Jefferson County District Court 100 Jefferson County Pkwy Golden, CO 80401 (720) 772-2500	
WILLIAM MONTGOMERY Plaintiff vs. **BEST BUY STORES, L.P.** Defendant	▲ Court Use Only ▲
Party Without Attorney: **William Montgomery** 2443 S University Blvd # 129 Denver, CO 80210 (970) 412-5463 *zoinbergs@gmail.com*	Case Number: **2023CV226** Division: **6** Courtroom: **520**
PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION	

Plaintiff, proceeding *pro se*, hereby submits to the Court his SECOND MOTION FOR RECONSIDERATION, and in support thereof, states as follows:

INTRODUCTION

Plaintiff recently filed a MOTION FOR RECONSIDERATION in this matter. In the MOTION, Plaintiff argued that numerous errors of both **FACT** *and* **LAW** were made. In the Court's most recent ORDER denying the MOTION FOR RECONSIDERATION, it **failed** to address **LITERALLY ANY** errors of FACT *or* LAW pointed out by Plaintiff.[1] Instead, to circumvent having to cure the well-pointed-out errors, the Court introduced a *brand new* holding encompassing a *brand new* theory of law. As such, Plaintiff has a right to challenge the *brand new* legal theory, and to which in turn, tolls the statute of limitations for filing a NOTICE OF APPEAL in this action.

1 As such, the Court has **confessed** that all such errors of FACT *and* LAW pointed out by Plaintiff **were indeed curable.**

C.R.C.P. RULE 121 § 1-15(8) CERTIFICATION

Plaintiff certifies that he has conferred in good faith with Defendant concerning this MOTION. Defendant indicates that it opposes the relief sought herein.

ARGUMENT

I. THE COURT IMPERMISSIBLY CONSIDERED PLAINTIFF'S C-MSJ *REPLY* AS SOME SORT OF *SURREPLY* TO DEFENDANT'S MSJ REPLY

In the Court's ORDER denying Plaintiff's MOTION FOR RECONSIDERATION, it held that that because "Plaintiff's reply was filed after the exhibits about which he complains," he purportedly had an "opportunity" to "respond" to them. This was not the complaint Plaintiff made in his MOTION, however,[2] **and this is *still* not how the law works in Colorado.**

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 fresh, reply-only arguments and evidence, it was whether she was "given ***NOTICE*** that she ***NEEDED*** to" respond it [and the Court held that she was not]. **This is because nowhere in the Colorado Rules Of Civil Procedure *or* Colorado Case Law does any rule or law explain to litigants that REPLY briefs are meant to provide such "notice" of such "need."** As such, Plaintiff could not, and did not fairly and reasonably "know" that he "needed" to use his MSJ's ***reply*** as some ***surreply*** to Defendant's MSJ reply.

Second, it is **utterly inappropriate** to require a Plaintiff to use *their* **Reply** "In Support Of *Their* Cross-MSJ" as some sort of **Surreply** "In Response To A *Defendant's* MSJ Reply." Not only are replies designed to *strictly* and *only* support the *initial* motions to which they are tied, **they are**

2 The **specific** argument Plaintiff made in his MOTION FOR RECONSIDERATION was that the Court made verifiable errors of **FACT** that **a)** Defendant supposedly submitted ***[WITH ITS INITIAL MSJ]*** a store employee's affidavit and some affidavit-less business records, thereby purportedly "satisfying its ***initial*** burden as the movant" in the matter [when no such evidence was *actually* filed with Defendant's ***initial*** MSJ], and **b)** that Plaintiff supposedly, ***[IN RESPONSE TO DEFENDANT'S INITIAL MSJ]*****,** "provided no evidence of his actions in the store to ***counter*** this" [when Plaintiff was never put on *actual* notice of the **NEED** to **counter** such *non-existent* evidence]. Side note: Plaintiff actually ***DID*** submit an affidavit of his actions inside the Best Buy store immediately preceding his detention, which the Court should have alternatively **INFERRED** was fairly applicable to him being on the inside of it [if said affidavit wasn't already explicit enough *on its own* to establish as much].

severely limited by page number and file-by date. Hence, Plaintiff could not have reasonably been expected to sacrifice valuable space and time *responding* to **new** allegations made by Defendant in this matter [that it should have presented in its ***initial*** MSJ] when he was already working tirelessly with said limited space and time to prepare the arguments necessary to *support* **his own** Cross-MSJ.

Third, conflating one MSJ's ***reply*** as another 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 misinterpreted ***in the other line of briefing.*** In other words, a party's **offense** argued *in support of their own* motion cannot be used as their **defense** argued *in opposition of the other party's* motion. "Where both parties to a legal action file motions for summary judgment, is the court restricted against denying both motions and requiring the production of additional evidence, or is it obligated under the rules to grant one or the other of the motions and enter judgment accordingly? The answer is no. If, upon considering the then state of the record, it should appear, or be the opinion of the court, that there remained in the case for determination factual issues upon which there might or could be produced further evidence, or upon which the evidence is incomplete, it is the duty of the court to deny both motions and require the parties to proceed regularly to trial on the merits. **Each 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 defendant 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 plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists.'" *Morlan v. Durland Co.,* 127 Colo. 5, 12-13 (Colo. 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 defendants' pending motion.** It may not be applied in connection with plaintiff'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)). "It is manifest **that when defendants' 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 plaintiff's motion.** This leaves plaintiff'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." *Id.*

In layman's terms, Plaintiff made a "concession" under his own "legal theory" that "no genuine issue existed" [and that his MSJ should be granted]. He presented legal argument that Defendant's affidavit of Mahmoud Abu-Shaweesh was **inadmissible** because it "blatantly contradicted the record," *Scott v. Harris,* 550 U.S. 372, 380 (2007), and that the business records (i.e. receipts) it submitted were likewise **inadmissible** because 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 other words, Plaintiff was arguing **offensively,** whereby his REPLY brief was appropriately tailored to

support his MSJ – by way of arguing, via *Scott* and *Henderson,* **that no dispute of fact existed in the case.** His reply brief *was not the place, nor the time,* to **defend** against Defendant's belated, reply-only evidence that it had introduced in ***its*** MSJ. Indeed, to hold otherwise would be to require Plaintiff to create a dispute of fact in his own MSJ, which is not his obligation in his own MSJ [his obligation in his own MSJ is to only **defend** against *Defendant's* attempts to create a dispute of fact]. As such, Plaintiff, **if unable to have his own Cross-MSJ granted,** "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 Co.,* 127 Colo. 5, 12-13 (Colo. 1952). Plaintiff is allowed to argue "alternative and inconsistent defenses." *M. Snower Co. v. United States,* 140 F.2d 367, 370 (7th Cir. 1944). He is allowed to argue in his Cross-MSJ that no genuine dispute of fact exists, while also arguing in Defendant's MSJ that a genuine dispute of fact exists. And because Defendant **failed** to provide Plaintiff with sufficient **"notice"** of his **"need"** to defend against such not-submitted-with-its-**initial**-MSJ-briefing evidence, **Defendant's MSJ should have been denied.** "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 Co.,* 127 Colo. 5, 12-13 (Colo. 1952).

CONCLUSION

"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).

"If, upon considering the then state of the record, it should appear, or be the opinion of the court, that there remained in the case for determination factual issues upon which there might

or could be produced further evidence, or upon which the evidence is incomplete, it is the duty of the court to deny both motions and require the parties to proceed regularly to trial on the merits." *Morlan v. Durland Co.,* 127 Colo. 5, 12-13 (Colo. 1952).

WHEREFORE, Plaintiff respectfully requests that this Court **GRANT** his SECOND MOTION FOR RECONSIDERATION, so that it may then **REVERSE** its ORDER impermissibly GRANTING Defendant's MSJ, so that this case may proceed to **TRIAL**, by Jury, on its merits.

Respectfully submitted on this, the 21st day of January, 2025.

William Montgomery
William Montgomery
2443 S University Blvd # 129
Denver, CO 80210
H: (970) 412-5463
C: (970) 232-0369
zoinbergs@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this, the 21st day of January, 2025, a true and correct copy of the foregoing **PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION** was sent to the following people, via email:

Lori K. Bell
Stephanie E. Boutsicaris
Montgomery | Amatuzio
4100 E Mississippi Ave, 16th Floor
Denver, CO 80246
T: (303) 592-6600
F: (303) 592-6666
lbell@mac-legal.com
sboutsicaris@mac-legal.com

Attorneys for Defendant

William Montgomery
William Montgomery