CONSOLIDATED BRIEFING COMPENDIUM

Montgomery *v.* Best Buy Stores, L.P.

COLORADO COURT OF APPEALS · NO. 2025CA327

Merits Appeal & Petition for Rehearing Briefing

Notice of Appeal, all merits briefs, the Court of Appeals Opinion affirming the District Court, the Combined Petition forRehearing, and the Order denying it.

Colorado Court of Appeals

2 East 14th Avenue

Denver, CO 80203

Appeal from:

Jefferson County District Court

District Court Judge: The Hon. Christopher Zenisek

District Court Case Number: 2023CV226

In the Case of:

Plaintiff/Petitioner: WILLIAM MONTGOMERY,

■ Appellant or ☐ Appellee

&

Defendant/Respondent: BEST BUY STORES, L.P.

☐ Appellant or ■ Appellee

FOR COURT USE

Filing Party Name: William Montgomery

Street Address: 2443 S University Blvd # 129

City: Denver State: CO Zip: 80210

Phone: (970) 412-5463

E-Mail: zoinbergs@gmail.com

Court of Appeals' Case Number:

Notice of Appeal

I. Case Background

In one page or less, give the court a brief description of this case and why you are appealing:

On November 21, 2023, WILLIAM MONTGOMERY filed a lawsuit against BEST BUY STORES, L.P., alleging that three of its employees false imprisoned, assaulted, and slandered him outside of a BEST BUY STORE located in Jefferson County, CO.

In the matter, the District Court Judge granted the Defendant's MOTION FOR SUMMARY JUDGMENT, dismissing Plaintiff's three-claim case. The Judge made errors of fact and/or law when making its ruling, however, and incorrectly granted the MOTION in contravention of clearly-established rules and law on the subject.

Plaintiff MONTGOMERY now seeks appellate review of the District Court Judge's ORDER granting Defendant's MSJ, as well as its subsequent two ORDERS denying Plaintiff's MOTION FOR RECONSIDERATION and SECOND MOTION FOR RECONSIDERATION. He seeks to have the ORDER granting Defendant's MSJ be REVERSED, so that his case may be REINSTATED and REMANDED to the Jefferson County District Court for further proceedings not inconsistent with its opinion.

II. Final Order on Appeal

1. Final Order: I am appealing the final order or judgment issued on (date) November 19, 2024

2. Remaining Issues:

☒ All the issues in the case have been decided.

OR

☐ Not all of the issues in the case have been decided. The following issues are still undecided: _____.

3. Attorney Fees and Costs:

☐ Any request for attorney fees and costs have been resolved.

OR

☒ The District Court needs to resolve a request for attorney fees and costs.

III. Post-Trial Motions

1. Motions Filed: Did any party file a post-trial motion?

☐ No (If this is checked, you may skip to the section IV. - Extension of Time to File the Notice of Appeal).

OR

☒ Yes. A post-trial motion was filed on: (date) December 3, 2024 and January 21, 2025.

2. Extensions of Time: Did a party request an extension of time to file a motion for post-trial relief?

☒ No party asked for an extension of time to file a post-trial motion, or the request was denied.

OR

☐ A request for extension of time to file a post-trial motion was filed on (date) _____. The District Court granted the motion on (date) _____ and extended the deadline to file a post-trial motion to (date) _____.

3. Ruling on Post-Trial Motion:

☒ The district court ruled on the motion on (date) January 6, 2025 and February 18, 2025.

OR

☐ The post-trial motion has not been decided by the district court.

IV. Extension of Time to File the Notice of Appeal:

☒ There were no requests to extend the deadline to file this notice of appeal.

OR

☐ A request to extend the deadline was filed on (date) _____.

V. Magistrate Order:

☐ Check here if your case was decided by a magistrate.

VI. Issues on Appeal:

List the legal questions you want the court of appeals to decide.

Did the District Court err in granting Defendant's MOTION FOR SUMMARY JUDGMENT, which dismissed Plaintiff's case in its entirety?

Did the District Court err in denying Plaintiff's MOTION FOR RECONSIDERATION and SECOND MOTION FOR RECONSIDERATION?

VII. Necessity of Transcript:

☒ A transcript is not necessary to review the issues on appeal.

OR

☐ A transcript of the hearing or trial is necessary to review the issues on appeal.

VIII. Lawyer or Party Information

1. My lawyer: I do not have a lawyer at this time.

2. The lawyer for the other side:

☐ The other side does not have a lawyer. Their contact information is:

Name:

Street Address: _____

City: _____ State: _____ Zip: _____

Phone Number: _____

E-Mail Address: _____

OR

☒ The other side has a lawyer. That lawyer's contact information is:

Attorney Name: Stephanie E. Boutsicaris & Lori K. Bell

Registration Number: No. 51297 (Boutsicaris) & No. 31714 (Bell)

Name of Law Firm: Montgomery | Amatuzio

Street Address: 4100 E Mississippi Ave Ste 1600

City: Denver State: CO Zip: 80246

Phone Number: (303) 592-6600

E-Mail Address: sboutsicaris@mac-legal.com & lbell@mac-legal.com

For all of the other parties to this appeal, list each person, state whether they have a lawyer, and if so, add that lawyer's contact information here:

IX. Attachments

Please see the documents I attached to this notice:

1. A copy of the judgment or order being appealed.
2. A copy of the district court order, if any, waiving my filing fees on appeal.

Dated: February 24, 2025

Respectfully submitted,

Signature: William Montgomery

Print Name: William Montgomery

Certificate of Service

I certify that on (date) February 24, 2025 I filed this Notice of Appeal with the Court of Appeals. I sent a copy, along with any attachments, to the people listed below:

Name of Party Served: BEST BUY STORES, L.P.

Sent by (Check One): ☐ U.S. Mail; OR ☐ In-Person Hand Delivery ■ Email

Email: sboutsicaris@mac-legal.com & lbell@mac-legal.com

City: _____ State: _____ Zip: _____

Enter the names and address of any other parties served here:

And filed with the:

Jefferson County District Court

Street Address: 100 Jefferson County Pkwy

City: Golden State: CO Zip: 80401

Signature: William Montgomery

Print Name: William Montgomery

COLORADO COURT OF APPEALS 2 East 14th Ave Denver, CO 80203 (720) 625-5150	
Appeal From: **Jefferson County District Court** District Court Judge: **The Honorable Christopher Zenisek** District Court Case Number: **2023CV226**	
WILLIAM MONTGOMERY Plaintiff / Petitioner-Appellant vs. **BEST BUY STORES, L.P.** Defendant / Respondent-Appellee	▲ Court Use Only ▲
Party Without Attorney: **William Montgomery** 2443 S University Blvd # 129 Denver, CO 80210 (970) 412-5463 *zoinbergs@gmail.com*	Court Of Appeals Case No: **2025CA327** Jefferson County District Court Case No: **2023CV226**
PLAINTIFF'S APPEAL OPENING BRIEF	

Plaintiff, proceeding *pro se*, hereby submits to the Court of Appeals his APPEAL OPENING BRIEF, and in support thereof, states as follows:

ORAL ARGUMENT REQUESTED

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Those include:

Word Limits: My brief has **9,500** words, which does not exceed the 9,500 word limit allowed by this Court Of Appeals for appeal opening briefs.

Included Sections: In the Arguments section, before arguing each issue on appeal, I have the following separately titled sub-sections:

1. The Standard of Review: I let the Court of Appeals know which standard to use in reviewing the issue. I cited to a law or case that supports using that Standard of Review.
2. Preservation: I let the Court of Appeals know where in the Record on Appeal I raised the issue to the District Court and where the District Court ruled on the issue.

I understand that my brief may be rejected if I fail to comply with these rules.

William Montgomery

William Montgomery

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STATUTES, LAWS, RULES, ETC.

ISSUES ON APPEAL

1. Did the District Court err in **GRANTING** Defendant's MSJ?

2. Did the District Court err in **DENYING** Plaintiff's CROSS-MSJ?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On November 25, 2022, Plaintiff visited a Best Buy store located in Westminster, CO. He walked into the store, walked directly over to the returns department, and then walked directly back out of the store once he realized that he was erroneously attempting to return non-store merchandise to the wrong store.

While inside the store, at all times, Plaintiff did not act suspiciously, furtively, or in any way "conceal" anything, nor did he place into, or remove, anything from any pocket either. From beginning to end, he openly held in his hands non-store private property, identical in every way to any actual customer leaving the store with a singular, non-tagged purchase. On his way out, Plaintiff did not observe anybody "posted up" at the store's exit, nor was he asked by anyone to show any receipts.

After Plaintiff exited the store, he stood just outside of it, waiting for his brother. While waiting, he was approached by three Best Buy employees, who immediately surrounded and detained him, and began accusing him of stealing.

Plaintiff had never once met, seen, identify, pass by, or been located anywhere physically near these employees, whatsoever, while inside the store.

After several unfruitful minutes of bullying, name calling, lies that the police had been contacted, and threats made to "jump" Plaintiff off-camera, all three employees eventually released him from their custody, and re-entered the store.

A year later, this lawsuit followed.

II. PROCEDURAL HISTORY

On November 21, 2023, Plaintiff filed a complaint against BEST BUY and its employees under theories of false imprisonment, defamation, and assault.

On November 19, 2024, the Jefferson County District Court **GRANTED** Defendant's MSJ and **DENIED** Plaintiff's Cross-MSJ in the matter. As such, Plaintiff's case was dismissed in its entirety. The District Court made numerous errors of both fact and law when making its rulings, however, impermissibly granting the MSJ and denying the Cross-MSJ in contravention of clearly established rules and law on the subject.

On February 24, 2025, Plaintiff filed this appeal, seeking appellate review of the District Court's conflated ruling. He seeks to have Defendant's MSJ be **DENIED**, and to have his own Cross-MSJ be **GRANTED**.

ARGUMENT SUMMARY

The District Court made numerous errors of both fact and law in this case.

First, the District Court improperly relied on legally inadmissible exhibits, affidavits, and conclusory statements submitted by Defendant, failed to properly infer statements made by plaintiff as applying to him being specifically inside the store, and "conflated" two separate and independent summary judgment motions as "two halves of the same coin," in order to unfairly **GRANT** Defendant's MSJ.

Then, the District Court relied on the same legally inadmissible exhibits, affidavits, and conclusory statements submitted by Defendant in Plaintiff's Cross-MSJ line of briefing, in order to unfairly **DENY** Plaintiff's Cross-MSJ.

ARGUMENTS

Issue 1 – The District Court erred in GRANTING Defendant's MSJ

A. Standard Of Review

"[W]e review the district court's grant of summary judgment de novo, applying the same standards that the district court should have applied." *EEOC v. C.R. Eng., Inc.,* 644 F.3d 1028, 1037 (10th Cir. 2011) (quotations omitted). In doing so, "we consider the evidence in the light most favorable to the non-moving party." *Id.* (quotations omitted). "The court shall grant summary judgment if the

movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." C.R.C.P. Rule 56(a).

B. Preservation On Appeal

Plaintiff sufficiently raised the issue of Defendant's MSJ in his RESPONSE to Defendant's MSJ, *CF at 640.* The District Court ruled on the issue in its final ORDER granting Defendant's MSJ, *CF at 876.*

C. Discussion

THE DISTRICT COURT IMPROPERLY RELIED ON LEGALLY INADMISSIBLE EXHIBITS, AFFIDAVITS, AND CONCLUSORY STATEMENTS, FAILED TO INFER STATEMENTS MADE BY PLAINTIFF, AND CONFLATED TWO SEPARATE MOTIONS, ALL IN ORDER TO UNFAIRLY GRANT DEF'S MSJ IN THE MATTER

a. Defendant submitted <u>legally inadmissible</u> receipts with its MSJ *reply* that were also <u>not accompanied by an affidavit of their custodian</u>

In the District Court's ORDER granting Defendant's MSJ, it stated that **"Defendant has provided proof that Plaintiff had a receipt from Best Buy from the date and time of the incident with his name on it, providing proof of purchase."** *CF at 878.* The Court made this statement in an attempt to support its subsequent legal conclusion that "showing proof of purchase would have freed Plaintiff from the false imprisonment, and that showing proof of purchase is a slight inconvenience that it was unreasonable of Plaintiff not to

utilize. Thus, the Court concludes that Defendant did not 'confine' Plaintiff and thus cannot be held liable for false imprisonment." *Id.*

The problem here is that the District Court **erroneously** and **unlawfully** based its aforementioned legal conclusion on a **LEGALLY INADMISSIBLE** exhibit (i.e. the business records / receipts) **belatedly** submitted by Defendant ***only* with its reply brief in support of its MSJ**, and to which was also independently inadmissible **due to not being "accompanied by an affidavit of its custodian" [i.e. hearsay].**

First, as the record indisputably reveals, the bold claim made by the District Court that "Defendant has submitted a Best Buy receipt with Plaintiff's name on it from the time and date of the incident, satisfying its **initial**[1] burden as the movant," *CF at 881,* **IS FLAT OUT NOT TRUE.** Rather, on July 25, 2024, Defendant filed a MSJ in this matter, *CF at 227,* but to which **DID NOT** include any business records / receipts attached to it. Then, *and only then,* on October 10, 2024, did Defendant file a REPLY IN SUPPORT OF ITS MSJ, and to which **DID** have attached to it, as an exhibit, *for the first time ever,* the business records / receipts purportedly of the incident at issue. *CF at 729 and 741.* However, at this point, having been supplied *exclusively* and *only* as an attachment to a *R-E-P-L-Y* brief, **the entire receipts exhibit was completely and unconditionally inadmissible.**

1 This was the **exact word** used by the District Court, revealing *just how* **indisputably** mistaken it was.

This is because "An issue not raised by the moving party in the motion or brief 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 v. Kelley,* 976 P.2d 330, 332 (Colo. App. 1999).

In *Wallman,* the Court explained that in Defendant's "**reply** brief before the trial court, Kelley **argued for the first time** that plaintiff could not prove that the JBH she allegedly purchased from him caused her illness." *Id at 332.* The Court then explicitly held that "**because plaintiff was not given notice that she needed to present evidence** on the causation issue in defendants' initial summary judgment motions and briefs, **we conclude that the trial court incorrectly relied upon the lack of such evidence in granting the motions.**" *Id.* THE SAME HOLDS **100% IDENTICALLY TRUE TODAY** IN PLAINTIFF'S INSTANT CASE. Because Plaintiff "**was not given notice that he needed to present evidence"** to refute Defendant's **REPLY-ONLY** raised issue of "receipt possession" – such as submission of an affidavit of his brother as being the entity who actually made the purchase to receive the receipt – the District Court **"incorrectly relied upon the lack of such evidence in granting [Defendant's] motion."** *Id.*

Second, ***even if*** the business records / receipts at issue could initially be considered admissible as a valid attachment to a REPLY-ONLY brief, they were still

FOREVER INADMISSIBLE *O-U-T-R-I-G-H-T* because of how they failed to be "accompanied by an affidavit of its custodian or other qualified witness certifying that the record was made by a person with knowledge in the course of the regularly conducted activity and that it was the regular practice of the party to make such a record." *Henderson v. Master Klean Janitorial,* 70 P.3d 612, 617 (Colo. App. 2003).

In *Henderson,* the Court explained that "Authentication of a document is a **condition precedent** to its admissibility and is satisfied by a showing that the document is what the proponent claims it to be." *Id at 617.* The Court then explicitly held that because the party "**failed to lay the requisite foundation** for admission of the report by not offering evidence of authentication," **the report "constitutes inadmissible hearsay."** *Ibid.* THE SAME HOLDS **100% IDENTICALLY TRUE TODAY** IN PLAINTIFF'S INSTANT CASE. Because ***absolutely no*** "affidavit of its custodian or other qualified witness" accompanied Defendant's business records / receipts exhibit, **Defendant "failed to lay the requisite foundation** for admission of [them]," and thus, **the entire business records / receipts exhibit "constitutes inadmissible hearsay."**

Therefore, in the end, when ruling on Defendant's MSJ, there was simply **no legally admissible, non-belatedly-submitted, non-hearsay evidence in the record** for the District Court to have fairly and legally concluded that "showing proof of

purchase would have freed Plaintiff from the false imprisonment." **There is simply no legally admissible evidence in the record that Plaintiff *even possessed a sales receipt in the first place*.** Indeed, this likewise means that there is **no legally admissible evidence in the record that Plaintiff *was even a customer of the store that day.***[2] As such, *for all legal intents and purposes,* the District Court had **NO OTHER CHOICE** than to conclude that Plaintiff was a **complete and total stranger** to the store, with no legal, personal, or professional relationship to it whatsoever. In other words, a complete and total stranger with **no legal obligation whatsoever** to cooperate with ***any*** of the store's **complete and total stranger** employees' demands to perform ***whatever*** acts that might be requested of him – to include, but not be limited to, showing a receipt, answering questions, emptying pockets, etc. *See Montgomery v. Lore,* 10th Circuit Court Of Appeals Case No 23-1106 (December 13, 2023), in which the Court held that Plaintiff **was not** required to show a receipt for, **was not** required to answer questions relating to, and **was not** required to consent to a search of his pocket to reveal the identity of a package of RV lights that an Aurora police officer lacked reasonable suspicion [let alone probable cause / shopkeepers' privilege] to suspect was stolen merchandise, because of how he

2 That is, the District Court also tried to claim [in the "shopkeeper's privilege" discussion section of its ORDER] that the receipt "prov[es] . . . that Plaintiff ***had the store's merchandise on him at the time of the detainment*.**" *CF at 881.* No such conclusion can fairly and legally be reached, however, leaving the District Court **right back at square one** [which is that Defendant *lacked* "shopkeeper's privilege" for its actions because of how it failed to provide *any* evidence of such].

did not observe Plaintiff walk out of the store with it. Indeed, in *Lore,* the officer lacked lawful justification altogether ***TO EVEN DETAIN*** Plaintiff, *in the first place,* to investigate into the potentially stolen nature of the RV lights [*even after* they were **unlawfully** searched for and **unlawfully** seized from his jacket pocket].

b. Defendant submitted a legally inadmissible affidavit with its MSJ *reply* that also blatantly contradicted the record and contained hearsay

In the District Court's ORDER granting Defendant's MSJ, it stated that **"Defendant has supplied an affidavit stating that its employee saw Plaintiff 'remove two boxes of JLab headphones/earbuds from the shelf, place them in his pocket and immediately leave the Best Buy Store,' which was then confirmed on store security video. Plaintiff also refused to show his receipt upon being asked."** *CF at 882.* The District Court made this statement in an attempt to support its subsequent legal conclusion that "Defendant had probable cause to believe Plaintiff was shoplifting." *Id.*

The problem here is that the District Court, once again, **erroneously** and **unlawfully** based its aforementioned legal conclusion on a **LEGALLY INADMISSIBLE** exhibit (this time the affidavit of Mahmoud Abu-Shaweesh) **belatedly** submitted by Defendant ***only* with its reply brief in support of its MSJ**, and to which was also independently inadmissible **due to it blatantly**

contradicting the record as well as **containing inadmissible hearsay.**

First, as the record indisputably reveals, on July 25, 2024, Defendant filed a MSJ in this matter, *CF at 227,* but to which **DID NOT** include any affidavit of Mahmoud Abu-Shaweesh attached to it. Then, *and only then,* on October 10, 2024, did Defendant file a REPLY IN SUPPORT OF ITS MSJ, and to which **DID** have attached to it, as an exhibit, *for the first time ever,* the affidavit of Mahmoud Abu-Shaweesh. *CF at 729 and 779.* However, at this point, having been supplied *exclusively* and *only* as an attachment to a *R-E-P-L-Y* brief, **the entire affidavit was completely and unconditionally inadmissible.** This is because, as already discussed, "An issue not raised by the moving party in the motion or brief 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 v. Kelley,* 976 P.2d 330, 332 (Colo. App. 1999). Therefore, once again, because Plaintiff "**was not given notice that he needed to present evidence"** to refute Defendant's **REPLY-ONLY** raised issue, this time of "shopkeeper's privilege" – such as submission of a [more precise][3] affidavit that he did not steal or "conceal" anything that day, from the store, *WHILE **INSIDE** THE STORE* – the District Court **"incorrectly relied upon**

3 The District Court held that Plaintiff's sworn affidavit of the event was purportedly not specific enough to constitute "proof as to his actions inside the Best Buy immediately preceding the incident." However, Plaintiff addresses and refutes this argument later on in this briefing, in that the District Court was **required by law** to **INFER** as much when ruling on Defendant's MSJ.

the lack of such evidence in granting [Defendant's] motion." *Id.*

Second, ***even if*** the affidavit of Mahmoud Abu-Shaweesh could initially be considered admissible as a valid attachment to a REPLY-ONLY brief, it was still **FOREVER INADMISSIBLE** *O-U-T-R-I-G-H-T* because of how it "**blatantly contradicted the record"** – namely Plaintiff's pen camera video footage of the event. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007).

Specifically, in Mahmoud's affidavit, he claims that he "observed a gentleman, now known to me as William Montgomery, remove two boxes of JLab headphones/earbuds from the shelf, place them in his pocket and immediately leave the Best Buy Store." *CF at 780, ¶ 4.* However, this claim **blatantly contradicts *numerous*** facts already indisputably established by Plaintiff's video.[4] One, Mahmoud stated [once outside] that Plaintiff had been "wait[ing] for us to come out and get 'em." *Plaintiff's Pen Camera Video Footage (herein "PPCVF") at 8:08.* Here, Mahmoud's use of the term **"wait[ing]"** indicates that he did not actually **FOLLOW**

4 It also happens to blatantly contradict ***Defendant's own*** proffered business records / receipt exhibit, which Defendant claims shows Plaintiff [purportedly] making a purchase **within a single minute** of his subsequent detention. *So which is it?* Did Plaintiff **BUY** something and "immediately" leave the store, or did he **STEAL** something and "immediately" leave the store? How about **NEITHER**, in that Plaintiff's ***didn't*** steal, and ***his brother*** made the associated purchase that day.

Plaintiff out of the store after purportedly *personally* observing him steal something from it "immediately" prior to. Meaning, **it is wildly unbelievable** for an assistant manager of a $14 billion dollar multinational company to act in such a way. That is, a high-ranking employee such as Mahmoud would presumably be aware of his store's loss prevention policy which customarily requires a merchant [pursuant to shopkeeper's privilege] to maintain complete **UNINTERRUPTED** visual contact of a suspected shoplifter in order to [lawfully] detain them. Therefore, the act of such an assistant manager to purportedly ***personally*** observe a suspect steal, ***not*** *immediately follow him out of the store*, but then all of a sudden, mere moments later, ***change his mind entirely*** *to then meet up with the suspect right outside the store*, **is just not a believable, *or even plausible*, thing to have happen.** Two, throughout his entire 12 minute confrontation with Plaintiff, Mahmoud only mentions wanting to recover the contents of Plaintiff's pocket ***three whole times.*** *PPCVF at 0:28, 10:22, and 10:48.* Meanwhile, he mentions wanting to recover what Plaintiff held in his hands **a whopping 31 times.** *PPCVF at 0:00, 0:02, 0:04, 0:05, 0:10, 0:11, 0:52, 1:01, 1:13, 1:44, 1:48, 2:01, 2:10, 2:16, 2:30, 2:40, 2:45, 2:51, 3:34, 3:51, 4:38, 4:53, 6:00, 8:51, 9:17, 10:11, 10:19, 10:47, 11:31, 11:43, and 12:08.* Thus, **it is wildly unbelievable** that an assistant manager would be ***so much more interested*** in recovering merchandise that he admittedly [by way of his own affidavit] ***did not*** observe Plaintiff walk out of the store with, than merchandise that he purportedly

DID observe him walk out with.[5] Indeed, Mahmoud even began his conversation with Plaintiff by using the word **"it"** [a singular term] to describe what he wanted to recover [i.e. what he presumably noticed Plaintiff holding in his hands upon first confronting him], **which meant that he *wasn't even interested* in the contents of Plaintiff's pocket** until later on in the conversation. *PPCVF at 0:05.* Then, when Mahmoud finally ***does*** mention Plaintiff's pocket, he only uses the word "too" to describe its contents, **which meant that such contents *weren't even the primary reason* for the confrontation** in the first place. *PPCVF at 0:28.* **This is just not the typical, believable, *or even plausible* behavior of a high-ranking assistant manager to exhibit** who purportedly *personally* observes a shoplifting suspect steal something from its store. Three, throughout Plaintiff's entire 12 minute detention, Mahmoud ***never once*** mentions to him that he observed him place something [or things] into his pocket. **It is absolutely wildly unbelievable** that an assistant manager would not explicitly let a shoplifting suspect know right away how surely and precisely he got caught, especially when another employee freely offers a similar [but utterly unsubstantiated, of course] explanation. *PPCVF at 4:46.* Four, **by way of his very own captured statements,** Mahmoud ***already admitted*** that he didn't *even remotely* know the identity of ***whatever*** Plaintiff held in his hands that

5 Most shockingly here, is that Mahmoud **didn't even bother to use the word "pocket" for nearly ten consecutive minutes of his encounter with Plaintiff.** *PPCVF at 0:28 to 10:22.* Such **lack of specificity** is *wildly inconsistent* with his **much more specific** [and thus, suspiciously convenient] claim made later in his affidavit that Plaintiff *explicitly* "removed two boxes of JLab headphones/earbuds from the shelf . . . **and placed them in his *pocket*.**"

day [let alone ***whatever*** may have existed inside one of his pockets]. *PPCVF at 0:28 ("I want what's in your pocket, too."), 7:58 ("Let me see the shit you grabbed, dude. What do you even got in there?"), 10:22 ("You have something in your pocket, you have something in your coat, just give it to me, and you can leave."), and 10:48 ("You'll have zero problems if you hand me what's in your pocket, and what's in your coat.").* Considering that Plaintiff's video incontrovertibly shows that he ***never once*** handed anything held in his hands over to Mahmoud, his fellow employees, or the police [let alone emptied his pockets in front of them], Mahmoud never once learned identity of Plaintiff's possessions, and therefore, **would have never identified them as "JLab headphones/earbuds."** Finally, **it is wildly unbelievable** that Mahmoud would have identified Plaintiff's possessions as "JLab headphones/earbuds" ***from afar,*** either, by way of having purportedly observed him "on the store security video" as the employee also claims in his affidavit. Security cameras, mounted on ceilings and thus located dozens of feet away, just don't offer that kind of resolution. As such, the entirety of ¶ 4 of Mahmoud's affidavit is legally inadmissible due to it **blatantly contradicting the record.**

Next, in Mahmoud's affidavit, he claims that he "observed the same activity on the store security video." *CF at 780, ¶ 5.* However, Plaintiff was told during his detention that the store employees ***had already*** [purportedly] observed him "on video" shoplifting from the store. *PPCVF at 4:46.* Moreover, Mahmoud **specifically** claims in his affidavit that he **a)** "observed [Plaintiff] remove two boxes of JLab

headphones/earbuds from the shelf, place them in his pocket and immediately leave the Best Buy Store," and **b)** "exited the store to request that [Plaintiff] return the product from his pocket." *CF at 780, ¶¶ 4 and 7.* In other words, if Mahmoud ***really did*** "observe Plaintiff steal something, exit the store, and then [according to Defendant, ***within a minute***] confront him outside about it," **the employee LITERALLY would have never had the time to go review any security video footage of the same.** Indeed, it would have been **quite literally preposterous** for Mahmoud to have [purportedly] observed Plaintiff steal something, *run to the security office within the time that Plaintiff had been waiting on the side of the building* [to go view him on video], but then *run back outside after viewing the video* [to then personally confront him about it]. **Not only is it wildly unbelievable** that an employee would need to go to such great lengths to view such a theft on video, *from afar*, **right after** *already* [purportedly] ***personally*** observing it occur *right in front of them,* such an incredible scenario would undoubtedly not provide said employee with sufficient enough time to perform the research necessary ***to even locate the suspect*** within the store's surveillance video system, *in the first place,* as Plaintiff has observed other merchants **take literally over an hour to do.** *See Montgomery v. Cruz,* District Civil Case No 1:20-cv-03189-PAB-CYC. This leaves Mahmoud with **but one single** remaining logical possibility: that he had [purportedly] "observed the same activity on the store security video" ***ONLY AFTER*** he and his fellow employees ended their confrontation with Plaintiff. But then this scenario begs an even bigger

question: *why on earth were the police never contacted?* **EVER.** As Plaintiff showed in his RESPONSE to Defendant's MSJ, "Defendant made no 'calls for service' to Westminster Police, *whatsoever,* in reference to Plaintiff purportedly shoplifting from its store." *CF at 651, ¶ 44.* **Defendant doesn't even dispute this fact.** *CF at 736, ¶ 44.* Indeed, Defendant even claims [and Plaintiff doesn't dispute] that "Best Buy arranged for extra patrols on November 25, 2022, including a call at 8:14am for extra patrols." *CF at 681, ¶ 24.* Therefore, **Best Buy certainly had an *active* and *ongoing* relationship with the police at the time, and would have surely called them** *within the SEVERAL HOURS the store had remaining that day*, to **EVENTUALLY** turn over said purported "video footage" of a shoplifter that was purportedly ***caught positively red handed.*** Yet *not one single* "call for service" was made that day regarding Plaintiff. **EVER.** Indeed, such failure to call the police would be a clear violation of a store's loss prevention policy [that an assistant manager would presumably have knowledge of and be following]. As such, the entirety of ¶ 5 of Mahmoud's affidavit is legally inadmissible due to it **blatantly contradicting the record** [as well as being **utterly illogical** in its own right].

Next, in Mahmoud's affidavit, he claims that "As Mr. Montgomery was exiting the store he was asked by a loss prevention employee to show his receipt, which he declined to do." *CF at 780, ¶ 6.* Here, such a statement **blatantly contradicts itself,** in that a loss prevention employee, *claimed by Mahmoud himself to have been "posted up" at the store's exit,* **would not have had the capacity to**

witness Plaintiff purportedly "remove two boxes of JLab headphones/earbuds from the shelf [and] place them in his pocket" for that employee to even know, *in the first place*, whether or not to "ask Plaintiff to show his receipt for them." *In other words,* e*mployees posted up at store exits just don't ask random people leaving to see receipts for whatever random, unidentified contents may already exist inside their random pockets / purses / etc.* Indeed, **it is wildly unbelievable** that a "loss prevention" employee ***would even bother asking to see a receipt at all, at that point,*** if they alternatively ***did*** personally observe a shoplifter steal something *right in front of them.* Rather, they would undoubtedly just jump right to detaining the positively-caught shoplifter and demand that they give the product back. Most importantly, because this statement of Mahmoud's refers to *what **some other** employee supposedly said*, the entirety of it is *already* **categorically inadmissible hearsay.** "Affidavits based on inadmissible hearsay are insufficient for purposes of summary judgment determination." *Henderson v. Master Klean Janitorial, Inc.,* 70 P.3d 612 (Colo. App. 2003). *See also C.R.C.P. Rule 56(e)* ("[A]ffidavits shall be made on personal knowledge."). As such, the entirety of ¶ 6 of Mahmoud's affidavit is legally inadmissible due to it **blatantly contradicting itself** [as well as being **categorically inadmissible hearsay** in its own right].

Finally, in Mahmoud's affidavit, he claims that "Once I received confirmation that the police had been contacted, I walked back inside of the Best Buy Store and had no further contact with Mr. Montgomery." *CF at 780, ¶ 9.* Here, ***even this***

statement **blatantly contradicts** the record, in which **AN ABSOLUTE PLETHORA** of claims were ***already*** made during the confrontation – both by Mahmoud ***AND*** by his fellow employees – that **a)** police were ***already*** contacted ***prior to*** Plaintiff's detention, and that **b)** Plaintiff ***would be ACTIVELY detained in the mean time UNTIL the police arrived*** [as is typical and customary to have happen when police are called out to an active shoplifting detention]. *PPCVF at 0:13, 0:15, 1:05, 1:33, 1:44, 1:48, 2:51, 3:17, 4:46, 5:11, and 8:51.* Of course, **the police were never actually contacted,** *in the first place,* neither prior to, nor during Plaintiff's detention, **let alone even later on THAT ENTIRE DAY after Plaintiff was released** [and to which, again, Defendant doesn't even dispute]. So ***even this*** portion of Mahmoud's statement, "that police had been contacted," has no truth whatsoever to it. *CF at 276.* As such, the entirety of ¶ 9 of Mahmoud's affidavit is legally inadmissible due to it **blatantly contradicting the record.**

Therefore, in the end, when ruling on Defendant's MSJ, there was simply **no legally admissible, non-belatedly-submitted, non-contradictory-to-the-record, non-hearsay evidence** for the District Court to have fairly and legally concluded that "Defendant had probable cause to believe Plaintiff was shoplifting." Of course, in the alternative, if this Court Of Appeals *were* to [miraculously] accept Mahmoud Abu-Shaweesh's affidavit as being **not** belatedly submitted, **not** contradictory to the record, and **not** containing inadmissible hearsay, such would ***STILL*** not be enough

to fairly and legally allow the granting of Defendant's MSJ to take place, as Plaintiff has shown that, ***AT THE VERY LEAST,*** his pen camera video footage of the event creates **enough** of a **"controversy"** for such a **"genuine dispute of fact"** to be properly submitted to the jury. "A summary judgment denie[s] a litigant the right to trial of his case and should therefore not be granted **where there appears any controversy** concerning material facts." *McCormick v. Diamond Shamrock Corp.,* 175 Colo. 406, 487 P.2d 1333 (1971). "To authorize the granting of summary judgment **the complete absence of any genuine issue of fact must be apparent,** and all doubts thereon must be resolved against the moving party." *Hatfield v. Barnes,* 115 Colo. 30, 168 P.2d 552 (1946). "A motion for summary judgment should be denied if under the evidence **reasonable men might reach different conclusions."** *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952). "Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial **where there is the slightest doubt** as to the facts." *Smith v. Mills,* 123 Colo. 11, 225 P.2d 483 (1950).

c. Plaintiff submitted a sworn affidavit, which the District Court should have inferred as applying to his actions inside the store

In the District Court's ORDER granting Defendant's MSJ, it stated that **"Plaintiff has made no statements and submitted no proof as to his actions**

inside the Best Buy immediately preceding the incident." *CF at 882.* The District Court made this statement in an attempt to support its subsequent legal conclusion that Plaintiff had purportedly failed to overcome Defendant's MSJ because of how he "'may not rest upon the mere allegations or denials in the pleadings' and must set forth specific facts through affidavits or other means." *Id.* (quoting *Burman v. Richmond Homes Ltd.,* 821 P.2d 913, 917 (Colo. App. 1991).

The problem here is that the District Court **erroneously** and **unlawfully** failed, in violation of C.R.C.P. Rule 56, to properly **INFER** several statements made by Plaintiff as applying to him being specifically **INSIDE** the store at issue. Additionally, the District Court also **impermissibly** failed to account for a **police report** that Plaintiff independently and properly admitted into the record, upon which such entry ***was not*** disputed by Defendant, and to which ***does*** constitute "proof as to his actions inside the Best Buy immediately preceding the incident."

Attached to Plaintiff's RESPONSE to Defendant's MSJ was an affidavit he submitted to the Court, which stated that "Prior to being approached by Mahmoud, Shane, and John Doe, at no time whatsoever had I ever once met, seen, identify, pass by, or been located anywhere physically near such Best Buy employees on that day of November 25, 2022." *CF at 621, ¶ 5.* Next, in that same affidavit, Plaintiff stated that "At no point in time, on that day of November 25, 2022, had I ever once

'concealed' anything in front of (let alone not in front of) anybody, ever, period." *Id at 621, ¶ 24.* Finally, in that same affidavit, Plaintiff stated that "At no point in time, on that day of November 25, 2022, had I ever once placed into, or removed, anything from any pant pocket in front of anybody, ever, period. Whatever was located in my pant pockets remained there before, throughout, and after my interaction with the Best Buy employees." *Id at 621, ¶ 25.* Evidently Plaintiff wasn't obvious enough, but the reason why he made these three statements was to describe his experience **INSIDE** the Best Buy store immediately prior to being confronted by its three employees right outside of it. *However, to a reasonable person, the result would be the same.* In other words, **it is absolutely wildly unbelievable** that any of these statements would **NOT** be referencing Plaintiff's actions **completely inside a store** that he was **literally** just found standing **right** outside of. As if Plaintiff would feel the need to state for the record that he had never "met, seen, identify, pass by, or been located anywhere physically near such Best Buy employees" ***while casually walking down the street that day.*** As if Plaintiff would feel the need to state for the record that he had never "once 'concealed' anything in front of (let alone not in front of) anybody, ever, period" ***while casually walking down the street that day.*** As if Plaintiff would feel the need to state for the record that he had never "once placed into, or removed, anything from any pant pocket in front of anybody, ever, period" ***while casually walking down the***

street that day. These are all **absolutely preposterous notions** that any reasonable, rational, prudent person would simply not entertain. As such, it was **untenable** and **impermissible** for the District Court to not, *at the very least,* **INFER** that said three statements made by Plaintiff applied to him being **INSIDE** the store at issue [and thus, properly deny Defendant's MSJ in the matter]. Specifically, once these facts in Plaintiff's affidavit are properly **inferred,** such is enough to create a "genuine dispute of fact" regarding what had actually happened that day versus what Mahmoud Abu-Shaweesh claims to have happened [if his affidavit were even admissible, of course, but to which was indisputably **not,** *see arguments above*]. "In assessing a summary judgment motion, a court must view all facts in the light most favorable to the nonmoving party, **give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence,** and resolve all doubts as to the existence of a material fact against the moving party." *Vigil v. Franklin,* 81 P.3d 1084, 1086 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004).

Also attached to Plaintiff's RESPONSE to Defendant's MSJ was a **police report** of the day and store at issue. *CF at 615.* The validity of this report was not disputed by Defendant. *CF at 736, ¶ 44.* Therefore, such an undisputed fact – that "Defendant made no 'calls for service' to Westminster Police, *whatsoever,* in reference to Plaintiff purportedly shoplifting from its store," *CF at 651, ¶ 44* – was enough to

constitute **legally sufficient** "proof as to his actions inside the Best Buy immediately preceding the incident." That is, if Plaintiff ***did*** commit theft **inside** the store, the police would have undoubtedly been called, and a report made. But because no police were called, such evidence shows that Plaintiff ***did not*** commit theft **inside** the store.

Therefore, in the end, when ruling on Defendant's MSJ, it was **impermissible** for the District Court to have concluded that Plaintiff purportedly failed to overcome the MSJ due to him purportedly "resting upon the mere allegations or denials in the pleadings" by not otherwise "setting forth specific facts through affidavits or other means." Plaintiff clearly submitted **a sworn affidavit** containing relevant statements that the District Court should have properly **INFERRED**, as well as **a police report** of the event, *which Defendant did not dispute,* and to which thus constituted sufficient "proof as to his actions inside the Best Buy immediately preceding the incident."

d. The District Court impermissibly conflated two independent motions for summary judgment *as two halves of the same coin*

In the District Court's ORDER denying Plaintiff's MFR, it stated that **"In resolving the conflated summary judgment motions, the Court considered all briefs and exhibits presented in connection with Defendant's motion and also Plaintiff's cross-motion."** *CF at 974.* The District Court made this all-encompassing statement in an attempt to support its subsequent legal conclusion

that Plaintiff had purportedly failed to overcome the submission of Defendant's MSJ reply-brief-only exhibits (i.e. the affidavit of Mahmoud Abu-Shaweesh and the business records / receipts) because of how he purportedly had [but purportedly did not utilize] the "opportunity to respond to them" with his [own cross-MSJ] reply brief that was "filed after the exhibits about which he complains." *Id.*

The problem here is that the District Court **erroneously** and **unlawfully "conflated"** Defendant's and Plaintiff's *separate* and *independent* summary judgment motions [as somehow being two halves of the same coin] in **blatant violation** of clearly established rules and law on the subject.

As discussed earlier, on October 10, 2024, Defendant filed a REPLY IN SUPPORT OF ITS MSJ. *CF at 729.* In that REPLY, Defendant, **FOR THE FIRST TIME EVER IN ITS MSJ BRIEFING,** submitted 1) a ***never-before-seen*** affidavit of Mahmoud Abu-Shaweesh, and 2) ***never-before-seen*** business records / receipts purportedly of the incident at issue. The employee affidavit was Defendant's **FIRST ATTEMPT** during its **ENTIRE** MSJ briefing to argue [with supposedly admissible evidence] that it "detained Plaintiff on the reasonable grounds that he appeared to be concealing merchandise in his pockets." *CF at 739.* The business records / receipts were Defendant's **FIRST ATTEMPT** during its **ENTIRE** MSJ briefing to argue [with, again, supposedly admissible evidence] that "Plaintiff had been inside the Best Buy making a purchase" [for which he might have been given a receipt for, and thus

might have been "required to show" upon leaving, as the argument goes]. *CF at 733.* **HOWEVER, NEITHER OF THESE TWO <u>FRESH</u>, <u>REPLY-ONLY-OFFERED</u> ARGUMENTS WERE MADE IN DEFENDANT'S INITIAL, <u>OPENING</u> MSJ BRIEF, NOR EVIDENCE SUPPLIED <u>THEN</u> TO SUPPORT THEM WITH.** Nevertheless, that didn't stop the District Court from [impermissibly] concluding that "Plaintiff provides no evidence of his actions in the store to **counter**[6] this." *CF at 879.* Newsflash: *****OF COURSE***** Plaintiff didn't **"COUNTER"** these arguments in his **<u>RESPONSE</u>** to Defendant's MSJ **<u>OPENING</u>** brief. They were **<u>BRAND NEW</u>** arguments Defendant **<u>LITERALLY RAISED FOR THE VERY FIRST TIME</u>** in its ******<u>R-E-P-L-Y</u>****** brief, but to which was obviously submitted **<u>AFTER</u>** Plaintiff had **<u>ALREADY</u>** submitted his **<u>RESPONSE</u>** brief in the matter!

Basically, in order to [impermissibly] grant Defendant's MSJ, the District Court "morphed" Plaintiff's REPLY to Defendant's RESPONSE to *his* **<u>CROSS</u>**-MSJ into some sort of ***<u>SURREPLY</u>*** to Defendant's REPLY to his RESPONSE to *Defendant's* MSJ! Such behavior is **<u>wildly inappropriate</u>** and **<u>patently illegal</u>**, however, the exact reasons for which why are discussed next.

First, in *Wallman v. Kelley,* 976 P.2d 330, 332 (Colo. App. 1999), the dispositive issue was not whether the Plaintiff had the mere "opportunity" to respond to the Defendant's fresh, reply-only-submitted MSJ arguments and evidence [using her own cross-MSJ reply brief as the vehicle], it was whether she

6 This was the **<u>exact word</u>** used by the District Court, revealing *just how* **indisputably** mistaken it was.

was "given ***NOTICE*** that she ***NEEDED*** to" respond them [and to which the Court held that she was not]. *Id.* This is of no surprise, as there exists no rule or law ***of any kind*** in the Colorado Rules Of Civil Procedure and/or Colorado Case Law that *even begins to* inform litigants that reply-only briefs are the appropriate and necessary vehicles to fairly provide such **"notice"** of such **"need."**

Second, it is **utterly inappropriate** to require a party to use *their* **reply** in support of *their* cross-MSJ as some sort of new ***SURREPLY*** in *response* to *an opposing party's* MSJ reply, as replies "in support of" are designed to *strictly* and *only* **support** (duh) *the initial motions* to which they are tied [not to mention the fact that they are **severely limited by page number and file-by date**]. Therefore, Plaintiff could not reasonably have been expected to sacrifice valuable space and time *responding* to **brand new** allegations made by Defendant in its MSJ ***reply*** brief [that should have unquestionably been presented by it in its MSJ ***opening*** brief], when he was already working tirelessly with said limited space and time to prepare the arguments necessary to *support* **his own** cross-MSJ with.

Third, conflating a cross-MSJ's ***reply*** as a MSJ's ***surreply*** creates an insurmountable **"uncertainty of fact"** that is manifestly impossible to overcome, because of how easily a party's "concessions," "admissions," and/or "legal theories" ***made in one line of briefing*** can be abused and/or misinterpreted ***in the other line of briefing.*** In other words, a party's **offense** argued *in support of their own MSJ* cannot be used as their **defense** argued *in opposition of the other party's*

MSJ. Indeed, the Court has *already* been required to address ***this exact issue.***

"Where both parties to a legal action file motions for summary judgment . . . **[e]ach of such motions is to be considered and ruled upon separately, without regard to whether similar motion has been filed by other parties.** The fact that each side in moving for summary judgment in his or its favor, respectively, assert 'that there is no genuine issue as to any material fact' **does not necessarily make it so, and does not bar the court from determining otherwise.** 'It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a [plaintiff] may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, **he may be able and should always be allowed to show that,** if [defendant's] legal theory be adopted, a genuine dispute as to a material fact exists.'" *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952) (quoting *Walling v. Richmond Screw Anchor Co.,* 154 F.2d 780, 784 (1946)). "This legal presumption of admission of fact, however, is not general **but extends only to consideration of the [plaintiff's] pending motion.** It may not be applied in connection with [defendant's] similar motion. 'The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue of fact exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, **which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is**

no longer effective. Appellants' concession that no genuine issue existed was made in support of its own motion for summary judgment. **We do not think that the concession continues over into the Court's separate consideration of appellee's motion for summary judgment** in his behalf after appellants' motion was overruled.'" *Id.* (quoting *Begnaud v. White,* 170 F.2d 323, 327 (1948)).

THE SAME HOLDS **100% IDENTICALLY TRUE TODAY** IN PLAINTIFF'S INSTANT CASE. In the instant case, Plaintiff made a "concession" under **his** "legal theory" that **"no genuine dispute of fact exists"** [and that **his** cross-MSJ should thus be **granted**]. He presented legal argument in **his** cross-MSJ reply brief that Defendant's affidavit of Mahmoud Abu-Shaweesh was **inadmissible** due to it "blatantly contradicted the record," *Scott v. Harris,* 550 U.S. 372, 380 (2007), and that its business records / receipts were likewise **inadmissible** due to them failing to be "accompanied by an affidavit of its custodian or other qualified witness." *Henderson v. Master Klean Janitorial,* 70 P.3d 612, 617 (Colo. App. 2003). In other words, **specifically and only in his cross-MSJ,** Plaintiff was arguing **offensively,** and whereby his reply brief was appropriately tailored to **support his** cross-MSJ's opening brief with [by way of arguing, via *Scott* and *Henderson,* **that no genuine dispute of fact exists, and thus, his cross-MSJ should be granted**]. ***His*** cross-MSJ reply brief *was not the place, nor the time,* to begin **defending** AGAINST Defendant's belated, reply-only-submitted argument that ***it*** introduced too late in ***its*** MSJ line of briefing. Indeed, to hold otherwise would be to require Plaintiff to ****create**** a dispute

of fact in his own cross-MSJ,[7] which is clearly not his obligation to do [his obligation in his own cross-MSJ is to only **defend** against *Defendant's* attempts to create a dispute of fact]. As such, **if Plaintiff was unable to have his own cross-MSJ granted,** he nevertheless "may be able ***and should always be allowed to show*** that, if [defendant's] legal theory be adopted, a genuine dispute as to a material fact exists." *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952).

Therefore, in the end, ***even if*** Plaintiff was unable to successfully have ***his*** cross-MSJ be granted, **the District Court should have still nevertheless DENIED Defendant's MSJ in the matter,** due to the simple fact that *Defendant* did not provide any legally admissible argument and/or evidence ***of its own*** to ***independently*** support ***its*** MSJ with. "It is manifest that **when [plaintiff's] motion for summary judgment was overruled, their admission of facts under the legal theory terminated, and it was error for the trial court to give any consideration thereto in connection with his determination of [defendant's] motion.** This leaves [defendant's] motion for summary judgment completely unsupported by anything except such as it had itself placed in the record, and which definitely discloses uncertainty of fact and disputable issues for trial." *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952).[8]

7 This appears to be ***exactly*** what the District Court tried to say Plaintiff failed to do. *CF at 881, footnote 6.* However, such argument made by Plaintiff [that Defendant failed to establish that he, and not just somebody else, used his credit card] was made *exclusively* **in HIS cross-MSJ line of briefing, *NOT* in Defendant's MSJ line of briefing.** By then, it was already too late for the District Court to require Plaintiff to make such an argument **in Defendant's MSJ line of briefing.**

8 This is what Plaintiff meant earlier with his **"two halves of the same coin"** argument. That is, *even if* a District Court properly **denies** one party's cross-MSJ in a matter, such does not mean that the

e. The District Court <u>impermissibly</u> relied on <u>conclusory statements</u> made by Defendant that are <u>legally insufficient</u> to grant a MSJ with

In the District Court's ORDER granting Defendant's MSJ, it stated that **"Plaintiff goes to stores and acts in a manner that could reasonably be construed as suspicious."** *CF at 879.* It also stated that **"Plaintiff intentionally created the misunderstanding for purposes of his later lawsuit,"** *Id at 880,* and that **"Plaintiff designed his conduct to inspire this belief."** *Id at 882.* The District Court made these statements in an attempt to support its subsequent legal conclusion that "Defendant had probable cause to believe Plaintiff was shoplifting." *Id.*

The problem here is that **<u>ALL</u>** of these statements / conclusions made by the District Court are **erroneously** and **unlawfully** based on **<u>LEGALLY INADMISSIBLE CONCLUSORY STATEMENTS</u>** made by Defendant in its MSJ.

In Defendant's MSJ, it made the following essentially identical statements: "Plaintiff targeted the Best Buy store located in Westminster, CO when he exited the store with merchandise in his possession." *CF at 231.* "Here, Plaintiff intentionally concealed merchandise." *Id at 234.* "Best Buy acted in good faith and had probable cause to believe Plaintiff may have shoplifted merchandise from Best Buy." *Id at 234.* "At the time Plaintiff was questioned by Best Buy employees they were acting

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other party's MSJ gets to now be *automagically* **granted** [i.e. without separate consideration]. Indeed, to hold otherwise would be to ***literally*** tell a party that he is *better off not filing a cross-MSJ in the first place,* which is an **<u>absolutely impermissible disincentive</u>** for a District Court to create.

on the good faith belief that Plaintiff was intentionally concealing merchandise stolen from Best Buy." *Id at 235.* "Plaintiff orchestrated the interaction with Best Buy employees in order to bait them into confronting him about suspected shoplifting." *Id at 236.* "Plaintiff left the Best Buy store with merchandise in a manner that caused Best Buy employees to suspect Plaintiff did not pay for said items." *Id at 236.* "These employees had probable cause to stop Plaintiff and their actions were taken in good faith." *Id at 237.* "All of Best Buy employees' actions were protected and permissible because Plaintiff took Best Buy inventory and refused to show proof of purchase." *Id at 237.* The problem with **EACH AND EVERY SINGLE ONE** of these statements [and thus, Defendant's MSJ as a whole, as its ***entire*** MSJ appears to be premised on ***nothing but*** these statements] is that they are ***ALL*** **utterly vague and purely conclusory statements made without a single iota of legally admissible "supporting documentation or testimony" to *even begin to* REMOTELY substantiate them with.** "A conclusory statement made without supporting documentation or testimony is insufficient to create an issue of material fact." *Suncor v. Aspen,* 178 P.3d 1263, 1269 (Colo. App. 2008). Indeed, Defendant's MSJ opening[9] brief is completely bereft of **ANY** supporting affidavits, *whatsoever,* **altogether.** Defendant simply submitted to the

9 Remember, Defendant ***belatedly*** submitted its affidavit of Mahmoud Abu-Shaweesh with its MSJ's ***R-E-P-L-Y*** brief, thus rendering it, as discussed earlier, **completely unconditionally inadmissible.**

District Court **no legally admissible evidence of any kind** that Plaintiff "targeted the Best Buy store," that he "intentionally concealed merchandise," that Best Buy "had probable cause to believe he may have shoplifted," that he "orchestrated the interaction with Best Buy employees in order to bait them," that he "took Best Buy inventory and refused to show proof of purchase," etc. Indeed, Best Buy failed to submit to the District Court **literally any legally admissible evidence, whatsoever, altogether,** ***that Plaintiff was even a customer of it that day,*** in the first place, for which any of its arguments could *even begin to* have merit in the matter.

As Courts have long held, "The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification." *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (Cal. 1940). In other words, **EVERY SINGLE STATEMENT** made by Defendant that ***IT*** possessed "shopkeeper's privilege" in this matter, ***IT*** was required to have **real, tangible, admissible evidentiary support** to justify such with, but to which ***IT*** utterly failed to do [and thus, the District Court had **NO OTHER CHOICE** than to outright **DENY** its MSJ in the matter].

Of course, in a feeble attempt to satisfy its burden of persuasion, Defendant *did* submit to the District Court, with its initial MSJ, *one* piece of information: a generic

YouTube video of Plaintiff discussing his long running "receipt refusal sting operation" carried out at Walmart stores. However, there are **numerous** grave issues with this video that render it **completely useless** in deciding Plaintiff's instant case.

One, the YouTube video does not constitute **actual evidence** of what occurred specifically that day of **November 25, 2022,** specifically at that **Best Buy** store, specifically with **its three employees.** Indeed, the words "Best Buy" *aren't even mentioned* by Plaintiff in the video [and not surprisingly so, as it was a response to a video discussing his experiences shopping at *Walmart* stores]. To hold otherwise would be to violate Plaintiff's 14th Amendment Right To Due Process, in which he has an ***unconditional*** right to have this instant case be **adjudicated on its merits.**

Two, Defendant's [and the District Court's] reference to the YouTube video is a **blisteringly inappropriate** attempt to mischaracterize Plaintiff's "sting operations" as [otherwise dishonest] situations where he purportedly "conducts himself in a manner that could be reasonably construed as suspicious" [i.e. he "fakes steals" to get "free lawsuits"]. However, such could **LITERALLY** not be further than the truth. Rather, Plaintiff's historical "use of back registers," "lack of use of plastic bags," and/or "refusal to show a receipt upon leaving" **have only ever been** "cruxes" that trigger **U-N-R-E-A-S-O-N-A-B-L-E** suspicions of shoplifting, not *reasonable* ones. In other words, such variables only create ***self-fulfilling prophecy induced, artificially***

manufactured, non-objective suspicions of shoplifting [read: mere hunches] that Courts have unanimously held as **categorically insufficient** to supply merchants with "shopkeeper's privilege" in a matter. *See Coblyn v. Kennedy's Inc.,* 359 Mass. 319, 320 (Mass. 1971); *Wal-Mart Stores, Inc. v. Odem,* 929 S.W.2d 513, 520 (Tex. App. 1996); *Ball v. WalMart, Inc.,* 102 F. Supp. 2d 44, 57 (D. Mass. 2000).

Three, ***even if*** said three variables of "using back registers," "not using plastic bags," and/or "refusing to show a receipt upon leaving" were all ***valid*** elements to consider in a "shopkeeper's privilege" assessment (which they are not), such variables ***STILL*** don't help Defendant *in Plaintiff's instant case*, in which he visited a **Best Buy** store ***that doesn't even incorporate such policies*** into its business model. Specifically, Best Buy, *a completely different merchant than Walmart,* **doesn't even utilize "back registers"** [they litter their registers all throughout their stores]. Then, *way back in July of 2022,* **the major retail chain phased out plastic bag use.** *CF at 907.* And finally, *even earlier than that, in November of 2017,* **the chain began issuing digital-only [emailed] receipts to its patrons** [thus eliminating the wherewithal for customers to even "refuse to show them" upon leaving]. *CF at 829.* **In other words, no "sting" operation of Plaintiff's *could have even occurred* that day of November 25, 2022, at that Best Buy store,** because no "elements" of his long running, *Walmart-based,* "sting operation" ***even existed*** at that point.

Four, and unquestionably the most grave of the issues, **is that Plaintiff wasn't even a customer of Best Buy that day of November 25, 2022,** in the first place, ***in order to even*** "use back registers," [if such even existed], "forgo the use of plastic bags," [if such were even offered], or "refuse to show a receipt upon leaving" [if such were even expected despite the chain having moved to digital-only receipts]. Rather, in the end, *for all legal intents and purposes,* the District Court was required to conclude that Plaintiff was nothing more than **a complete and total stranger** who had been standing on the side of a building, holding **non-store** private property in his hands, and **non-store** private property in his pockets, that **three complete and total strangers** recklessly and unlawfully chose to detain, in which they **did not** observe him on inside of, **did not** supply the Court with legally admissible evidence of his actions inside of, and thus **DID NOT** possess "shopkeeper's privilege" to detain in order to even require him to "show a receipt" to, "answer questions" for, or "empty his pockets" in front of to satisfy their baseless curiosities with [let alone serve as some "escape path" for which **a complete and total stranger** is not required to "avail" himself of].

As such, Defendant's [and the District Court's] use of Plaintiff's YouTube video as any sort of "evidence" of his actions that day of November 25, 2022 was **completely impermissible,** and whereby **all conclusory statements** derived

therefrom were "insufficient to create an issue of material fact." *Suncor* at 1269.

Issue 2 – The District Court erred in DENYING Plaintiff's CROSS-MSJ

A. Standard Of Review

"[W]e review the district court's grant of summary judgment de novo, applying the same standards that the district court should have applied." *EEOC v. C.R. Eng., Inc.,* 644 F.3d 1028, 1037 (10th Cir. 2011) (quotations omitted). In doing so, "we consider the evidence in the light most favorable to the non-moving party." *Id.* (quotations omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." C.R.C.P. Rule 56(a).

B. Preservation On Appeal

Plaintiff sufficiently raised the issue of his CROSS-MSJ in his CROSS-MSJ, *CF at 254,* and his REPLY IN SUPPORT OF HIS CROSS-MSJ, *CF at 800.* The District Court ruled on the issue in its final ORDER denying Plaintiff's CROSS-MSJ, *CF at 876.*

C. Discussion

THE DISTRICT COURT IMPROPERLY RELIED ON LEGALLY INADMISSIBLE EXHIBITS, AFFIDAVITS, AND CONCLUSORY STATEMENTS IN ORDER TO UNFAIRLY DENY PTF'S CROSS-MSJ

As discussed earlier, Defendant submitted to the District Court an affidavit

of Mahmoud Abu-Shaweesh, several business records / receipts, and numerous statements that Plaintiff is a "merchant entrapping" "lawsuit scammer" who "intentionally conceals merchandise" in order to "bait" employees into detaining him. Even though these documents and statements were ***not*** untimely filed ***in Plaintiff's Cross-MSJ line of briefing,*** the affidavit was still **legally inadmissible** *in its own right* **for "blatantly contradicting the record"** in violation of *Scott v. Harris,* 550 U.S. 372, 380 (2007), the business records / receipts were still **legally inadmissible** *in their own right* **for lacking an "affidavit of their custodian or other qualified witness"** in violation of *Henderson v. Master Klean Janitorial,* 70 P.3d 612, 617 (Colo. App. 2003), and the statements were still **legally inadmissible** *in their own right* **for being "conclusory"** in violation of *Suncor v. Aspen,* 178 P.3d 1263, 1269 (Colo. App. 2008). As such, it was still **completely and unconditionally impermissible** for the District Court to have considered such documents and statements, ***even when*** ruling on Plaintiff's CROSS-MSJ. Therefore, the District Court, ***in addition to denying Defendant's MSJ,*** should have **GRANTED** Plaintiff's **legally undisputed** CROSS-MSJ in the matter.

CONCLUSION

In the end, Plaintiff's case is most analogous to that of *Coblyn v. Kennedy's*

Inc., 359 Mass. 319, 320 (Mass. 1971). In *Coblyn,* the Court held that a merchant lacked "shopkeeper's privilege" to detain a patron despite personally observing him carry out of the store, in plain sight, non-store private property. Specifically, the *Henry* Court held, when discussing *Coblyn,* that "The absence of any indication that the merchandise was 'unpurchased' justifies the conclusion of the court that there were no reasonable grounds for believing that the defendant-customer was shoplifting." *Henry v. Shopper's World,* 200 N.J. Super. 14, 18 (App. Div. 1985).

Of course, in the instant case, Defendant only met Plaintiff *for the very first time* ***ever***, ***outside*** *its store,* and thus, **did not even observe him "leave the store"** like in *Coblyn.* So now we have a situation that is ***literally one step removed***, thus rendering Defendant to have **categorically lacked** "shopkeeper's privilege" for its actions.

WHEREFORE, Plaintiff respectfully requests that this Court of Appeals ORDER the Jefferson County District Court to **DENY** Defendant's MSJ, and **GRANT** Plaintiff's Cross-MSJ, in this particular matter.

Respectfully submitted on this, the 30th day of June, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 30th day of June, 2025, the foregoing **PLAINTIFF'S APPEAL OPENING BRIEF** was filed with the Court, and a true and correct copy of it was electronically sent to the following people:

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COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	
DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, CO 80401	
WILLIAM MONTGOMERY, Plaintiff, v. **BEST BUY, L.P.,** Defendant.	**▲ COURT USE ONLY ▲**
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	Court of Appeals' Case No: 2025CA327 Case No.: 2023CV00226 Division: 6
DEFENDANT-APPELLEE BEST BUY, L.P.'S ANSWER BRIEF	

<table>
<tr><td>COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3"></td></tr>
<tr><td>DISTRICT COURT, JEFFERSON COUNTY, COLORADO
100 Jefferson County Parkway
Golden, CO 80401</td></tr>
<tr><td>WILLIAM MONTGOMERY,

Plaintiff,

v.

BEST BUY, L.P.,

Defendant.</td></tr>
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2025CA327

Case No.: 2023CV00226

Division: 6</td></tr>
<tr><td colspan="2">DEFENDANT-APPELLEE BEST BUY, L.P.'S CERTIFICATE OF COMPLIANCE</td></tr>
</table>

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

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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 ptfs reply to defs response to ptfs 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. <u>*Discussion*</u>

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. <u>*Discussion*</u>

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]ppearance, 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

By: *s/ Sarah K. Vogel*
Lori K. Bell
Sarah K. Vogel

Attorneys for Best Buy Stores, L.P.

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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☐ U.S. Mail ☒ Email ☐ CCES

s/ Sarah K. Vogel

COLORADO COURT OF APPEALS 2 East 14th Ave Denver, CO 80203 (720) 625-5150	
Appeal From: **Jefferson County District Court** District Court Judge: **The Honorable Christopher Zenisek** District Court Case Number: **2023CV226**	
WILLIAM MONTGOMERY Plaintiff / Petitioner-Appellant vs. **BEST BUY STORES, L.P.** Defendant / Respondent-Appellee	▲ Court Use Only ▲
Party Without Attorney: **William Montgomery** 2443 S University Blvd # 129 Denver, CO 80210 (970) 412-5463 *zoinbergs@gmail.com*	Court Of Appeals Case No: **2025CA327** Jefferson County District Court Case No: **2023CV226**
PLAINTIFF'S APPEAL REPLY BRIEF	

Plaintiff, proceeding *pro se*, hereby submits to the Colorado Court of Appeals his APPEAL REPLY BRIEF, and in support thereof, states as follows:

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Those include:

Word Limits: My reply brief has **5,693** words, which does not exceed the 5,700 word limit allowed by this Court for appeal reply briefs.

I understand that my brief may be rejected if I fail to comply with these rules.

William Montgomery
William Montgomery

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ARGUMENT

I. THE DISTRICT COURT IMPERMISSIBLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

a. The District Court improperly considered inadmissible evidence introduced *for the very first time* in Defendant's MSJ reply brief

In Defendant's Appeal Answer Brief, it claims that "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." *Def's Answer Brief at 12.* Defendant further asserts that "'Issue' is defined in Black's Law Dictionary as 'the matter to be decided in court,' and is separate from factual evidence," *Def's Answer Brief at 16*, and that "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." *Def's Answer Brief at 17.*

These arguments fundamentally misconstrue the nature of summary judgment and procedural due process. While the general "issue" of shopkeeper's privilege or receipt possession might have been mentioned in Defendant's initial motion, the ***evidence*** to support those issues was conspicuously absent. Thus,

Defendant's statement made that "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," *Def's Answer Brief at 21,* **is factually incorrect.** The record clearly shows that the receipts and the affidavit of Mahmoud Abu-Shaweesh were ***NOT*** provided with Defendant's original Motion for Summary Judgment, *CF at 227.* Instead, they were introduced for the very first time in Defendant's MSJ reply brief, *CF at 729 and 741.* Therefore, Defendant did not "raise" these specific ***factual*** issues, nor did it "preserve" them through the briefing process from the outset.

Defendant's assertion that "'Issue' is defined in Black's Law Dictionary as 'the matter to be decided in court,' *and is separate from factual evidence*" (emphasis added) is intellectually dishonest in the context of summary judgment. In a summary judgment proceeding, **issues are inextricably linked to factual evidence.** By arguing that an "issue" is separate from factual evidence, Defendant attempts to ignore the fundamental standard for summary judgment. In essence, Defendant is trying to bypass the court's examination of the factual record to determine if a material factual dispute exists. C.R.C.P. Rule 56(c) explicitly states that summary judgment is appropriate only if "there is no genuine issue as to any material fact."

Thus, a "genuine issue" *literally* IS a <u>factual</u> dispute <u>supported by evidence</u>. Without factual evidence, a purported "issue" is nothing more than a conclusory statement, which is insufficient to create or sustain a claim or defense in summary judgment. *Suncor v. Aspen,* at 1269. As such, Defendant's failure to provide *actual* **<u>factual</u>** evidence in its **initial** motion meant that the "issues" it claims to have "raised" were not properly before the Court for summary judgment purposes.

Specifically, Defendant claims that "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." *Def's Answer Brief at 23.* However, no such "factual information" was ever provided in Defendant's **original** Motion for Summary Judgment. Only conclusory argument was provided, *CF at 233-237.* Thus, Mahmoud's affidavit introduced **<u>entirely new</u>** "factual information," not merely "additional evidence" to pre-existing facts, which demonstrates precisely the procedural impropriety.

Finally, Plaintiff's responses to these "issues" that he argued in his Response to Defendant's MSJ were made purely out of thoroughness and an abundance of caution, addressing all potential arguments even if unsupported. However, they do not mean that Defendant ever met ***<u>ITS</u>*** initial burden. The burden to establish the absence of a genuine issue of material fact <u>always rests with the moving party first</u>.

If the moving party fails to satisfy that initial burden, no amount of "pointing to" the nonmovant's arguments will ever be enough to change that.

b. The District Court erred by relying on conclusory statements

The District Court's Order repeatedly relied on conclusory statements made by Defendant, which lead it to conclude that Plaintiff "act[ed] in a manner that could reasonably be construed as suspicious," "intentionally created the misunderstanding" and "designed his conduct to inspire this belief." These statements, unsupported by admissible evidence, are legally insufficient to grant summary judgment.

Defendant's Motion for Summary Judgment was replete with unsubstantiated assertions that Plaintiff "targeted" the store, "orchestrated the interaction," "intentionally concealed merchandise," "shoplifted," "took Best Buy inventory," etc. As Plaintiff has argued numerous times, **every single one of these** are "purely conclusory statements" that lack "supporting documentation or testimony" which thereby render them "insufficient to create an issue of material fact." *Suncor v. Aspen,* 178 P.3d 1263, 1269 (Colo. App. 2008). Therefore, Defendant failed to satisfy **its** burden **as the movant** to show – *with real, concrete,* ***non-conclusory*** *statements and* ***actual*** *evidence* – that it possessed "shopkeeper's privilege" in the matter.

Next, with specific regard to conclusory statements made in relation to the issue of "receipt possession," in Defendant's Appeal Answer Brief it claims that

"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." *Def's Answer Brief at 21.* Defendant further claims that it "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." *Def's Answer Brief at 33.* However, merely "presenting arguments" in a motion for summary judgment opening brief, even those referencing legal treatises, *but whereby no supporting evidence is ever submitted,* is not enough to shift the burden as the movant. **Arguments must be supported by evidence, and conclusory statements will not suffice.** For example, Defendant's claim that "At all times, Plaintiff could have simply shown a receipt and ended the confrontation," *CF at 231,* is a prime example of a conclusory statement. It lacks any evidentiary foundation, such as proof that a receipt existed, proof that Plaintiff possessed it, or proof that whatever he had on him was even store merchandise for which a receipt might be associated.

Furthermore, Defendant's claim that "Plaintiff provided in his Response in Objection to Defendant's Motion for Summary Judgment that *Plaintiff always refuses to provide a receipt*," (emphasis added), *Def's Answer Brief at 34,* is a mischaracterization. While Plaintiff may have made a general statement in his

Response about his personal policy regarding receipt showing, this was a general, open-ended statement and not a specific admission of fact regarding the incident at Best Buy on November 25, 2022. A general statement about a personal habit does not constitute specific evidence relevant to the particular incident in question, nor does it absolve the moving party of its burden to factually support its arguments with. Crucially, Plaintiff explicitly argued in his Response to Defendant's MSJ that Defendant failed to present any admissible evidence that Plaintiff ***was even a customer of the Best Buy store*** on the date of the incident, *CF at 657.* Therefore, any general statement about Plaintiff's receipt showing habits is irrelevant to this specific case, as Plaintiff could not have refused to show a receipt for a purchase he did not make. Defendant's attempt to apply Plaintiff's general statement as a specific admission of conduct on the day of the incident is a conclusory leap, unsupported by specific evidence, that does not satisfy its burden as the movant.

Moreover, Defendant's claim that "Plaintiff asserted that *'all this talk about receipt showing is still an entirely moot point,"*" (emphasis added), *Def's Answer Brief at 18,* is also a misinterpretation of Plaintiff's argument. Plaintiff's statement was not a concession or an admission against interest. Instead, it was a strategic legal assertion emphasizing Defendant's fundamental failure to establish the foundational facts necessary to make the "receipt showing" issue relevant to the case. Plaintiff's

argument was, and remains, that without admissible evidence proving he was a customer of Best Buy on the date of the incident, or that he possessed a receipt for merchandise from Best Buy, any discussion about "receipt showing" is irrelevant and speculative. In the end, Plaintiff's statement highlights Defendant's evidentiary deficiencies, rather than providing support for its claims.

Finally, Defendant even admitted in its own Motion for Summary Judgment that it didn't ***actually*** know whether Plaintiff had a receipt on him or not that day. Specifically, Defendant stated that "It is **presumed** Plaintiff had such proof, because **if** he did not have proof of purchase..." *CF at 233.* The explicit use of the words "presumed" and "if" inherently indicates uncertainty and a lack of concrete factual assertion. Such are precisely the type of conclusory statements that *Suncor v. Aspen* deems insufficient to create a genuine issue of material fact.

c. The District Court improperly shifted the burden of proof and erroneously negated "confinement" based on Plaintiff's silence and/or refusal to accept unproven demands

In Defendant's Appeal Answer Brief, it claims that "Plaintiff[] fail[ed] to meet his burden of proof for his false imprisonment claim [that he *did not* have any 'means of escape' in the matter]." *Def's Answer Brief at 24.* However, it was Defendant who failed satisfy **its** burden **as the movant,** *in the first place,* to prove that Plaintiff ***DID*** have any "means of escape" available to him.

Specifically, the District Court relied on conclusory statements made by Defendant to effectively shift the burden to Plaintiff to now ***disprove*** the unsubstantiated claims that he had any "means of escape," which is an error of law. The moving party in a summary judgment motion always bears the initial burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *C.R.C.P. Rule 56(c).* ***Only if*** the moving party meets this initial burden does the burden then shift to the nonmoving party to show that a triable issue of fact exists. *Ginter v. Palmer Co.,* 196 Colo. 203, 585 P.2d 583 (1978). *See also Wolther v. Schaarschmidt,* 738 P.2d 25 (Colo. App. 1986) ("Moreover, while a party against whom a summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate."); *People v. Hernandez & Assocs., Inc.,* 736 P.2d 1238 (Colo. App. 1986) ("Although it may be perilous for the party opposing summary judgment not to file a responsive affidavit, *see* C.R.C.P. 56(e), election not to do so does not relieve the moving party of its burden to establish that summary judgment is appropriate.").

Defendant's initial motion failed to provide any admissible evidence to substantiate its claims that Plaintiff had any "means of escape," yet the District

Court adopted such claims as actual factual findings. However, as just mentioned, until the moving party has made a prima facie showing that there is no genuine issue of material fact, the burden does not shift to the nonmoving party. Therefore, Defendant's attempt to introduce evidence to meet this burden **only in its reply brief** was procedurally improper and prejudicial.

Case in point: the District Court erroneously negating the element of "confinement" in this matter by improperly **inferring –** from Plaintiff's silence and refusal to accept unproven demands – that he purportedly chose not to "avail himself" of two purported "means of escape" that he purportedly had available to him.

First, the District Court stated that "Plaintiff does not deny having a receipt at the time of the incident." *CF at 878.* This statement was the District Court's way of **inferring** that Plaintiff *did* have a receipt on him [that he purportedly *could* have shown as a "means of escape"]. However, such reasoning improperly shifted the burden onto Plaintiff to now prove (in his Response to Defendant's MSJ) that he *did not* have a receipt on him, when no such **fact** [that Plaintiff *did* have a receipt on him] was ever properly established by Defendant, **in its initial MSJ brief,** *in the first place.* Rather, Defendant merely supplied *conclusory statements* in its MSJ opening brief that "Plaintiff had a receipt on him."

Second, the District Court stated that "Defendant's employees can repeatedly be

heard telling Plaintiff that he can leave as soon as he gives back the stolen goods" and that "Not once during the detainment does Plaintiff deny stealing." *CF at 878.* These statements were the District Court's way of **inferring** that Plaintiff *did* have stolen merchandise on him [that he purportedly *could* have returned as a "means of escape"].[12] However, once again, such reasoning improperly shifted the burden onto Plaintiff to now prove (in his Response to Defendant's MSJ) that he *did not* have stolen merchandise on him, when no such **fact** [that Plaintiff *did* have stolen merchandise him] was ever properly established by Defendant, **in its initial MSJ brief,** *in the first place.* Rather, Defendant, once again, merely supplied *conclusory statements* in its MSJ opening brief that "Plaintiff had stolen merchandise on him."

Therefore, the District Court's **inferences** that Plaintiff's non-denials somehow negated the "confinement" element of his false imprisonment claim is a fundamental misapplication of summary judgment law. Instead, the only appropriate decision for the District Court to have made in this matter was to **infer**

1 It should be noted that this is an **utterly terrible argument** in its own right. That is, it strains SERIOUS credulity that if Plaintiff *did* steal something from the store, then *did* return it upon being asked to, **that Defendant ***WOULD NOT*** *ABSOLUTELY* and *UNQUESTIONABLY* continue to detain him in the mean time until the police arrived to begin processing him!** At that point, the act of "returning stolen merchandise" would be *the exact opposite* of an "escape path."

2 Also worth noting is that ***EVEN IF*** Plaintiff were to "hand over" merchandise, *regardless of whether it be stolen, owned by him, or perhaps property that he had been erroneously attempting to return to the wrong store,* such would ***STILL*** not nullify his unlawful detention from having occurred in the matter. This is because **"The exercise of dominion over the property serves also to exercise dominion over the person owning such property."** *Burrow v. K-Mart Corp,* 166 Ga. App. 284, 285 (1983). That is, "it may be inferred that the employee intended to restrain and control both the property and the person of the plaintiff until the search was completed." *Id.*

that Plaintiff, the nonmoving party, ***DID NOT*** have a receipt ***OR*** stolen merchandise on him, since Defendant failed to supply actual factual evidence that ***EITHER*** was true **with its initial MSJ.** As the District Court *itself* stated in its own Order, *CF at 877,* "In assessing a summary judgment motion, a court must view all facts in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party." *Vigil v. Franklin,* 81 P.3d 1084, 1086 (Colo. App. 2003), rev'd on other grounds, 103 P.3d322 (Colo. 2004).

d. The District Court failed to properly infer facts from Plaintiff's evidence

Even though it was *not even remotely necessary* for Plaintiff to provide "counter" evidence in his Response to Defendant's MSJ – because of how Defendant, **as the movant,** failed "itself [to] demonstrate the lack of a genuine factual issue," *Wolther v. Schaarschmidt,* 738 P.2d 25 (Colo. App. 1986) – it is worth reiterating that the District Court ***STILL*** independently, erroneously, and unlawfully concluded that "Plaintiff has made no statements and submitted no proof as to his actions inside the Best Buy immediately preceding the incident." *CF at 881.* This finding directly contradicts the record and demonstrates the District Court's failure to apply the fundamental summary judgment standard

requiring all reasonable inferences to be drawn **in favor of the nonmoving party.**

As detailed in Plaintiff's Response to Defendant's MSJ, Plaintiff submitted an affidavit containing several critical statements regarding his actions on November 25, 2022. *CF at 621, ¶¶ 5, 24, and 25.* While these statements did not explicitly use the words "inside the store," it strains credulity that they would not be referencing Plaintiff's actions completely inside a store from which he was literally just found standing right outside of.

Therefore, the absence of such explicit "inside the store" phrasing is not fatal to Plaintiff's position. In assessing a summary judgment motion, a court must view all facts in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party. *Vigil v. Franklin,* at 1086. By failing to **infer** that Plaintiff's sworn statements applied to his actions **inside** the store, the District Court violated his fundamental rights in a summary judgment proceeding.

The District Court also failed to account for a police report that Plaintiff independently and properly admitted into the record, upon which such entry was not disputed by Defendant, and to which does constitute "proof as to his actions inside the Best Buy immediately preceding the incident." *CF at 615.* This further demonstrates

the District Court's selective and improper consideration of the evidence before it.

e. The District Court misinterpreted key jury instructions

In Plaintiff's Appeal Opening Brief, he explained that he "was nothing more than a complete and total stranger" to three store employees, that he was thereby not required to "show a receipt" to, "answer questions" for, or "empty his pockets" in front of to satisfy their baseless curiosities with [let alone serve as some "escape path" for which a complete and total stranger is not required to "avail" himself of]. *Ptf's Opening Brief at 40.* Even though Plaintiff explained, *supra,* how "returning stolen goods" and "showing a receipt" are already not valid "means of escape," it is worth reiterating why the act of "emptying one's pockets" is not a valid one, either.

Specifically, for ***all*** purported "means of escape," any misapplication of Colorado Civil Jury Instruction 21:2(1) that demonstrates a fundamental misinterpretation and abuse of its key phrases impermissibly warps legislative intent and leads to absurd results that undermine the tort of false imprisonment.

When construing a jury instruction, a court must read it "as a whole in order to give consistent, harmonious, and sensible effect to all of its parts," and should not interpret it in ways that "defeat the legislature's obvious intent or render part of the [jury instruction] either 'meaningless' or 'absurd.'" *Welby Gardens v. Adams County Bd. of Equalization,* 71 P.3d 992, 995 (Colo. 2003); *Reg'l Transp. Dist. v.*

Lopez, 916 P.2d 1187, 1192 (Colo. 1996). Most importantly, **"Courts may not impute their own meaning to otherwise clear statutory language, nor assume a legislative intent that would vary the words used by the General Assembly."** *People v. Gholston,* 26 P.3d 1, 7 (Colo. App. 2001).

First, a Court is not allowed to vary the plain and ordinary meaning of "escape." "Escape" refers to gaining freedom from confinement *through one's own efforts,* typically by flight or breaking free from physical restraint. It does not encompass a conditional "release" granted by the detainer upon compliance with demands. The Legislature, in crafting laws related to false imprisonment and shopkeeper's privilege, clearly intended "escape" to refer to **a physical act of self-liberation,** not an act of proving innocence or surrendering property. If a Court impermissibly expands the definition of "escape" to include such conditional acts of compliance, it will effectively render the tort of false imprisonment meaningless, as a merchant can now ***literally always*** claim the patron "failed to escape" by not complying with the *any number of* arbitrary demands that it can possibly think up. This interpretation creates an absurd result, contrary to established principles of statutory construction.

Next, a Court is not allowed to improperly expand the definition of "physical barriers" to include people. The plain and ordinary meaning of "barrier" refers to inanimate objects or structures, as evidenced by dictionary definitions and synonyms

like “barricade,” “fence,” “hedge,” and “wall.” The Colorado jury instruction itself separately addresses restriction by “physical force” (CJI 21:2(2)) and “submission to another” (CJI 21:2(5)). Therefore, to include *actual people* as “physical barriers” would render these other distinct methods of restriction redundant and meaningless, which is contrary to established principles of statutory construction.

Next, a Court is not allowed to misconstrue “unreasonable risk of harm” to encompass minor inconveniences or the “harm” of having to prove innocence. The term “harm” in the proper context refers to physical or mental *violence* or *damage*, not mere embarrassment or inconvenience. While the aforementioned actions would indeed not subject a patron to “physical or mental damage,” attempting to break through employees physically blocking an exit *would* practically always involve an “unreasonable risk of harm.” This interpretation is the only one that gives sensible effect to the phrase in conjunction with “physical barriers” and avoids an absurd result where any perceived inconvenience negates a false imprisonment claim.

Finally, a Court is not allowed to misapply the “for any amount of time, no matter how short” instruction. That is, a Court's extensive focus on whether a patron could have ended a detention by complying with demands implicitly diminishes the significance of the initial confinement. Rather, the tort of false imprisonment is complete the moment unlawful confinement occurs, regardless of

its duration. The explicit phrase **"no matter how short"** emphasizes that even a *momentary* unlawful detention is compensable. Therefore, the "means of escape" argument, even if validly applied, addresses the *continuation* of confinement, not the lawfulness of its inception. Thus, if a Court focuses too much on post-confinement actions, it may impermissibly overlook whether the initial detention itself was lawful, which is the primary inquiry for false imprisonment.

Of course, it is always worth reiterating that requiring a patron to "empty their pockets" is *undoubtedly* a **"search"** they are not required to consent to [nor are merchants are allowed to "bootstrap" such refusal to consent into justification for a detention that renders that very consent unnecessary]. *See Florida v. Bostick,* 501 U.S. 429, 111 S. Ct. 2382 (1991); *United States v. Hunnicutt,* 135 F.3d 1345 (10th Cir. 1998); *United States v. Wood,* 106 F.3d 942, 946 (10th Cir. 1997).

II. THE DISTRICT COURT IMPERMISSIBLY DENIED PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

a. Authentication (Rule 901) and Hearsay (Rule 803) are distinct and independent legal requirements

Defendant contends that the business records (i.e. receipts) it submitted to the District Court were admissible under a combination of Colorado Rules of Evidence Rule 901(b)(4) and Rule 803(6). However, such an argument conflates two separate evidentiary requirements. C.R.E. Rule 901 deals with authentication,

which is the process of establishing that evidence is what its proponent claims it to be. C.R.E. Rule 803 deals with exceptions to the hearsay rule. However, "Authentication [alone] does not guarantee admissibility." *People v. N.T.B.,* 457 P.3d 126, 15 (2019). "Evidence must also satisfy rules governing relevance and must not be excludable under other bars to admission, such as hearsay." *Gonzales v. People,* 471 P.3d 1059, 12 (2020). "Put simply, authentication is necessary, but insufficient, for the admission of evidence." *Id.*

Thus, while Defendant argues that the receipts were authenticated under Rule 901(b)(4) by their dates, times, addresses, bar codes, and Plaintiff's member ID number, **this is an entirely irrelevant and moot point,** as such does not negate the need for a proper foundation to be laid that satisfies Rule 803(6) regarding hearsay. Accordingly, Plaintiff stated in his briefings that the receipts were not "accompanied by an affidavit of its custodian or other qualified witness" as **explicitly** required by C.R.E. Rule 803(6) and discussed in *Henderson v. Master Klean Janitorial,* 70 P.3d 612, 617 (Colo. App. 2003), which thereby rendered them **wholly inadmissible** – in *either* Defendant's MSJ *or* Plaintiff's Cross-MSJ.

Indeed, Plaintiff isn't even alone on this issue, as *United States v. Watkins,* 519 F.2d 294, 296 (D.C. Cir. 1975) unambiguously held that "it is a matter of horn-book law that receipts are hearsay as independent evidence of the making of payment."

Therefore, for a store receipt to be ***actually*** admissible for its *truth* – that a *particular* patron made a *particular* purchase at a *particular* store on a *particular* date – such requires a **foundation** showing that the record was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make such a record." *C.R.E. Rule 803(6).* Defendant failed to provide such a foundation; and without such a foundation, the receipts are inadmissible hearsay ***regardless of any purported authentication.*** Cases like *Santa Fe Energy Co. v. Baca,* 673 P.2d 374 (1983), *Ed Hackstaff Concrete v. Powder Ridge Condo.,* 679 P.2d 1112 (1984), *Herman v. Steamboat Springs Super 8 Motel,* 634 P.2d 1005 (1981), *Fasso v. Straten,* 640 P.2d 272 (1982), and *Great West Food Packers v. Longmont Foods Co.,* 636 P.2d 1331 (1981) all underscore the necessity of a proper foundation for business records to be admitted under the hearsay exception.

b. The District Court impermissibly accepted "conclusory inferences" that *Plaintiff* made the associated purchase

Even if the receipt exhibits were admissible absent an accompanied affidavit (which they are not), they do not demonstrate that ***Plaintiff*** made the purchase. In Defendant's Appeal Answer Brief, it claims that "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 Defendant store location on the date of the incident, directly responding to Plaintiff's arguments." *Def's Answer Brief at 22.* However, the receipt exhibits only demonstrate that ***purchases were made using Plaintiff's credit card,*** not that he personally made any purchases. It is still technically [yet another] conclusory statement to effectively say, as Defendant is doing, that "because Plaintiff's name was on the credit card transaction receipt, he was the one who personally purchased the item." **This constitutes a "conclusory inference,"** not a reasonable one from undisputed facts; it requires a significant logical leap without direct supporting evidence because of how the mere presence of a name on a credit card receipt, without more, does not establish that the cardholder was the person who personally made the purchase at that specific time and place. Indeed, many people use credit cards belonging to others (e.g., family members, employers). Thus, the District Court's acceptance of this conclusory inference, rather than requiring direct evidence of personal involvement, was an error.

Furthermore, the District Court's reliance on the weak, inferential, and purely conclusory statement about who made the purchase improperly shifted the burden onto Plaintiff. For Defendant to defeat Plaintiff's Cross-Motion for Summary Judgment, it needed to show that there was a genuine issue of material fact regarding

who made the purchase. It failed to do so with "significantly probative" evidence. That is, evidence that only creates a "merely colorable" dispute is insufficient to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). Thus, Plaintiff had no obligation to ***create*** such a dispute ***for*** Defendant; Defendant already failed to do so ***with its own*** evidence.

III. THE DISTRICT COURT MISCHARACTERIZED PLAINTIFF'S ACTIONS AS THAT OF UNLAWFUL "ENTRAPMENT"

a. Defendant's baseless arguments of "baiting" and "entrapment"

In Defendant's MSJ, it attempted to characterize Plaintiff's behavior as that of unlawful "targeting," "baiting," and "entrapment." *CF at 231, 235, and 237.* Defendant now further asserts in its Appeal Answer Brief that "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," *Def's Answer Brief at 22.* However, such a statement inadvertently ***supports*** Plaintiff's position. That is, Plaintiff's purported "targeting" of such locations has never been nefarious, but rather a necessary response to a widespread and legally problematic retail practice.

Specifically, the "locations in which retail service workers routinely request

customers present a sales receipt upon exit from the store premises" are precisely **the locations where unlawful detentions are most likely to occur.** They are *inherently fertile ground* for violating a patron's rights. By identifying these locations, Plaintiff has not manufactured claims, but rather challenged practices that, by their very nature, are prone to infringing on constitutional and common law rights. Defendant's own characterization of Plaintiff's "modus operandi" thus serves ***to only highlight*** the systemic issue of unlawful receipt checking practices that lead to false imprisonment, rather than demonstrating any nefarious intent on Plaintiff's part.

Of course, it bears repeating, ONE MORE TIME, that all this talk about "receipt checking" **IS **STILL**** **AN ENTIRELY MOOT POINT,** as Defendant failed to show the District Court, with any tangible, admissible, **non-conclusory, non-hearsay** evidence, *whatsoever*, that Plaintiff's case ***has anything to do with receipts.*** Defendant failed to show the District Court that it *asked Plaintiff to show a receipt,* that he *refused to show one upon request,* that he *had one on him in the first place,* or that *whatever he held in his hands or was located in his pockets was even store merchandise for which one might have been associated.* Indeed, Defendant utterly failed to show the District Court ***that Plaintiff was even a customer of it that day.***

b. The District Court's baseless ruling of "baiting" and "entrapment"

In response to Defendant's conclusory, unsubstantiated, and defamatory

statements that Plaintiff "targeted," "baited," and "entrapped," it, the District Court ruled that Plaintiff "act[ed] in a manner that could reasonably be construed as suspicious," "intentionally created the misunderstanding for purposes of his later lawsuit," and "designed his conduct to inspire this belief." *CF at 879, 880, and 882.* However, these are all legally baseless attempts to invoke a *de facto* "entrapment" defense, and as such, are fundamentally flawed for several reasons.

First, entrapment is an affirmative defense typically asserted in criminal cases where a defendant admits to committing the crime but argues they were improperly induced by law enforcement. As held in *People v. Hendrickson,* 45 P.3d 786, 791 (Colo. App. 2002), "Because entrapment is an affirmative defense, it does not apply where a defendant denies committing the crime." Here, Defendant explicitly denies falsely imprisoning Plaintiff – by way of claiming that it either didn't conceptually detain him in the first place, or that it had "shopkeeper's privilege" for its actions in the alternative. **Therefore, Defendant is legally precluded from asserting an entrapment defense.**

Second, Plaintiff's actions were merely the exercise of his rights, not an inducement to commit a tort. Plaintiff's refusal to cooperate with an unlawful detention (i.e. refusal to answer questions and/or refusal to consent to searches) is a constitutional right. As established in *U.S. v. Carter,* 985 F.2d 1095, 1097 (D.C. Cir.

1993), "The constitutional right to withdraw one's consent to a search would be of little value if the very fact of choosing to exercise that right could serve as any part of the basis for finding the reasonable suspicion that makes consent unnecessary." *See also Boxberger v. Highway Dept,* 126 Colo. 438, 440 (1952) ("The rights of a citizen remain the same whether they collide with an individual or the government."). Therefore, Defendant's attempt to "bootstrap" Plaintiff's exercise of his rights into justification for a detention is patently illegal.

Third, and most critically, the District Court formulated its nefarious "sting operation" conclusion based on past behavior that was never even applicable in the instant circumstance. That is, the supposed "elements" of Plaintiff's "modus operandi" (e.g., using "back" registers, not using plastic bags, refusing to show receipts) were drawn from prior cases involving a different merchant (Walmart) with different policies. In the instant Best Buy case:

- Best Buy does not utilize "back" registers (they have registers littered all throughout their stores).

- Best Buy phased out plastic bags in July 2022, *CF at 907.*

- Best Buy moved to digital-only receipts in November 2017, *CF at 830,* eliminating the physical receipt to "refuse to show."

Furthermore, the only "evidence" purportedly showing that Plaintiff "acted"

in a suspicious manner (e.g., concealing merchandise) was Mahmoud Abu-Shaweesh's affidavit, which was not submitted with Defendant's **initial** MSJ brief, *CF at 227,* and was independently inadmissible in Plaintiff's Cross-MSJ briefing because it **blatantly contradicts** his video record of the event (as argued in Plaintiff's Appeal Opening Brief and Cross-MSJ Reply Brief). Therefore, the District Court's explicit conclusion that Plaintiff "designed his conduct to inspire this belief" is not only a speculative finding of intent (which is inappropriate for summary judgment), but it is also based on a factual premise that is demonstrably false and inapplicable to the specific incident at Best Buy.

Finally, Plaintiff's video demonstrates that Defendant's employees showed no reluctance, but rather *indifference* and even *eagerness* to detain him, further undermining any claim of improper inducement.

CONCLUSION

The District Court improperly considered inadmissible evidence introduced belatedly in a reply brief, relied on conclusory statements that lacked evidentiary support, improperly shifted the burden of proof, failed to infer facts in the light most favorable to the nonmoving party, misinterpreted key jury instructions, misapplied the rules of authentication and hearsay, and allowed an entrapment defense to be improperly pled. These errors deprived Plaintiff of a fair opportunity to present his

case and resulted in a judgment that is not supported by the admissible record.

WHEREFORE, Plaintiff respectfully requests that this Court of Appeals **REVERSE** the District Court's granting of Defendant's Motion For Summary Judgment, so that it can then **DENY** Defendant's Motion for Summary Judgment, and **GRANT** Plaintiff's Cross-Motion for Summary Judgment.

Respectfully submitted on this, the 8th day of September, 2025.

William Montgomery
William Montgomery

CERTIFICATE OF SERVICE

I hereby certify that on this, the 8th day of September, 2025, the foregoing **PLAINTIFF'S APPEAL REPLY BRIEF** was filed with the Court, and a true and correct copy of it was electronically sent to the following people:

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25CA0327 Montgomery v Best Buy 02-19-2026 modified

COLORADO COURT OF APPEALS

Court of Appeals No. 25CA0327
Jefferson County District Court No. 23CV226
Honorable Christopher C. Zenisek, Judge

William Montgomery,

Plaintiff-Appellant,

v.

Best Buy, L.P.,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE YUN
Grove and Schock, JJ., concur

Opinion Modified
on the Court's Own Motion
Petition for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 19, 2026

William Montgomery, Pro Se

Montgomery Amatuzio, Lori K. Bell, Sarah K. Vogel, Denver, Colorado, for Defendant-Appellee

CAPTION is modified as follows:

Caption page currently reads:

Montgomery Amutzio, Lori K. Bell, Sarah K. Vogel, Denver, Colorado, for Defendant-Appellee

Caption page now reads:

Montgomery Amatuzio, Lori K. Bell, Sarah K. Vogel, Denver, Colorado, for Defendant-Appellee

¶ 1 Plaintiff, William Montgomery, appeals the district court's order granting the motion for summary judgment (MSJ) filed by defendant, Best Buy, L.P., and denying the cross-MSJ filed by Montgomery. He contends that the court (1) relied on inadmissible evidence; (2) improperly considered evidence appended to Best Buy's reply brief; and (3) failed to properly apply the summary judgment standard. We reject these contentions and affirm the judgment.

I. Background

¶ 2 Montgomery has a long history of filing lawsuits against large retail chains, their employees, and police officers contacted by the employees.[1] Each lawsuit is based on similar facts. Montgomery

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[1] *See Montgomery v. Holweger*, 529 F. Supp. 3d 1212 (D. Colo. 2021) (federal district court opinion granting MSJ in favor of defendant on Montgomery's claims); *Montgomery v. Calvano*, No. 21-1134, 2022 WL 1132212 (10th Cir. Apr. 18, 2022) (federal appellate unpublished opinion affirming grant of MSJ in favor of defendant); *Montgomery v. Walmart Stores, Inc.*, (Colo. App. No. 21CA0359, May 12, 2022) (not published pursuant to C.A.R. 35(e)) (state appellate opinion affirming grant of MSJ in favor of defendants in plaintiff's district court case); *Montgomery v. Anderson*, No. 21-cv-03191, 2022 WL 3584895 (D. Colo. Aug. 22, 2022) (federal district court unpublished order granting MSJ in favor of defendant); *Montgomery v. Walmart, Inc.*, (Colo. App. No. 22CA0625, June 1, 2023) (not published pursuant to

walks into a store and behaves in a way that makes employees suspect theft — such as leaving the store with items in hand but no bag or receipt, choosing exits that are out of sight from the register he used, or entering one store with an item purchased from another location. When employees approach him to investigate, he records the interaction with a device that he brings with him. And while the employees investigate, he remains uncooperative — refusing to show a receipt until police arrive, keeping his hands in his pockets throughout the interaction, or ignoring the employees' inquiries or requests.

C.A.R. 35(e)) (state appellate opinion affirming grant of MSJ in favor of defendant in plaintiff's six district court cases); *Montgomery v. Cohn*, No. 22-cv-00011, 2023 WL 2366732 (D. Colo. Mar. 3, 2023) (federal district court unpublished order granting MSJ in favor of defendant); *Montgomery v. Cruz*, No. 20-cv-03189, 2023 WL 1437878 (D. Colo. Feb. 1, 2023) (federal district court unpublished report and recommendation granting MSJ in favor of defendant), *adopted in part and rejected in part*, 2023 WL 5938913 (D. Colo. Sep. 11, 2023), *aff'd*, 162 F.4th 1285 (10th Cir. 2026); *Montgomery v. Lore*, No. 21-cv-02553, 2023 WL 2423325 (D. Colo. Mar. 9, 2023) (federal district court unpublished order granting MSJ in favor of defendant); *Montgomery v. Walmart Inc.*, (Colo. App. No. 23CA0159, Oct. 26, 2023) (not published pursuant to C.A.R. 35(e)) (state appellate opinion affirming grant of MSJ in favor of defendant on plaintiff's claims in two district court cases).

¶ 3 The facts of these encounters vary slightly, but the pattern remains the same. After these incidents, Montgomery files lawsuits that raise a combination of claims, including assault, false imprisonment, defamation, battery, negligence, malicious prosecution, and, if police were involved, claims under 42 U.S.C. § 1983 for Fourth Amendment violations.

A. Montgomery's Complaint

¶ 4 The present case follows this pattern. In his complaint, Montgomery brought claims of assault, false imprisonment, and defamation per se against Best Buy for the actions of its employees. He alleged that he was standing outside a Best Buy store at 2:19 p.m. when three employees approached him, accused him of theft, and threatened and detained him for twelve minutes. Best Buy denied these claims and invoked the shopkeeper's privilege. *See* § 18-4-407, C.R.S. 2025.[2]

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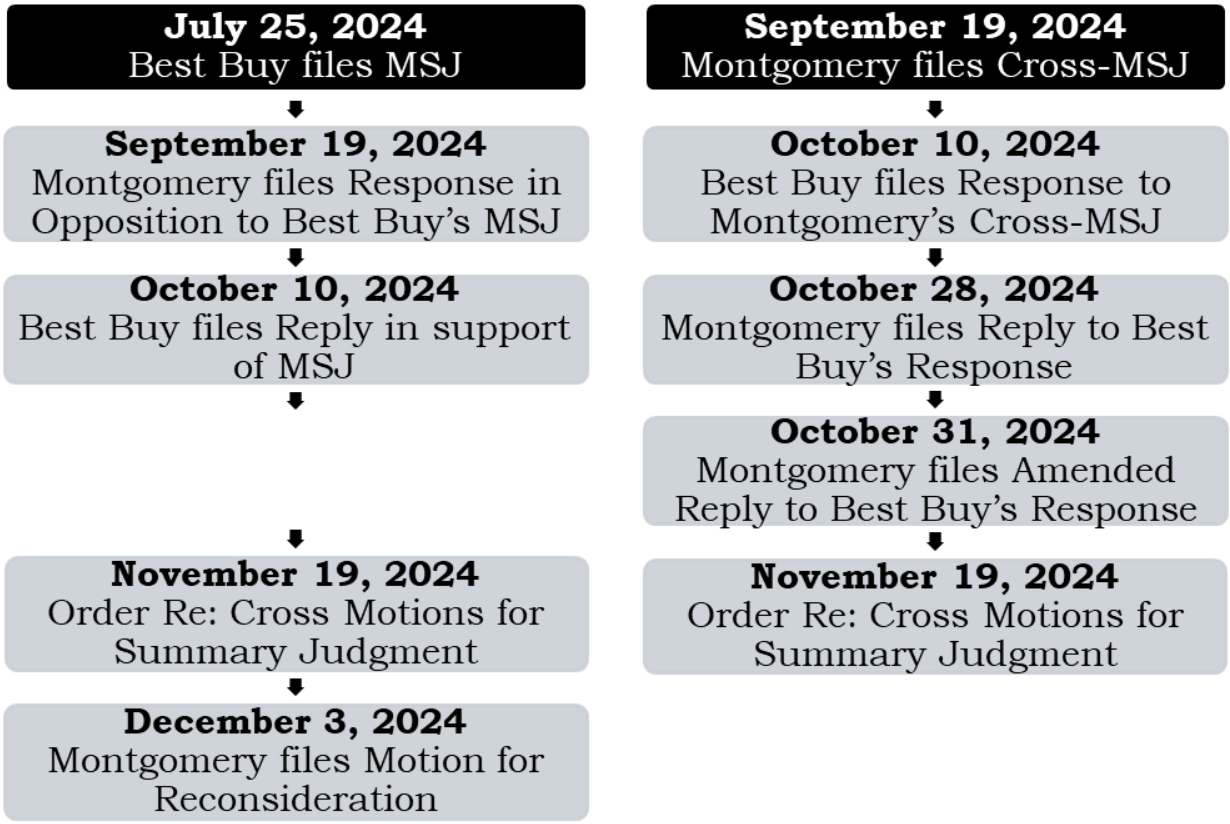
[2] The shopkeeper's privilege offers "protection from . . . claims based on [slander and false imprisonment] to one who[,] acting in good faith and upon probable cause based upon reasonable grounds[,] questions [a suspected shoplifter]." *J.S. Dillon & Sons Stores Co. v. Carrington*, 455 P.2d 201, 203 (Colo. 1969).

B. MSJ Filings

¶ 5 Both parties filed motions for summary judgment. For clarity, the chart below shows the timelines for the parties' motions and related filings.



1. Best Buy's MSJ and Related Responsive Filings

¶ 6 Best Buy argued in its MSJ that (1) Montgomery failed to establish a prima facie case for his claims of false imprisonment,

defamation per se, and assault;[3] and (2) even if he could establish a prima facie case for the former two, the employees' actions were protected by the shopkeeper's privilege.

¶ 7 Best Buy's "statement of facts" asserted that Montgomery left the store with merchandise and refused to produce his receipt when asked by employees who suspected theft. Best Buy attached exhibits, including Montgomery's pen camera footage of the incident outside the store and a YouTube video posted by Montgomery. In his YouTube video, Montgomery explains how he gets "free lawsuits" by running a "sting operation" against merchants and then withholding information, like whether he "[had] a receipt" or "was a customer," in the lawsuits he files.

¶ 8 In his response, Montgomery disagreed with Best Buy's "statement of facts," specifically "DEN[YING] that he 'exited' the store, or that he did so with any of the store's 'merchandise' in his possession." Instead, he filed an affidavit, stating as follows:

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[3] Because Montgomery did not develop any argument addressing the court's grant of summary judgment on his assault claim in his opening brief, we do not discuss the claim further. *See In re Estate of Chavez*, 2022 COA 89M, ¶ 26 ("We don't consider undeveloped and unsupported arguments." (quoting *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 41 n.12)).

- "On or about November 25[,] 2022, at approximately 2:19 p.m. I was standing outside a Best Buy store . . . waiting for my brother."
- "I had been standing . . . for about five minutes before I was approached by several Best Buy employees."
- "Prior to being approached by [the Best Buy employees], at no time whatsoever had I ever once met, seen, identify [sic], pass by [sic], or been located anywhere physically near [the employees] on that day . . . this was the very first time that I had ever become aware as to the very existence of said Best Buy employees, whatsoever, in the first place."
- "At no point in time, on [that day] had I ever once 'concealed' anything in front of (let alone not in front of) anybody, ever, period."
- "At no point in time, on that day . . . had I ever once placed into, or removed, anything from any pant pocket in front of anybody, ever, period. Whatever was located in my pant pockets remained there before, throughout, and after my interaction with the Best Buy employees."

He also included the results of his police records request for calls originating from the Best Buy store on the day of the incident, which showed that there were "2 calls for service" in the morning.

¶ 9 Best Buy filed its reply, reiterating that Montgomery failed to establish a prima facie case for each claim and, alternatively, that the shopkeeper's privilege barred his claims of defamation and false imprisonment. Best Buy added two new exhibits to those it had already submitted. The first consisted of Montgomery's Best Buy receipts from the day of the incident, including one from the store where he was questioned with his name on it and a timestamp of 2:20 p.m. The second was an affidavit from the general manager of the store in question, stating as follows:

- He observed Montgomery "remove two boxes of JLab headphones/earbuds from the shelf, place them in his pocket and immediately leave the Best Buy Store."
- He observed "the same activity on security video."
- Montgomery declined to show his receipt when "asked by a loss prevention employee."
- He "exited the store to request Mr. Montgomery return the product from his pocket."

- He "walked back inside the store" once he "received confirmation that the police had been contacted."

2. Montgomery's Cross-MSJ and Related Responsive Filings

¶ 10 Montgomery filed his cross-MSJ, arguing that (1) he established his claims, and (2) the shopkeeper's privilege did not apply since the employees lacked probable cause. He again attached the pen camera footage and the results of his police records request, and he referenced his previously filed affidavit. He reiterated that he was waiting outside the store at 2:19 p.m. when the employees "took [him] by surprise."

¶ 11 Best Buy filed its response, which reiterated the arguments from its own MSJ — specifically, that Montgomery could not establish a prima facie case for any claim and that the shopkeeper's privilege applied. In support, Best Buy attached to its response the same exhibits that were attached to its reply, including the receipts and the manager's affidavit.

¶ 12 Montgomery filed a reply and an amended reply. His arguments closely followed his previous filings and referred to the same exhibits, with two exceptions. First, he submitted a second affidavit stating that he had authorized others to use his credit card

and opted to receive receipts by email from Best Buy. Second, he challenged the admissibility of the receipt from the store where he was questioned and the manager's affidavit, arguing that both were hearsay and that the manager's affidavit was contradicted by the record.

3. Summary Judgment Order

¶ 13 The district court granted Best Buy's MSJ on Montgomery's claims of false imprisonment, defamation per se, and assault, and denied Montgomery's cross-MSJ on the same claims. The court ruled that each of Montgomery's claims failed as a matter of law and, alternatively, that the shopkeeper's privilege protected Best Buy from his claims of defamation and false imprisonment.

¶ 14 As to his false imprisonment claim, the court noted that Montgomery's claim fails if he refused to use "a means of escape of which he is himself aware merely because it entails a slight inconvenience." Restatement (Second) of Torts § 36 cmt a (A.L.I. 1965). The court explained that Best Buy offered evidence that Montgomery "had a receipt from Best Buy from the date and time of the incident with his name on it, providing proof of purchase," and that Montgomery "does not deny having a receipt at the time of the

incident." Accordingly, the court concluded that "showing proof of purchase," although a slight inconvenience, "would have freed Montgomery from the false imprisonment."

¶ 15 As for his defamation per se claim, the court noted that Montgomery must prove that the Best Buy employees were at least negligent in accusing him of stealing merchandise from the store. Restatement (Second) of Torts § 580B (A.L.I. 1977). The court noted that the manager "saw [Montgomery] remove merchandise from the shelf and place it in his pocket," Montgomery provided no contrary evidence about his actions inside the store, and his YouTube video corroborated "how [he] goes to stores and acts in a manner that could reasonably be construed as suspicious." Based on this evidence, the court ruled that this claim failed because the employees were not negligent in accusing Montgomery of stealing store merchandise.

¶ 16 As to the shopkeeper's privilege, the court noted that it shields Best Buy and its employees from liability if they, acting in good faith and with probable cause, detained Montgomery to question him about theft in a reasonable manner. *See* § 18-4-407. The court concluded that the timestamped receipt proved Montgomery

was inside the store with merchandise before the incident. The court then stated that the manager's affidavit supported probable cause — Montgomery removed "two boxes of JLab headphones/earbuds from the shelf, place[d] them in his pocket and immediately [left] the Best Buy Store, which was then confirmed on the store security video," and Montgomery "refused to show his receipt upon being asked." The court noted that neither of Montgomery's affidavits contradicted the manager's affidavit since Montgomery "claim[ed] only that he had been waiting outside of the Best Buy for five minutes when he was approached." Thus, the court ruled that the shopkeeper's privilege would protect the employees' actions, "even if Plaintiff were able to make a prima facie case of false imprisonment and defamation."

4. Motion for Reconsideration

¶ 17 Montgomery then filed a motion for reconsideration, arguing that he was denied fair notice and an opportunity to respond to the two exhibits — the manager's affidavit and the receipts — that Best Buy submitted with (1) its reply in support of its MSJ and (2) its response to Montgomery's cross-MSJ. The court denied the motion, noting that it had considered all the briefs and exhibits related to

both Best Buy's MSJ and Montgomery's cross-MSJ together. It explained that Montgomery was given an opportunity to respond to the two exhibits because he filed his reply in support of his cross-MSJ after the two exhibits were filed and did, in fact, file his second affidavit along with his reply in support of his cross-MSJ.

¶ 18 Montgomery now appeals.

II. Inadmissible Evidence

¶ 19 Montgomery contends that the district court relied on inadmissible hearsay evidence in granting Best Buy's MSJ and denying his cross-MSJ — namely, his receipt from the store where he was questioned and the manager's affidavit.[4] We disagree.

A. Applicable Law and Standard of Review

¶ 20 In deciding whether to grant or deny a party's MSJ, the district court must consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits. C.R.C.P. 56(c). However, a court should not consider evidence that would be inadmissible at trial. *St. Croix v. Univ. of Colo. Health Scis.*

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[4] Montgomery also argues the court impermissibly relied on conclusory statements from Best Buy's MSJ to support its order. We disagree because the court cites specific exhibits supporting its conclusions.

Ctr., 166 P.3d 230, 244 (Colo. App. 2007). While the form of the evidence, such as an affidavit, does not need to be admissible at trial, the "content or substance of the evidence must be admissible." *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 16 (quoting *Johnson v. Weld County*, 594 F.3d 1202, 1210 (10th Cir. 2010)).

¶ 21 The hearsay rule generally prohibits the admission of any "statement other than one made by the declarant while testifying at the trial or hearing" that is offered "to prove the truth of the matter asserted." CRE 801(c), 802. If an out-of-court statement is not offered for its truth, then it is admissible as nonhearsay evidence as long as it is relevant. *People v. Phillips*, 2012 COA 176, ¶ 62. For example, a statement is not hearsay when the statement is offered to show its effect on the listener or to explain the listener's later actions. *Id.* at ¶ 107.

¶ 22 If a statement is hearsay, it is inadmissible unless it falls within a statutory exception or an enumerated exception in CRE 803 or 804. *See* CRE 802. Under CRE 803(6), a court can admit into evidence records of regularly conducted activity when supported by an adequate foundational showing that (1) the document was made at or near the time of the matters recorded in

it; (2) the document was prepared by, or from information transmitted by, a person with knowledge of the matters recorded; (3) the person who recorded the document did so as part of a regularly conducted business activity; (4) it was the regular practice of that business activity to make such documents; and (5) the document was retained and kept in the course of a regularly conducted business activity. *People v. Flores-Lozano*, 2016 COA 149, ¶ 13.

¶ 23 Furthermore, "[e]ven if a party introduces a computer-generated record to prove the truth of its contents, that record may not constitute hearsay if the computer created the record automatically without human input or interpretation." *People v. N.T.B.*, 2019 COA 150, ¶ 22. The computer generated record is not hearsay because no "person" or "declarant" made a communicative "statement" within the meaning of CRE 801. *People v. Hamilton*, 2019 COA 101, ¶ 24.

¶ 24 We review evidentiary rulings for an abuse of discretion. *Leaf v. Beihoffer*, 2014 COA 117, ¶ 9. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair or when it misapplies the law. *Id.* However, "[e]ven when a [district]

court may have abused its discretion in admitting certain evidence, reversal is not required if the error was harmless under the circumstances." *People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006); *see also* C.A.R. 35(c) ("The appellate court may disregard any error or defect not affecting the substantial rights of the parties.").

B. Best Buy's Receipt

¶ 25 Montgomery argues that the court could not consider the receipt when evaluating false imprisonment or the shopkeeper's privilege because it was hearsay. He further contends that the business records exception to hearsay, CRE 803(6), cannot apply without an affidavit from a records custodian.

¶ 26 In evaluating false imprisonment, the court relied on the receipt to conclude "that showing proof of purchase would have freed Plaintiff." The existence of the receipt was therefore not offered for the truth of the matter asserted — that is, the price and details of the purchase. Instead, it was offered to show the effect it would have had on the listener — specifically, that the employees would have permitted Montgomery to leave the premises if presented with his receipt. *See, e.g.*, *People v. Tenorio*, 590 P.2d 952, 958 (Colo. 1979) (A radio report was "elicited only to establish

the officers' reasons for initially going to the park and for drawing their guns after arrival there," not "to show the truth of the contents of the radio report."); *People v. Robinson*, 226 P.3d 1145, 1152 (Colo. App. 2009) ("[T]he informant's statements — referencing the drug transaction arrangements, purportedly describing the two suppliers and giving their street names, and identifying them upon arriving at the scene — were all introduced for the nonhearsay purpose of showing" why the officers "chose to go to that particular location and stop, arrest, and search defendant and the car in which he was traveling."); *Phillips*, ¶ 108 (The witness's statement to the defendant's girlfriend "was admissible for the nonhearsay purpose of showing its effect on [the girlfriend] as a listener, in that she called defendant to notify him of the message . . . and sought his advice."). Thus, for the false imprisonment claim, we hold the receipt was admissible for the nonhearsay purpose of showing the effect on the listener.

¶ 27 However, in evaluating the shopkeeper's privilege, the court relied on the receipt's contents as true to conclude that "[Montgomery] was in Best Buy directly preceding the incident [at 2:20 p.m.] and . . . had the store's merchandise on him." As used

for this purpose, the receipt was offered for its truth, which generally is "not admissible except as provided by [the Colorado Rules of Evidence]." CRE 802. And the record does not contain an affidavit from a records custodian establishing the five-part foundational showing required for the business records exception. *See* CRE 803(6); *Flores-Lozano*, ¶ 13.

¶ 28 But even if the court abused its discretion by considering the receipt as evidence that Montgomery had been in the store and had merchandise on him, any such error was harmless for two reasons. *Summitt*, 132 P.3d at 327. First, the receipt was cumulative of other evidence establishing that Montgomery had been in the store and left with merchandise. *Curry v. Brewer*, 2025 COA 28, ¶ 57. The manager's affidavit established the same facts. Second, Best Buy offered the receipt to support its shopkeeper's privilege defense. Because the court ruled that the defamation per se and false imprisonment claims independently failed on their merits, this affirmative defense was unnecessary to resolve those claims.

¶ 29 Finally, we may affirm the district court's summary judgment on any grounds supported by the record. *Roque v. Allstate Ins. Co.*, 2012 COA 10, ¶ 7. Montgomery has failed to show that the receipt

was not generated automatically by a computer without human input or interpretation. If the receipt was computer generated, it would not constitute hearsay and it would be admissible for its truth to establish the shopkeeper's privilege defense and to disprove the false imprisonment claim. *See N.T.B.*, ¶ 22.

¶ 30 For all these reasons, the district court did not err by relying on the receipt to resolve the false imprisonment claim and the shopkeeper's privilege defense.

C. Best Buy's Affidavit

¶ 31 Montgomery argues that the district court could not consider the manager's affidavit when evaluating defamation per se or the shopkeeper's privilege because it was hearsay. Specifically, he objects to one paragraph in the affidavit stating that Montgomery declined to show his receipt when "asked by a loss prevention employee." Insofar as Montgomery contends "the entirety of [the manager's affidavit] is *already categorically inadmissible hearsay*" because of this one paragraph, we disagree. Montgomery provides no authority suggesting that one paragraph renders the entire affidavit inadmissible.

¶ 32 Moreover, even if the court abused its discretion by mentioning this paragraph in its finding of probable cause for the shopkeeper's privilege, the error was harmless because it did not "substantially influence[]" the outcome. *Stockdale v. Ellsworth*, 2017 CO 109, ¶ 32 (An error is harmless unless "it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." (citation omitted)). If we were to exclude this paragraph, the court's finding of probable cause is supported by other paragraphs in the affidavit, including the manager's observations of apparent theft in person and on security footage, and by the pen camera footage — in which Best Buy employees can be heard repeatedly asking for the merchandise back.

III. Late Evidence

¶ 33 Montgomery contends that the district court should not have considered the manager's affidavit or "the entire receipts exhibit" because they were "belatedly" submitted with Best Buy's reply in support of its MSJ. He argues that both exhibits were late because including them with Best Buy's reply deprived him of fair notice and a meaningful opportunity to respond to the issues of "receipt

possession" and "shopkeeper's privilege." We disagree for three reasons.

¶ 34 First, Montgomery did not object to or move to strike the manager's affidavit or the receipts on the basis that they were late until his motion for reconsideration — after the district court had entered summary judgment. And we do not review arguments raised for the first time in a motion for reconsideration. *United States v. City of Golden*, 2024 CO 43M, ¶¶ 77-78 (declining to review arguments raised for the first time in a motion for reconsideration, unless they are based on "newly discovered evidence").

¶ 35 Second, even if his objections were timely, we are not convinced that the exhibits were late. A court may properly consider an affidavit attached to a reply in support of an MSJ if "[n]either the affidavit nor the reply brief raised a new issue as to which [the nonmoving 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) (citing *Wallman v. Kelley*, 976 P.2d 330, 332 (Colo. App. 1998)). Here, Best Buy's MSJ put Montgomery on notice that he needed to present evidence of his actions inside the

store because it raised the shopkeeper's privilege and specifically claimed that he exited the store with merchandise, refused to show a receipt, and was suspected of theft. Best Buy's reply, by including the affidavit and the receipts, did not advance a "new argument" to which Montgomery was unable to respond. Rather, these reply exhibits rebutted Montgomery's various denials — about exiting the store, having merchandise, and having a receipt. Thus, the court did not err by considering the affidavit and receipts.

¶ 36 Third, any error in considering the manager's affidavit and receipts was harmless. Both exhibits were submitted not only with Best Buy's reply in support of its MSJ but also with its response to Montgomery's cross-MSJ. As a result, Montgomery had the opportunity to respond to the affidavit and receipts when he submitted his reply in support of his cross-MSJ.[5] Because the

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[5] Montgomery argues that the district court "erroneously and unlawfully conflated" the separate motions for summary judgment "in blatant violation of clearly established rules or law on the subject." But he cites no authority supporting this argument. Based on our review of the record, both Best Buy's MSJ and Montgomery's cross-MSJ addressed the same claims and affirmative defense and submitted substantially the same evidence for both motions. Under these circumstances, the court did not err in considering briefs and exhibits in connection with both motions together.

district court considered all briefs and exhibits in connection with both parties' motions together, Montgomery was not prejudiced by the "belated" affidavit and receipts. *See* C.A.R. 35(c); *Stockdale*, ¶ 32.

IV. Summary Judgment Evidence

¶ 37 Montgomery contends that the district court disregarded conflicting evidence and failed to give him the benefit of all reasonable inferences when it granted Best Buy's MSJ and denied his cross-MSJ. We are not persuaded.

A. Standard of Review and Applicable Law

¶ 38 We review a grant of summary judgment de novo. *Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶ 22. Summary judgment is appropriate only when the pleadings, affidavits, depositions, and admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Griswold*,¶ 23; C.R.C.P. 56(c). In evaluating a motion for summary judgment, all doubts must be resolved against the moving party, and the nonmoving party is entitled to the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. *Griswold*, ¶ 24.

¶ 39 The mere existence of a factual dispute is insufficient to defeat a summary judgment motion; instead, the disputed factual issue must be "genuine" and "material." *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). A factual issue is material if it will affect the outcome of the case. *Gognat v. Ellsworth*, 224 P.3d 1039, 1045 (Colo. App. 2009), *aff'd*, 259 P.3d 497 (Colo. 2011). A factual issue is genuine if the nonmoving party can provide sufficient evidence to demonstrate that a reasonable fact finder could return a verdict in his favor. *Andersen*, 160 P.3d at 239. "If the evidence opposing summary judgment is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

B. Manager's Affidavit

¶ 40 Relying on *Scott v. Harris*, 550 U.S. 372, 380 (2007), Montgomery contends the manager's affidavit is inadmissible for establishing material facts because it "blatantly contradicted . . . [his] pen camera footage of the event" and the results of his police records request. *See also Andersen*, 160 P.3d at 240 ("[I]f the evidence presented in opposition to summary judgment is so

incredible that it could not be accepted as true by a reasonable jury, it cannot serve to create a 'genuine' issue, or dispute, of fact.").

¶ 41 As an initial matter, we are unsure how the manager's statements about what he observed inside the store could contradict the pen camera footage of the subsequent incident outside the store. Indeed, many of Montgomery's claimed "contradictions" are based on speculation. For example, he claims the following:

- In the footage, the manager "mentions wanting to recover what Plaintiff held in his hands a whopping 31 times," which, to Montgomery, means "[the headphones/earbuds the manager observed him take] *weren't even the primary reason for the confrontation*."
- In the footage, the manager commented that it was odd for him to "stand here and wait for us to come get [him]," which, to Montgomery, "indicates that he did not actually *FOLLOW* Plaintiff out of the store after purportedly *personally* observing him steal something from it 'immediately' prior to."

- In the footage, the employees say they saw his apparent theft "on video," but Montgomery hypothesizes the manager "*LITERALLY would have never had the time to go review any security video footage* [before the interaction]."

But Montgomery cannot manufacture a contradiction, or a "genuine issue" of material fact, simply by means of argument. *People in Interest of A.C.*, 170 P.3d 844, 846 (Colo. App. 2007) ("A genuine issue of material fact cannot be established simply by allegations in pleadings or argument; rather, the opposing party must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial."). Based upon our review of the record, the manager's affidavit is not "blatantly contradicted" by the pen camera footage.

¶ 42 Montgomery does raise one possible contradiction: The manager's affidavit stated that he returned inside "[o]nce [he] received confirmation that the police had been contacted," but the police records responsive to Montgomery's records request indicated that the police were called only in the morning, hours before the incident. Assuming this record is admissible, it did not create a genuine or material factual issue for purposes of the district court's

decision. The court did not mention, much less rely on, his police records request because whether the police were called was not "significantly probative" of the false imprisonment claim, the defamation claim, or the shopkeeper's privilege. *Andersen*, 160 P.3d at 239 ("If the evidence opposing summary judgment is merely colorable or is not significantly probative, summary judgment may be granted." (quoting *Anderson*, 477 U.S. at 249)). Accordingly, there was no genuine issue of material fact for trial.

C. Montgomery's Actions Inside the Store

¶ 43 Montgomery argues that the district court failed to give him the benefit of reasonable inferences when it found that he presented no evidence of his actions inside the store to counter the manager's affidavit. Specifically, he argues the court should have inferred that his affidavit described his actions inside the store — namely, that he was never "physically near" any Best Buy employees before they approached him about theft, did not "conceal" anything, and did not put anything in his pockets "in front of anybody."

¶ 44 The court did give Montgomery the benefit of all reasonable inferences. Throughout the district court proceedings, Montgomery insisted that Best Buy could not prove he entered the store. In his

briefing, he began each "statement of facts" with him standing outside the Best Buy at 2:19 p.m. He explicitly "DENIE[D] that he 'exited' the store, or that he did so with any of the store's 'merchandise' in his possession." Given Montgomery's refusal to admit he entered the store or to discuss his conduct inside the store in his briefing, the court properly found that he presented no evidence of his actions inside the store.

¶ 45 Further, Montgomery's affidavit does not give rise to reasonable inferences that would contradict the court's finding. Montgomery's affidavit states that he was waiting outside Best Buy at 2:19 p.m. for five minutes before the Best Buy employees "surprise[d]" him. He explained that this was the first time he was "anywhere physically near" them and "the very first time that [he] had ever become aware as to the very existence of said Best Buy employees." Although he states that he did not "conceal" anything or put anything in his pockets "in front of anybody," neither statement creates disputed issues of material fact. His statement that he never "concealed" anything is a "merely self-serving conclusion[] of the ultimate facts," and thus insufficient to create a genuine issue for trial. *Ginter v. Palmer & Co.*, 585 P.2d 583, 585

(Colo. 1978). And given that Montgomery said the first time he was ever "physically near" or aware of any Best Buy employee was outside the store, his statement that he never put anything in his pocket "in front of anybody" must refer to his conduct outside the store.

¶ 46 For all these reasons, we agree with the district court that it "assum[ed] the truth of [Montgomery's] evidence and [drew] every favorable inference of fact therefrom" when it found that Montgomery presented no evidence of his actions inside the store.

D. Montgomery's Police Records Request

¶ 47 Montgomery argues the district court should have inferred from the results of his police records request — which indicated that the police did not receive a call from Best Buy that afternoon — that he "*did not* commit theft inside the store." It is unclear whether this exhibit is even admissible, given that there is no affidavit or certification laying the foundation for its admission. *See St. Croix*, 166 P.3d at 244 ("Failure to authenticate a document or otherwise submit evidence establishing its admissibility precludes consideration of the document for purposes of summary judgment."). Moreover, it is unclear how this document contradicts

the manager's observation or how it would alter the court's resolution of the claims. Because this argument is undeveloped, we do not consider it further. *See People v. Cuellar*, 2023 COA 20, ¶ 44 (declining to address a pro se party's arguments that were "undeveloped" (citation omitted)).

V. Other Arguments

¶ 48 Montgomery raises additional arguments in his reply brief on appeal. However, we do not consider issues raised for the first time in a reply brief. *Colo. Korean Ass'n v. Korean Senior Ass'n of Colo.*, 151 P.3d 626, 629 (Colo. App. 2006).

VI. Disposition

¶ 49 The judgment is affirmed.

JUDGE GROVE and JUDGE SCHOCK concur.

COLORADO COURT OF APPEALS 2 East 14th Ave Denver, CO 80203 (720) 625-5150	
Appeal From: **Jefferson County District Court** District Court Judge: **The Honorable Christopher Zenisek** District Court Case Number: **2023CV226**	
WILLIAM MONTGOMERY Plaintiff / Petitioner-Appellant vs. **BEST BUY STORES, L.P.** Defendant / Respondent-Appellee	▲ Court Use Only ▲
Party Without Attorney: **William Montgomery** 2443 S University Blvd # 129 Denver, CO 80210 (970) 412-5463 *zoinbergs@gmail.com*	Court Of Appeals Case No: **2025CA327** Jefferson County District Court Case No: **2023CV226**
<u>COMBINED</u> PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC	

Plaintiff, proceeding *pro se*, hereby submits to the Colorado Court of Appeals the following <u>COMBINED</u> PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC, and in support thereof, states as follows:

<u>CERTIFICATE OF COMPLIANCE</u>

I hereby certify that this COMBINED PETITION complies with all the requirements of C.A.R. Rules 40 and 32, including all formatting requirements set

forth in these rules. Specifically, I certify that this COMBINED PETITION contains **3,041** words, which does exceed the 1,900 word limit, but to which can be allowed by this Court via Plaintiff's attached MOTION TO EXEED WORD COUNT.

William Montgomery
William Montgomery

INTRODUCTION

Plaintiff William Montgomery respectfully petitions for panel rehearing under C.A.R. Rule 40 and, to the extent necessary, rehearing en banc under C.A.R. Rule 35.

Rehearing is warranted because the Opinion announced on February 19, 2026 misapprehends and conflicts with established Colorado precedent on the basic structure of summary-judgment practice. In particular, the Opinion:

1. Upholds summary judgment based on factual grounds and evidentiary materials (Best Buy's receipts and the Mahmoud affidavit) first presented in a **reply** in support of Best Buy's motion for summary judgment, notwithstanding *Wallman v. Kelley's* holding that a nonmovant is entitled to **notice in the opening motion** of the specific issues on which it must present evidence to avoid judgment.

2. Endorses the District Court's treatment of the parties' cross-motions for summary judgment as "two halves of the same coin," using Montgomery's own

cross-MSJ reply as the vehicle to respond to Best Buy's reply-only exhibits. That approach cannot be reconciled with *Morlan v. Durland Trust Co.* and *Central Bank & Trust Co. v. Robinson,* which require that each summary-judgment motion "stand on its own" and be decided separately, without being "aided" by the opponent's motion or supporting documents.

3. Mischaracterizes Montgomery's Response to Best Buy's MSJ by treating his insistence that Best Buy had not carried its initial evidentiary burden as "denials" of store entry, merchandise, and receipt possession, and then uses that mischaracterization to justify treating the reply-only exhibits as mere "rebuttal" to those supposed denials. This effectively inverts the Rule 56 burden structure and provides a path around *Wallman's* notice requirement, permitting a movant to withhold evidence in its opening brief and later cure that omission in reply.

4. Treats the mere **possibility** that Montgomery could have responded to the reply-only exhibits somewhere in the combined briefing as a forfeiture of his right to insist that Best Buy meet its initial burden and provide *Wallman*-compliant notice in its opening motion—a standard directly at odds with *Wallman's* explicit rule that a "[n]onmovant is entitled to notice of [the] issue regarding which evidence must be introduced to avoid granting of summary judgment; lacking such notice, summary judgment cannot be granted."

These holdings create an intra-court conflict on four core points of law:

• Whether a movant may use reply-only evidence as a dispositive ground for summary judgment without having given the nonmovant clear notice in the opening motion of the need to present counter-evidence on that ground (*Wallman*).

• Whether, in cross-motion situations, a court may treat the parties' motions and briefs as a single, blended record and use the nonmovant's separate cross-MSJ filings to cure defects in the movant's original MSJ (*Morlan* and *Central Bank*).

• Whether a nonmovant's refusal to adopt the movant's unsupported factual narrative can be treated as a true, factual "denial" that invites reply-only "rebuttal" evidence and overrides *Wallman's* notice requirement.

• Whether the absence of a motion to strike or surreply can override *Wallman's* notice requirement and permit summary judgment on grounds first revealed in a reply.

This case also has outsized practical significance for Montgomery as a *pro se* pauper. In addition to granting Best Buy's motion for summary judgment, the District Court awarded Best Buy $36,124.50 in attorney fees against him, an amount he has no realistic ability to pay absent reversal. Allowing reply-only grounds to sustain summary judgment, and then to support a substantial fee award against an indigent, self-represented litigant, raises serious access-to-justice concerns and

amplifies the need for strict adherence to *Wallman's* notice requirement and *Morlan* / *Central Bank's* rule that each summary-judgment motion must stand on its own.

Because these are not case-specific fact disagreements but direct tensions with published Colorado authority governing summary-judgment procedure, they present both a compelling basis for panel rehearing and, if necessary, an issue of intra-court conflict warranting rehearing en banc.

ARGUMENT

I. THE COURT OVERLOOKED *MORLAN* BY TREATING TWO MSJS AS "TWO HALVES OF THE SAME COIN"

a. Montgomery did cite *Morlan*, which strictly forbids conflating cross-motions

To begin, the February 19th Opinion states that Montgomery "cites no authority" for his argument that the District Court impermissibly "conflated" Best Buy's motion for summary judgment with his cross-motion. **The panel is demonstrably mistaken:** Montgomery's appeal opening brief devoted literally seven pages (pages 28–34) to *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952) and related authority, explaining that each MSJ must be evaluated independently, on its own record and theory.

Morlan holds that where both parties move for summary judgment, "[e]ach of such motions is to be considered and ruled upon separately, without regard to

whether similar motion has been filed by other parties" and whereby each party bears the burden of demonstrating its entitlement to judgment as a matter of law on its own motion; one party's failure does not automatically establish the other's entitlement. *Central Bank Trust Co. v. Robinson,* 137 Colo. 409, 326 P.2d 82 (1958) similarly explains that "[e]ach motion, together with evidentiary matters tendered in support thereof, must stand on its own and cannot be aided by the motion of the opposing party, with its supporting documents, for summary judgment.").

Montgomery invoked *Morlan* to argue that Best Buy's MSJ had to stand or fall on its *own* motion, evidence, and timing, and that his cross-MSJ (and reply) could not be used to supply the missing response to Best Buy's late-filed evidence. The Opinion's statement that he cited no authority for "conflation" overlooks *Morlan* and the numerous pages in his appellate record where it was fairly developed.

b. The District Court used Montgomery's MSJ reply as the de facto response to Best Buy's reply-only exhibits

Best Buy's opening MSJ contained only conclusory assertions that Montgomery "had a receipt," "could have simply shown a receipt," and exited the store with Best Buy merchandise; it attached no receipts, no Mahmoud affidavit, and no authenticated records to support those assertions. The first time Best Buy actually submitted the receipt exhibit and the Mahmoud affidavit was with (1) its reply in

support of its MSJ and (2) its response to Montgomery's cross-MSJ.

The District Court then treated all filings on both motions as a single, blended record and expressly relied on the reply-only exhibits to grant Best Buy's MSJ. In practical terms, the only place Montgomery could have attempted to respond to those late-filed materials was his reply on *his* motion—not a response on Best Buy's motion.

That is precisely the kind of conflation *Morlan* and *Central Bank* forbid. Best Buy, as movant, had to meet its initial burden on every dispositive factual ground in its **own** MSJ papers; Montgomery's cross-MSJ briefing is not a substitute for the response that Rule 56 contemplates to Best Buy's motion. By treating the cross-MSJ reply as the de facto response to Best Buy's reply-only exhibits, and then using that blended record to rule on both motions, the District Court did exactly what *Morlan* and *Central Bank* forbid—treating two independent motions as "two halves of the same coin."

The Opinion's approval of that approach misapprehends *Morlan* and *Central Bank*. Properly applied, those cases required (1) denial of Best Buy's MSJ for failure to support its key factual theories in its opening motion and supporting materials, and (2) a separate analysis of Montgomery's cross-MSJ on the evidence and law he submitted, without transforming *his* reply to *his* motion into some *surreply* to *Best Buy's* motion.

II. THE COURT MISAPPLIED *WALLMAN* BY FOCUSING ON "OPPORTUNITY" INSTEAD OF RULE-COMPLIANT "NOTICE"

a. *Wallman's* rule is about notice in the *opening* MSJ, not theoretical chances to respond later

Wallman v. Kelley holds that "an issue not raised by the moving party in the motion or brief cannot serve as the basis for summary judgment because the nonmoving party is not put on notice as to the need to present evidence concerning that issue." In *Wallman,* the defendant's reply raised a new dispositive theory, and the trial court granted summary judgment on that ground; the Court of Appeals reversed, even though the plaintiff had not moved to strike or sought a surreply.

Wallman thus distinguishes **notice** from mere **opportunity**. The question is not whether the nonmovant could, in theory, have responded somewhere; it is whether the opening MSJ gave clear notice that the nonmovant needed to marshal evidence on that specific ground to avoid judgment. Because that notice was missing, the plaintiff did not forfeit her right to insist that summary judgment be denied on the reply-only ground, despite the absence of motions to strike or surreply requests.

b. Best Buy's opening MSJ did not give *Wallman*-compliant notice of the receipt-based and Mahmoud-affidavit grounds

Best Buy's opening MSJ raised the general topics of false imprisonment and

shopkeeper's privilege, but it offered no *evidence*—no receipts, no Mahmoud affidavit, no authenticated records—supporting its factual claims that Montgomery was a Best Buy customer at that store at the relevant time, that the item in his hand was store merchandise, or that he had an associated receipt on his person. Those assertions were purely conclusory.

As Montgomery thoroughly explained in his appeal briefing, until a movant supports an "issue" with evidence, there is no properly framed summary-judgment ground that shifts any burden to the nonmovant. The first time Best Buy actually supplied evidence on both "receipt possession" and its version of what occurred inside the store was in its MSJ reply (adding the receipt exhibit and Mahmoud's affidavit). Those reply-only materials were therefore not mere elaboration; they were the initial evidentiary basis **for entirely new factual grounds** on which summary judgment was ultimately granted.

The Opinion nevertheless treats Montgomery as having forfeited his right to complain about those reply-only exhibits by (1) not moving to strike them until his motion for reconsideration and (2) being able, in theory, to address them in his cross-MSJ reply. That analysis misapprehends *Wallman* in two ways:

1. It converts *Wallman's* **notice** requirement into a mere **opportunity** test, asking only whether Montgomery "could have" responded somewhere, rather than

whether Best Buy's opening MSJ put him on notice that he *needed* to respond with evidence on these specific, later-supported grounds.

2. It treats the absence of a motion to strike or surreply as dispositive, even though *Wallman* reversed a reply-only summary-judgment ruling ***WITHOUT*** requiring either, precisely because fair notice under Rule 56 was lacking.

Here, Best Buy's opening MSJ never gave Montgomery *Wallman*-compliant notice that (a) register receipts and (b) sworn testimony from a manager about in-store concealment would be used as ***evidentiary*** grounds for summary judgment. Montgomery was not required to anticipate and rebut evidence that had not yet been presented, and he did not waive his right to have Best Buy's MSJ denied simply because he did not file a motion to strike or seek a surreply once that evidence appeared in reply.

Under *Wallman,* the reply-only grounds could not serve as the basis for granting summary judgment. Rehearing is warranted so the panel can apply *Wallman's* notice-based rule to these facts.

III. BEST BUY'S REPLY EXHIBITS WERE NEW FACTUAL GROUNDS, NOT MERE FOLLOW-UPS TO PRESERVED ISSUES

a. The Opinion mischaracterizes Montgomery's "denials" to impermissibly justify admitting reply-only evidence

The Opinion states that Best Buy's reply-only exhibits were admissible because they merely "rebutted Montgomery's various denials—about exiting the store, having merchandise, and having a receipt." Yet the Opinion itself elsewhere concedes the truth: "Given Montgomery's **refusal to admit** he entered the store or to discuss his conduct inside the store in his briefing…" *Opinion, p.27.* This admission undercuts the panel's own rationale and shows precisely why the reply exhibits were **new** factual grounds, not mere "rebuttal" to supposed "denials."

In his Response to Best Buy's MSJ, Montgomery did not offer a competing factual story about whether he was ever in the store, whether he carried store merchandise, or whether he had a receipt. Instead, he argued that Best Buy, as the movant, **had not yet carried its initial Rule 56 burden**, repeatedly pointing out that it had "failed to provide this Court with any tangible, admissible evidence, whatsoever" to substantiate those assertions. His sworn Affidavit of the Event likewise begins the timeline outside the store at 2:19pm, and stays neutral on what, if anything, occurred inside before that time; it focuses on the detention and threats outside, not on purchase / receipt issues. Under Colorado summary-judgment law, a nonmovant is not required to disprove a movant's bald assertions or fill evidentiary gaps in the movant's affirmative defenses; the burden shifts **only after** the movant first makes a prima facie showing, *with admissible*

evidence, that there is no genuine dispute and it is entitled to judgment as a matter of law. *See Suncor v. Aspen; Ginter v. Palmer Co.*

By relabeling Montgomery's insistence that Best Buy had not met its burden as true, factual "denials" of store entry, merchandise, and receipt possession—and despite the Opinion's own acknowledgment that he merely "refus[ed] to admit" those facts—the Opinion treats new, reply-only exhibits as legitimate "rebuttal" to those supposed denials. That reverses the burden structure and circumvents *Wallman:* it allows a movant to withhold evidence on key factual grounds in its opening MSJ, then introduce that evidence for the first time in reply on the theory that it is just responding to the nonmovant. *Wallman* squarely holds that summary judgment cannot rest on a ground as to which the nonmovant lacked clear notice in the opening motion of the need to present counter-evidence. Here, questions of theft, receipt possession, and shopkeeper's privilege went to Best Buy's **affirmative defense**, on which it—not Montgomery—bore the burden. Treating his decision not to adopt Best Buy's narrative as actual factual "denials" that justify reply-only "rebuttal" evidence is inconsistent with *Wallman* and with *Morlan / Central Bank's* rule that each MSJ must stand on its own evidentiary footing.

b. The reply exhibits were the first evidentiary support for critical grounds, not "additional" evidence

The Opinion asserts that "Best Buy's MSJ put Montgomery on notice that he needed to present evidence of his actions inside the store because it raised the shopkeeper's privilege and specifically claimed that he exited the store with merchandise, refused to show a receipt, and was suspected of theft." Montgomery squarely rebutted this claim in his appellate reply brief, where he addressed Best Buy's assertion that the Mahmoud affidavit and receipt exhibit "merely add[ed] additional evidence to factual information already addressed in Defendant's original Motion for Summary Judgment." As he explained, the exhibits introduced "entirely new 'factual information,' not merely 'additional evidence' to pre-existing facts."

Under *Suncor,* a summary-judgment movant must support its factual assertions with admissible evidence; "purely conclusory statements," even if "specifically claimed," are insufficient. Under *Wallman,* an issue that is not properly raised (i.e. supported with admissible, factual evidence) in the opening motion cannot serve as the basis for summary judgment.

Only in its MSJ reply (and its response to Montgomery's cross-MSJ) did Best Buy first introduce:

- The receipt exhibit, offered to show that Montgomery personally made a purchase at that store at the relevant time and had that merchandise and receipt on his person at the time he left; and

• Mahmoud's affidavit, asserting detailed, inculpatory facts about alleged in-store concealment and immediate exit.

Those submissions were therefore not "additional" support for facts already backed by evidence; they were the **first** actual evidentiary support for new, dispositive factual grounds on which summary judgment was granted.

The Opinion's conclusion that the exhibits were "not late" because Best Buy's opening MSJ mentioned the ***topics*** of false imprisonment and shopkeeper's privilege conflates *issues* with *evidence*. ***Wallman*** **and** ***Suncor*** **both attach summary-judgment "issues" to their supporting evidence, not to bare assertions.** Once the receipt and affidavit are recognized as new factual grounds first raised in a reply, they cannot properly serve as the foundation for granting summary judgment.

Montgomery's appeal squarely and timely presented this argument in his appeal opening and reply briefs, supported by *Wallman, Suncor,* and *Morlan,* and to which condemns the use of reply-only evidence as a dispositive basis for granting summary judgment. The Opinion did not address that reasoning. Rehearing is necessary so the panel can confront and resolve it.

CONCLUSION

WHEREFORE, for the reasons set out in this petition, Plaintiff William

Montgomery respectfully requests:

1. **Panel rehearing:** That the panel GRANT rehearing under C.A.R. Rule 40, withdraw or modify its Opinion, and hold that:

- Under *Wallman v. Kelley,* summary judgment may not rest on factual grounds and evidentiary materials (Best Buy's receipts and the Mahmoud affidavit) first presented in Best Buy's reply because Montgomery lacked fair notice in the opening MSJ of the specific issues on which he was required to present evidence.

- Under *Morlan v. Durland Trust Co.* and *Central Bank & Trust Co. v. Robinson,* Best Buy's motion for summary judgment must stand or fall on its own motion and supporting materials and cannot be "aided" by Montgomery's separate cross-MSJ briefing or reply; the parties' cross-motions may not be treated as "two halves of the same coin."

- Because Best Buy failed to carry its initial burden on these grounds in its opening MSJ, the District Court erred in granting summary judgment, and this Court should reverse that portion of the judgment and remand for further proceedings on Montgomery's claims.

2. **Rehearing en banc in the alternative:** If the panel declines to grant rehearing or to conform its decision to *Wallman, Morlan,* and *Central Bank,* that the Court GRANT rehearing en banc under C.A.R. Rule 35 because:

• The Opinion cannot be reconciled with those published decisions on the questions of (a) what constitutes adequate notice of summary-judgment issues to a nonmovant, and (b) how cross-motions must be treated under Rule 56; and

• Allowing the Opinion to stand would create or perpetuate an intra-court conflict on fundamental summary-judgment procedures that recur frequently in Colorado civil litigation and have especially severe consequences for *pro se*, indigent parties facing large fee awards.

3. **Any further relief:** That the Court GRANT any additional or alternative relief it deems just and proper, including narrowing or clarifying the Opinion to eliminate the identified conflicts.

Respectfully submitted on this, the 5th day of March, 2026.

William Montgomery

William Montgomery

CERTIFICATE OF SERVICE

I hereby certify that on this, the 5th day of March, 2026, the foregoing **COMBINED PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC** was filed with the Court, and a true and correct copy of it was electronically sent to the following people:

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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED March 26, 2026
Jefferson County 2023CV226	
Plaintiff-Appellant: William Montgomery, **v.** **Defendant-Appellee:** Best Buy, L.P.	Court of Appeals Case Number: 2025CA327
OPINION MODIFIED ON THE COURT'S OWN MOTION & ORDER DENYING PETITION FOR REHEARING	

The motion to exceed word limit is GRANTED.

The **PETITION FOR REHEARING** filed in this appeal by:

William Montgomery, Plaintiff-Appellant,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED. OPINION MODIFIED ON THE COURT'S OWN MOTION AND PETITION FOR REHEARING IS **DENIED**.

Issuance of the Mandate is stayed until: April 24, 2026

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: March 26, 2026

BY THE COURT:
Grove, J.
Yun, J.
Schock, J.