filing of the Complaint. CF, p. 6.

Defendant filed its *Answer to Plaintiff's Complaint and Jury Demand under Simplified Civil Procedure* with exhibits on February 8, 2024. CF, p. 9 – 32.

Defendant filed its *Motion for Summary Judgment* on July 25, 2024. CF. p. 227 – 239. Defendant's *Motion for Summary Judgment* included exhibits. CF, p. 91 – 226.

Plaintiff filed his *Emergency Motion for Extension of Time to File Ptf's Response to Def's MSJ & Ptf's Own Cross-MSJ* with exhibits on August 12, 2024. CF, p. 242 – 248. The District Court granted Plaintiff's motion on August 21, 2024. CF, p. 249.

Plaintiff filed his *Cross-Motion for Summary Judgment* on September 19, 2024. CF, p. 254 – 275. Plaintiff's Cross-Motion included exhibits. CF, p. 276 – 280.

Plaintiff filed his *Response in Opposition to Defendant's MSJ* on September 19, 2024. CF, p. 640 – 671.

Plaintiff filed his *Motion to Exceed Page Limitation Regarding Plaintiff's Response to Defendant's Motion for Summary Judgment* on September 19, 2024. CF, p. 637 – 639.

Defendant filed *Defendant's Unopposed Motion for Extension of Time to File a Reply Brief for its Motion for Summary Judgment* on October 3, 2024. CF, p. 672 – 675. This motion was granted by the District Court on October 4, 2024. CF, p. 676.

Defendant filed *Defendant Best Buy, L.P.'s Response to Plaintiff's Cross-Motion for Summary Judgment* on October 10, 2024. CF, p. 677 – 688. Defendant's Response included exhibits. CF, p. 689 – 728.

Defendant filed *Defendant Best Buy, L.P.'s Reply Brief in Support of its Motion for Summary Judgment* on October 10, 2024. CF, p. 729 – 740. Defendant's Reply included exhibits. CF, p. 741 – 783.

The District Court issued an Order granting Plaintiff's *Motion to Exceed Page Limitation Regarding Plaintiff's Response to Defendant's Motion for Summary Judgment* on October 11, 2024. CF, p. 784 – 786.

Defendant filed a *Notice of Deposit* attesting to delivery of Exhibit Q to Defendant's *Response to Plaintiff's Cross Motion for Summary Judgment* on October 14, 2024. CF, p. 787 – 788.

Plaintiff filed his *Motion for Extension of Time to File Ptf's Reply to Def's Response to Ptf's Cross-MSJ* on October 21, 2024. CF, p. 791 – 794.

Plaintiff filed his *Notice of Conventionally Submitted Material in Plaintiff's Cross-Motion for Summary Judgment* on October 28, 2024. CF, p. 795 – 796.

Plaintiff filed his *Motion to Exceed Page Limitation Regarding Ptf's Reply to Def's Response to Ptf's Cross-MSJ* on October 28, 2024. CF, p. 797 – 799.

Plaintiff filed *Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment* on October 28, 2024. CF, p. 800 – 828. Plaintiff's Reply included exhibits. CF, p. 829 – 832.

Plaintiff filed *Plaintiff's Motion for Extension of Time to File Ptf's Reply to Def's Response to Ptf's Cross-MSJ* on October 21, 2024. CF, p. 834 – 837. This motion was granted by the District Court on the same date.

Defendant filed *Defendant's Response in Opposition to Plaintiff's Motion to Exceed Page Limitation* on October 29, 2024. CF, p. 838 – 840. Defendant's response included exhibits. CF, p. 841 – 843.

The District Court issued its *Order: Motion to exceed page limitation regarding ptf's reply to defs response to ptf's cross msj* on October 29, 2024, granting Plaintiff a page limitation extension by five pages. CF, p. 844 - 847.

Plaintiff filed *Plaintiff's Amended Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment* on October 31, 2024. CF, p. 849 – 869.

Plaintiff filed his *Unopposed Motion to Strike and Replace Ptf's Reply to Def's Response to Ptf's Cross-MSJ* on October 31, 2024. CF, p. 870 – 872.

The District Court granted Plaintiff's *Unopposed Motion to Strike and Replace Ptf's Reply to Def's Response to Ptf's Cross-MSJ* on November 1, 2024. CF, p. 873 – 875.

The District Court issued its *Order Re: Cross Motions for Summary Judgment* on November 19, 2024, granting Defendant's *Motion for Summary Judgment* and denying Plaintiff's *Cross Motion for Summary Judgment*. CF, p. 876 – 883.

Plaintiff filed *Plaintiff's Motion for Reconsideration* with respect to the District Court's *Order Re: Cross Motions for Summary Judgment* on December 3, 2024. CF, p. 890 – 907.

Defendant filed *Defendant's Response in Opposition to Plaintiff's Motion to Reconsider* on December 24, 2024. CF, p. 908 – 913.

Plaintiff filed *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Reconsideration* on December 31, 2024. CF, p. 963 – 973.

The District Court issued its *Order: Plaintiff's Motion for Reconsideration* on January 6, 2025, denying Plaintiff's *Motion for Reconsideration*. CF, p. 974 – 992.

III. SUMMARY OF THE ARGUMENT

The District Court committed no error in properly considering evidence included with Defendant's Reply and Response to Plaintiff's Cross Motion for Summary Judgment because such evidence did not raise any new issues for which Plaintiff had not been placed on notice in Defendant's original *Motion for Summary Judgment*. The District Court properly considered the evidence included in Defendant's Reply and Response to Plaintiff's *Cross Motion for Summary Judgment* because the evidence was admissible pursuant to Colo. R. Evid. 901(b)(4) and Colo. R. Evid. 803(6). Therefore, the District Court committed no error in issuing its Order granting Defendant's *Motion for Summary Judgment*.

The District Court committed no error in properly considering all evidence included with Defendant's *Motion for Summary Judgment* and subsequent briefing alongside Plaintiff's *Cross Motion for Summary Judgment* and subsequent briefing. The District Court committed no error in finding the facts specially and stating separately its conclusions of law thereon pursuant to Colo. R. Civ. P. 52. The District Court did not abuse its discretion in issuing a ruling on summary judgment based

upon findings of fact which shall not be set aside unless clearly erroneous pursuant to Colo. R. Civ. P. 52.

IV. ARGUMENT

A. The District Court committed no error in properly considering evidence submitted with Defendant’s Reply and Response to Plaintiff’s Cross Motion for Summary Judgment which did not raise any new issues for which Plaintiff had not been placed on notice in Defendant’s original Motion for Summary Judgment.

i. Standard of Review

Defendant agrees with Plaintiff’s assertion that an order granting or denying a motion for summary judgment is reviewed de novo. *Lombard v. Colorado Outdoor Educ. Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008), citing *Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608, 611 (Colo. 1998). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Colo. R. Civ. P. 56(c).

Defendant asserts Plaintiff has failed to properly identify the standard of review for admissibility of evidence. Colorado courts review a District Court’s determination as to admissibility of evidence for abuse of discretion. *Berenson v. USA Hockey, Inc.*, 338 P.3d 379, 380 (Colo.App. 2013).

ii. Preservation on Appeal

Defendant filed *Defendant Best Buy, L.P.'s Reply Brief in Support of its Motion for Summary Judgment* on October 10, 2024. CF, p. 729 – 740. Defendant's Reply included exhibits. CF, p. 741 – 783. Defendant's Reply Brief provided evidence which demonstrated that Plaintiff had refused to show a receipt, and that Plaintiff had receipts on his person, thereby supporting Defendant's previous arguments as to Shopkeeper's Privilege and Plaintiff's unreasonable failure to show proof of purchase. CF, p. 741 – 783.

Plaintiff filed *Plaintiff's Amended Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment* on October 31, 2024. CF, p. 848 – 869. Plaintiff submitted argumentation as to Plaintiff's assertion that the exhibits were inadmissible. CF, p. 849. Plaintiff additionally submitted argumentation that, even if such exhibits were admissible, Defendant had not met its burden of demonstrating Plaintiff was unreasonable in refusing to provide proof of purchase. CF, p. 863. Plaintiff argued further that Defendant lacked Shopkeeper's Privilege for its actions. CF, p. 864.

The District Court issued its *Order Re: Cross Motions for Summary Judgment* on November 19, 2024, granting Defendant's *Motion for Summary Judgment* and denying Plaintiff's *Cross Motion for Summary Judgment*. CF, p. 876 – 883.

Plaintiff filed *Plaintiff's Motion for Reconsideration* with respect to the District Court's *Order Re: Cross Motions for Summary Judgment* on December 3, 2024. CF, p. 890 – 907. Plaintiff presented arguments asserting Plaintiff was not provided notice to reply to the issues of Shopkeeper's Privilege and whether Plaintiff was unreasonable in refusing to utilize a means of escape pursuant to the Restatement (Second) of Torts § 36 cmt a. in reference to exhibits included in Defendant's Reply Brief. CF, p. 891.

Defendant filed *Defendant's Response in Opposition to Plaintiff's Motion to Reconsider* on December 24, 2024. CF, p. 908 – 913. Defendant asserted that the exhibits were not necessary for the District Court to find in favor of Defendant with respect to the issues of Shopkeeper's Privilege and whether Plaintiff was unreasonable in refusing to utilize a means of escape pursuant to the Restatement (Second) of Torts § 36 cmt a. because the issue was sufficiently addressed in Defendant's original *Motion for Summary Judgment*. CF, p. 911.

The District Court issued its *Order: Plaintiff's Motion for Reconsideration* on January 6, 2025, denying Plaintiff's *Motion for Reconsideration*. CF, p. 974.

Accordingly, Defendant agrees this issue has been preserved on appeal.

iii. Discussion

Consideration of new evidence attached to a reply brief in support of a summary judgment motion is proper when neither the evidence nor the reply brief raise a new issue to which the non-moving party was not put on notice of the need to present evidence. *Barfield v. Hall Realty, Inc.*, 232 P.3d 286, 290 (Colo.App. 2010), *see Wallman v. Kelley*, 976 P.2d 330, 332 (Colo.App. 1998). Issues not raised by the moving party in the original motion for summary judgment cannot serve as the basis for summary judgment “because the non-moving party is not put on notice as to the need to present evidence concerning that issue.” *Wallman*, 976 P.2d, at 332. “Issue” is defined in Black’s Law Dictionary as “the matter to be decided in court,” and is separate from factual evidence. *Issue*, Black’s Law Dictionary (2nd ed., 1910).

The court in *Wallman* determined that new evidence attached to a reply brief was improper for the district court’s consideration specifically because the Court found that the “plaintiff was not given notice that she needed to present evidence on the causation **issue** in defendants’ initial summary judgment motions and briefs.” *Wallman*, 976 P.2d, at 332 (emphasis added). In *Wallman*, the defendants argued in their original motion for summary judgment “that plaintiff’s claims should be construed as claims for strict liability in tort and that, as such, they were completely barred by § 13-21-402, C.R.S. 1997.” *Id.* The court further noted that the defendants

“did set out in their briefs that proof of a strict liability in tort claim requires proof of causation, but the assertion was made in the context of the argument that plaintiff’s claims must be asserted as strict liability claims, or not at all.” *Id.* The court found that, given the above, the reply brief was the first instance in which the defendants raised the issue of causation, thereby rendering consideration of new evidence on such issue improper. *Id.*

Plaintiff had ample notice of the issues raised by Defendant in its *Motion for Summary Judgment* and expressly responded to such issues in Plaintiff’s *Response in Objection to Defendant’s Motion for Summary Judgment*. Defendant argued in its initiating *Motion for Summary Judgment* that Plaintiff had failed to demonstrate the actions of Defendant amounted to false imprisonment because

“It is unreasonable for one whom the actor intends to imprison to refuse to utilize a means of escape of which he is himself aware merely because it entails a slight inconvenience. Restatement (Second) of Torts § 36 cmt. a (Am. L. Inst. 1965).”

CF, p. 233.

Defendant argued that Plaintiff had the tools of escape because Plaintiff “could simply comply with the request to show his receipt,” and Defendant “presumed Plaintiff had such proof, because if he did not have proof of purchase,

then Plaintiff committed theft and [Defendant is] exonerated from all Plaintiff's claims." *Id.*

Plaintiff's *Response in Objection to Defendant's Motion for Summary Judgment* directly addressed Defendant's argument as to receipt possession by indicating that Plaintiff agreed with Defendant as to the assertion that showing a receipt to Defendant would not result in physical or mental damage. CF, p. 653. Further, Plaintiff addressed the Restatement (Second) of Torts § 36 cmt. a extensively in his Response, providing arguments as to Plaintiff's assertion that the section applied to pre-confinement issues with respect to false imprisonment claims. CF, p. 655. Plaintiff further responded to Defendant's arguments with supporting case law and additional context as to why Plaintiff "always refuses to show his receipt." CF, 656 – 657. (emphasis omitted). Following Plaintiff's arguments in response to Defendant's arguments as to the reasonable means of showing a receipt to end the interaction at issue, Plaintiff asserted that "all this talk about 'receipt showing' is still an entirely moot point." CF, p. 658. Plaintiff additionally responded to Defendant's arguments under Plaintiff's header which posited that "[a] receipt is legally incapable of being the 'key' to a patron's release; rather, a merchant's personal decision is the actual 'key'". *Id.* Plaintiff's arguments in response to Defendant's address of the Restatement (Second) of Torts § 36, particularly with

respect to the reasonableness of presenting a receipt to end the interaction, extended through pages 14 through 25 of Plaintiff's *Response in Opposition to Defendant's Motion for Summary Judgment*. CF, p. 653 – 664.

Plaintiff further responded to Defendant's argument as to the reasonableness of showing a receipt in his *Cross Motion for Summary Judgment*, in which Plaintiff challenged that Defendant had not shown the District Court that Plaintiff had a receipt at the time of the incident. CF, p. 270. Where a moving party points out the lack of any allegation or supporting evidence of an issue in its motion for summary judgment, it becomes incumbent on the non-moving party to come forward with evidence which demonstrates a genuine issue of material fact. *State v. 5 Star Feedlot Inc.*, 487 P.3d 1183, 1191 (Colo.App. 2019), citing *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). A nonmoving party "may not rely on allegations or denials in the pleadings, legal conclusions unsupported by evidence, or mere argument to establish the existence of a genuine issue of material fact." *In re Estate of Garcia*, 2023 WL 12061382, *3 (Colo.App. 2023). Where a non-moving party fails to come forward with evidence demonstrating a genuine issue of material fact on cross-motions for summary judgment, the appellate court may direct the entry of judgment against it and for the moving party. *State*, 487 P.3d at 1191.

Plaintiff's *Cross Motion for Summary Judgment* did address whether Plaintiff had a receipt on his person, demonstrating Plaintiff's continued refusal to provide proof of purchase and contending that Defendant's arguments should fail merely because such evidence had not been provided. CF, p. 270. In due response to this contention, Defendant included in its subsequent Reply brief exhibits of receipts which evidenced Plaintiff had made purchases at the store location on the date of the incident, as well as an additional affidavit in support of Defendant's arguments under the same legal issue. CF, p. 741 – 769; 779 – 780.

The District Court properly considered exhibits of receipts provided in Defendant's *Reply Brief in Support of its Motion for Summary Judgment*. Plaintiff has argued, from the outset of this instant action and its underlying action, that he did not wish to produce evidence as to whether or not he had a receipt on his person at the time of the incident alleged in the underlying case. CF, 656 – 657. Plaintiff has further demonstrated through numerous lawsuits his modus operandi of targeting retail store locations which he has specifically identified as locations in which retail service workers routinely request customers present a sales receipt upon exit from the store premises. CF, p. 91 – 226.

Defendant's inclusion of additional exhibits in its reply brief was not improper, and the District Court did not err in its consideration of the same. Plaintiff

contended that the District Court erred when it considered receipts included as exhibits to Defendant's Reply and Response to Plaintiff's *Cross Motion for Summary Judgment*. Defendant's initiating *Motion for Summary Judgment* raised the following issues: (1) false imprisonment; (2) defamation; (3) assault; and (4) Defendant's affirmative defense of the Shopkeeper's Privilege. CF, p. 233 – 237. The exhibits addressed by Plaintiff were provided in support of Defendant's argument as to the first issue of False Imprisonment, which Defendant raised in its original *Motion for Summary Judgment* and subsequently preserved throughout the briefing process. CF, p. 233.

Defendant's decision to provide evidence of the receipts in its reply brief did not raise a new issue, but rather resolved the primary issue in the underlying case. Plaintiff had notice in Defendant's *Motion for Summary Judgment* that Defendant had presented arguments with respect to Plaintiff's refusal to provide a receipt to relieve himself of the alleged detention. CF, p. 233. Plaintiff had the opportunity to respond to the issue of Defendant's assertion that Plaintiff did not meet the burden of proof for his claim of false imprisonment claim when he provided his *Response in Objection to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment*. Plaintiff addressed this issue extensively in his *Response in Objection to Defendant's Motion for Summary Judgment*. CF, p. 653 – 664. Plaintiff

further acknowledged the issue in his *Cross Motion for Summary Judgment*, in which Plaintiff challenged that Defendant had not provided evidence that Plaintiff had refused to show a receipt, or that Plaintiff had a receipt on his person. CF, p. 270.

At the conclusion of Defendant's *Motion for Summary Judgment* and Plaintiff's *Cross Motion for Summary Judgment*, Plaintiff had established a reliance upon a lack of factual evidence to support his argument that a genuine issue of material fact remained in the underlying case. Plaintiff, as a nonmoving party, "may not rely on allegations or denials in the pleadings, legal conclusions unsupported by evidence, or mere argument to establish the existence of a genuine issue of material fact." *In re Estate of Garcia*, 2023 WL 12061382, *3 (Colo.App. 2023). To resolve the arguments which had been developed through briefing on the issue of false imprisonment, Defendant included with its Reply exhibits which demonstrated that Plaintiff did make purchases at the Defendant store location on the date of the incident, directly responding to Plaintiff's arguments. CF, p. CF, p. 741 – 769.

The mere fact that receipts existed for the date at issue was not a new legal issue to be addressed for which Plaintiff did not have an opportunity to formulate a response. Plaintiff responded extensively to Defendant's arguments as to Plaintiff's reasonable means of escape through showing of a receipt in Plaintiff's *Response in*

Objection to Defendant's Motion for Summary Judgment. Plaintiff further relied upon the presumption that Defendant did not have evidence of relevant receipts when providing his *Cross Motion for Summary Judgment to the District Court.* Plaintiff had received notice through Defendant's *Motion for Summary Judgment,* not only of the issues raised by Defendant as to Plaintiff's false imprisonment claim, but also of Defendant's arguments on Plaintiff's decision not to provide reasonable evidence of a receipt to end the confrontation.

The District Court properly considered the affidavit of Mahmoud Abu-Shaweesh included as an exhibit to Defendant's Reply Brief. The affidavit provided from Defendant's employee, Mahmoud Abu-Shaweesh (hereinafter "Mahmoud"), was properly considered by the District Court.

The affidavit provided from Mahmoud, Defendant's employee, merely adds additional evidence to factual information already addressed in Defendant's original *Motion for Summary Judgment.* The information provided did not create a new issue to which Plaintiff had no opportunity to respond. Plaintiff addressed Mahmoud's actions directly in his Response and *Cross Motion for Summary Judgment* and provided Plaintiff's affidavit as to how the interaction occurred. To resolve this established issue, Defendant provided an affidavit from Mahmoud which reinforced factual evidence in support of Defendant's arguments as to the legal issue of

Plaintiff's failure to meet his burden of proof for his false imprisonment claim and Defendant's argument that Plaintiff should have reasonably provided proof of purchase to end the interaction. CF, p. 779 – 780.

Defendant's *Motion for Summary Judgment* set forth the following factual allegations: (1) Plaintiff did not show a receipt to Defendant employees despite request; (2) Defendant employees suspected Plaintiff of committing theft at the time of the stop; (3) Defendant employees repeatedly asked Plaintiff to return store merchandise; (4) Defendant employees left Plaintiff and told him to "have a good one"; (5) Defendant employees did not physically touch Plaintiff during the interaction; and (6) Plaintiff could have shown a receipt at any point in time to end the confrontation. CF, p. 227 – 239.

Plaintiff's *Response in Opposition to Defendant's Motion for Summary Judgment* addressed the following with respect to Mahmoud: (1) Plaintiff asserted Mahmoud repeatedly requested Plaintiff return Defendant merchandise; (2) Plaintiff denied that Mahmoud requested to see Plaintiff's receipt; (2) Plaintiff asserted Mahmoud and other Defendant employees did not have knowledge of what was in Plaintiff's pockets or on his person; (4) Plaintiff asserted Mahmoud made statements which Plaintiff asserted made him feel he could not leave; (5) Plaintiff asserted Mahmoud and other Defendant employees physically corralled Plaintiff against the

building wall; and (6) Plaintiff confirmed Mahmoud told Plaintiff to “Have a good one” at the end of the interaction. CF, p. 640 – 671.

The affidavit included in Defendant’s Reply specifically addressed the following factual information: (1) Mahmoud was a General Manager employed by Defendant at the store location at issue on the date of the incident; (2) Mahmoud had observed Plaintiff remove items from a shelf, place them in his pocket, and immediately leave the store; (3) Mahmoud had confirmed this observation through security camera footage; (4) Plaintiff was asked by Defendant’s loss prevention employee upon exit of the store location to show his receipt and declined; (5) Mahmoud exited the store to request Plaintiff return the product from his pocket; (8) Plaintiff refused to return the product; and (9) Mahmoud returned to the interior of the store location after he confirmed police had been contacted. CF, p. 779 – 780.

Accordingly, this Court should uphold the District Court’s Order granting Defendant’s *Motion for Summary Judgment*.

B. The District Court properly considered the evidence included with Defendant’s Reply and Response to Plaintiff’s Cross Motion for Summary Judgment because such evidence was admissible under Colo. R. Evid. 901(b)(4) and 803(6).

i. Standard of Review

Colorado courts review a District Court’s determination as to admissibility of evidence for abuse of discretion. *Berenson v. USA Hockey, Inc.*, 338 P.3d 379, 380

(Colo.App. 2013). Defendant asserts Plaintiff has failed to properly identify the standard of review for admissibility of evidence and respectfully requests this Court disregard Plaintiff's arguments as to the same.

A. Preservation on Appeal

Defendant filed *Defendant Best Buy, L.P.'s Reply Brief in Support of its Motion for Summary Judgment* on October 10, 2024. CF, p. 729 – 740. Defendant's Reply included exhibits. CF, p. 741 – 783. Defendant's Reply Brief provided evidence which demonstrated that Plaintiff had refused to show a receipt, and that Plaintiff had receipts on his person, thereby supporting Defendant's previous arguments as to Shopkeeper's Privilege and Plaintiff's unreasonable failure to show proof of purchase. CF, p. 741 – 783.

Plaintiff filed *Plaintiff's Amended Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment* on October 31, 2024. CF, p. 848 – 869. Plaintiff submitted argumentation as to Plaintiff's assertion that the exhibits were inadmissible hearsay. CF, p. 849.

The District Court issued its *Order Re: Cross Motions for Summary Judgment* on November 19, 2024, granting Defendant's *Motion for Summary Judgment* and denying Plaintiff's *Cross Motion for Summary Judgment*. CF, p. 876 – 883.

Plaintiff filed *Plaintiff's Motion for Reconsideration* with respect to the District Court's *Order Re: Cross Motions for Summary Judgment* on December 3, 2024. CF, p. 890 – 907. Plaintiff presented arguments asserting the affidavit and receipt exhibits included in Defendant's Reply Brief were inadmissible. CF, p. 891-892.

Accordingly, Defendant agrees this issue has been preserved on appeal.

i. Discussion

Evidence is relevant when it tends to make the existence of any fact material to the determination of the action more or less probable than such fact would be without the evidence. Colo. R. Evid. 401. Relevant evidence is admissible unless otherwise enumerated in the Constitution of the United States, the Constitution of the State of Colorado, the Colorado Rules of Evidence, or other rules of the Supreme Court or the statutes of the State of Colorado. Colo. R. Evid. 402. Irrelevant evidence is inadmissible. *Id.*

Defendant's Reply and *Response to Plaintiff's Cross Motion for Summary Judgment* included three exhibits: (1) Exhibit P., Affidavit of Mahmoud Abu-Shaweesh; (2) Exhibit N., Map of Plaintiff's Travels on November 25, 2022; and (3) Exhibit O., Receipts Showing Plaintiff's Purchases at Each Location. CF, p. 689 – 728. Plaintiff has asserted that Exhibit N. is inadmissible due to the lack of an

accompanying affidavit of its custodian or other qualified person under Colo. R. Evid. 902. However, Exhibit N. may also be authenticated pursuant to assessment of its distinctive characteristics pursuant to Colo. R. Evid. 901(b)(4).

Authentication of documents is a requirement which is satisfied under Colorado law by evidence which is “sufficient to support a finding that the matter in question is what a proponent claims.” Colo. R. Evid. 901(a). Documents may be authenticated through distinctive characteristics and the like, including “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.” Colo. R. Evid. 901(b)(4). Colorado courts have found that emails may be authenticated through “consideration of their distinctive characteristics shown by an examination of their content and substance.” *State ex rel. Coffman v. Robert J. Hopp & Associates, LLC*, 442 P.3d 986, 1005 (Colo.App. 2018); *see People v. Bernard*, 305 P.3d 433, 435 (Clapp. 2013). Documents which could be authenticated through distinctive characteristics are not required to be supported by personal knowledge of the documents themselves for authentication. *Id.* at 1005.

Federal law provides for an identical mechanism by which documents may be authenticated through distinctive characteristics and the like, particularly through “[t]he appearance, contents, substance, internal patterns, or other distinctive

characteristics of the item, taken together with all the circumstances.” Fed. R. Evid. 901(b)(4). Persuasive federal courts have found that “[w]here documents are otherwise submitted to the court, and where personal knowledge is not relied upon to authenticate the document, the district court must consider alternative means under Federal Rules of Evidence 901(b)(4),” which includes authentication through distinctive characteristics and the like, by which documents may be authenticated by review of their contents should they appear sufficiently genuine. *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011), *see U.S. v. Whitworth*, 856 F.2d 1268, 1283 (9th Cir. 1988) (authenticating letters through matches between the postmark dates and defendant’s location on the days letters were mailed).

The District Court properly considered the distinctive characteristics of Exhibit N. Exhibit N. provided evidence of receipts which demonstrated Plaintiff made purchases at multiple Defendant store locations on November 25, 2022. CF, p. 741 – 769. The receipts included dates, times, and addresses for each purchase made by Plaintiff. *Id.* Exhibit N. was demonstratively supported by the information evidenced in Exhibit O., which illustrated the Defendant store locations visited by Plaintiff on the date of November 25, 2022 based upon the addresses, dates, and times evidenced in Exhibit N. CF, p. CF, p. 770 – 778. Further, the receipt records provided in Exhibit N. were characterized by receipt bar codes, Plaintiff’s Member

ID Number, and identification of Defendant as the company which issued each receipt. CF, p. 741 – 769.

Hearsay is defined as a “statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Colo. R. Evid. 801(c). Hearsay is generally inadmissible unless such hearsay falls within an enumerated exception. Colo. R. Evid. 802. Records of regularly conducted activity, including a record of a regularly conducted business activity, qualify as admissible hearsay under an enumerated exception. Colo. R. Evid. 803(6).

Exhibit N. provides evidence of receipt records demonstrating purchases made by Plaintiff on November 25, 2022. Receipts fall within the hearsay exception category of a regularly conducted business activity pursuant to Colo. R. Evid. 803(6). Therefore, Exhibit N. is admissible hearsay.

Exhibit P. provides evidence of a sworn affidavit from Defendant employee, Mahmoud, and does not qualify as hearsay pursuant to Colo. R. Evid. 801(c). Therefore, Exhibit P. cannot be excluded under the hearsay rule and is admissible.

Accordingly, this Court should uphold the Order issued by the District Court granting Defendant’s *Motion for Summary Judgment*.

C. **The District Court properly considered the applicable evidence in Granting Defendant’s Motion for Summary Judgment and Denying Plaintiff’s Cross Motion for Summary Judgment.**

I. Standard of Review

Defendant agrees with Plaintiff’s assertion that an order granting or denying a motion for summary judgment is reviewed de novo. *Lombard v. Colorado Outdoor Educ. Center, Inc.*, 187 P.3d 565, 570 (Colo. 2008), citing *Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608, 611 (Colo. 1998). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Colo. R. Civ. P. 56(c).

ii. Preservation on Appeal

The District Court issued its *Order Re: Cross Motions for Summary Judgment* on November 19, 2024, granting Defendant’s *Motion for Summary Judgment* and denying Plaintiff’s *Cross Motion for Summary Judgment*. CF, p. 876 – 883.

Plaintiff filed *Plaintiff’s Motion for Reconsideration* with respect to the District Court’s *Order Re: Cross Motions for Summary Judgment* on December 3, 2024. CF, p. 890 – 907. Plaintiff presented arguments asserting Plaintiff was not provided notice to reply to the issues of Shopkeeper’s Privilege and whether Plaintiff

was unreasonable in refusing to utilize a means of escape pursuant to the Restatement (Second) of Torts § 36 cmt a. in reference to exhibits included in Defendant's Reply Brief. CF, p. 891.

Defendant filed *Defendant's Response in Opposition to Plaintiff's Motion to Reconsider* on December 24, 2024. CF, p. 908 – 913. Defendant asserted that the exhibits were not necessary for the District Court to find in favor of Defendant with respect to the issues of Shopkeeper's Privilege and whether Plaintiff was unreasonable in refusing to utilize a means of escape pursuant to the Restatement (Second) of Torts § 36 cmt a. because the issue was sufficiently raised in Defendant's original *Motion for Summary Judgment*. CF, p. 911.

Plaintiff filed *Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Reconsideration* on December 31, 2024. CF, p. 963 – 973. Plaintiff submitted arguments asserting that Plaintiff did not receive proper notice in Defendant's original *Motion for Summary Judgment* to address the issues of Shopkeeper's Privilege and whether Plaintiff was unreasonable in refusing to utilize a means of escape pursuant to the Restatement (Second) of Torts § 36 cmt a. CF, p. 964-965.

The District Court issued its *Order: Plaintiff's Motion for Reconsideration* on January 6, 2025, denying Plaintiff's *Motion for Reconsideration*. CF, p. 974.

Accordingly, Defendant agrees this issue has been preserved on appeal.

i. Discussion

Plaintiff has contended that the District Court erred when it ruled on both Plaintiff's *Cross Motion for Summary Judgment* and Defendant's *Motion for Summary Judgment* simultaneously.

District courts should deny both parties' motion for summary judgment and cross-motion for summary judgment when the court determines "there remained in the case for determination factual issues upon which there might or could be produced further evidence." *Morlan v. Durland Trust Co.*, 252 P.2d 98, 102 (Colo. 1952). When a moving party provides its motion for summary judgment to point out the lack of any allegation or supporting evidence as to an issue, it becomes incumbent on the non-moving party to come forward with evidence demonstrating a genuine issue of material fact. *State*, 487 P.3d, 1191. When a non-moving party is unable to demonstrate a genuine issue of material fact, the district court may enter judgment against the non-moving party and for the moving party. *Id.*

Defendant raised the issue of Plaintiff's inability to meet his burden of proof with respect to his claims in its *Motion for Summary Judgment*, including Plaintiff's false imprisonment claim. CF, p. 233. In doing so, Defendant expressly addressed the Restatement (Second) of Torts § 36 and argued that it was unreasonable for Plaintiff to choose not to provide proof of purchase to end the interaction. *Id.* In

responding to Defendant’s Motion for Summary Judgment, it was incumbent on Plaintiff as the non-moving party to present a genuine issue of material fact. *State*, 487 P.3d, 1191. Plaintiff provided in his *Response in Objection to Defendant’s Motion for Summary Judgment* that Plaintiff always refuses to provide a receipt, rather than providing evidence there existed a genuine issue of material fact. CF, 656 – 657. Plaintiff further provided argument in his *Cross Motion for Summary Judgment* that Defendant had not provided evidence of Plaintiff having a receipt at the time of the interaction, rather than providing evidence which would demonstrate no dispute of material fact. CF, p. 270. In responding to Plaintiff’s *Cross Motion for Summary Judgment*, it was incumbent on Defendant to provide evidence that there existed no genuine dispute of material fact, and that the evidence was in favor of the issues Defendant had raised in its *Motion for Summary Judgment*. Therefore, Defendant provided additional evidence in support of the issues raised in Defendant’s original *Motion for Summary Judgment*. CF, p. 689 – 728.

The District Court properly considered Plaintiff’s arguments in evaluating both Defendant’s Motion for Summary Judgment and Plaintiffs’ Cross-Motion for Summary Judgment. Courts apply a more liberal standard to pleadings drafted by pro se plaintiffs in comparison to pleadings drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 519 (1972). Courts seek to ensure that pro se litigants “are not denied

review of important issues because of their inability to articulate their argument like a lawyer.” *Jones v. Williams*, 443 P.3d 56, 58 (Colo. 2019). However, a court may not assume the role of advocate for a pro se litigant. *Loomis v. Seely*, 677 P.2d 400, 401 (Colo.App. 1983); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Plaintiff contended that the District Court failed to infer several points of fact with respect to Plaintiff’s arguments. The District Court indicated in its *Order re: Cross Motions for Summary Judgment* that its analysis assumed “the truth of Plaintiff’s evidence” and drew “every favorable inference of facts therefrom” in evaluating Plaintiff’s arguments and evidence. CF, p. 881. While Plaintiff is entitled to liberal construal of his filings, Plaintiff may not expect the District Court act as advocate or attorney to bolster Plaintiff’s position. *Loomis*, 677 P.2d at 401. The District Court, by its own admission, evaluated Plaintiff’s arguments and evidence to draw every favorable inference. CF, p. 881. Therefore, the District Court properly met its obligation in consideration of Plaintiff’s filings, and this Court should uphold the District Court’s *Order re: Cross Motions for Summary Judgment*.

Accordingly, this Court should uphold the Order issued by the District Court granting Defendant’s *Motion for Summary Judgment* and denying Plaintiff’s *Cross Motion for Summary Judgment*.

V. CONCLUSION

The District Court committed no error in properly considering evidence included with Defendant's Reply and Response to Plaintiff's Cross Motion for Summary Judgment because such evidence did not raise any new issues for which Plaintiff had not been placed on notice in Defendant's original *Motion for Summary Judgment*. The District Court properly considered the evidence included in Defendant's Reply and Response to Plaintiff's *Cross Motion for Summary Judgment* because the evidence was admissible pursuant to Colo. R. Evid. 901(b)(4) and Colo. R. Evid. 803(6). Therefore, the District Court committed no error in issuing its Order granting Defendant's *Motion for Summary Judgment*.

The District Court committed no error in properly considering all evidence included with Defendant's *Motion for Summary Judgment* and subsequent briefing alongside Plaintiff's *Cross Motion for Summary Judgment* and subsequent briefing. The District Court committed no error in finding the facts specially and stating separately its conclusions of law thereon pursuant to Colo. R. Civ. P. 52. The District Court did not abuse its discretion in issuing a ruling on summary judgment based upon findings of fact which shall not be set aside unless clearly erroneous pursuant to Colo. R. Civ. P. 52.

Accordingly, this Court should uphold the District Court's rulings on Defendant's *Motion for Summary Judgment* and Plaintiff's *Cross-Motion for Summary Judgment*, respectively.

Filed August 4, 2025.

MONTGOMERY | AMATUZIO

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CERTIFICATE OF SERVICE

I hereby certify that, on August 4, 2025 a true and correct copy of the foregoing was prepared for service to the following in the manner indicated below:

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