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: **2025CA1351** 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 **5,022** 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

TABLE OF CONTENTS

ARGUMENT SUMMARY

Defendant's Answer Brief fundamentally fails to engage with the substance of Plaintiff's appellate arguments. Rather than presenting persuasive legal reasoning addressing each statutory requirement and factual element, Defendant relies on conclusory assertions, circular logic, and strategic silence on matters that significantly undermine its position.

This Reply Brief identifies four critical deficiencies in Defendant's Answer:

First, Defendant does not address the statutory mandate that trial courts must make specific findings of fact and conclusions of law when determining attorney fees under C.R.S. §§ 13-17-102 and 13-17-103. The District Court's Order is replete with unsupported conclusory statements. Defendant's failure to respond to the *In re Aldrich* standard and the requirement to analyze C.R.S. § 13-17-103(1) factors constitutes an admission that the statutory requirements were not met.

Second, Defendant completely fails to engage with Plaintiff's substantive legal arguments concerning: (1) novel legal theories protected by C.R.S. § 13-17-102(7); (2) material factual distinctions from prior cases; (3) genuine factual disputes that preclude frivolousness findings; and (4) procedural violations that undermine the bad faith determination. This silence constitutes waiver of responses to these significant arguments.

Third, Defendant's theory of "bad faith" rests entirely on discovery-related conduct and selective quotations from a YouTube video and deposition, without acknowledging that: (a) Defendant never filed a Rule 37 motion to compel or seek sanctions; (b) Plaintiff proactively cured alleged deficiencies before judgment; (c) Defendant's post-judgment invocation of discovery issues demonstrates post-hoc narrative construction; and (d) Defendant failed to comply with procedural requirements for imposing sanctions.

Fourth, Defendant ignores logical inconsistencies, procedural failings, due process violations, and proportionality concerns that require reversal.

For these reasons, all three of the District Court's attorney fee orders should be **REVERSED** and **VACATED** in their entirety.

ARGUMENTS

Reply To Issue 1 – The District Court Erred In Granting Defendant's Motion For Attorney Fees

I. DEFENDANT'S ANSWER BRIEF FAILS TO ADDRESS STATUTORY MANDATE FOR SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Opening Brief established that Colorado law imposes a mandatory statutory requirement that trial courts make specific findings of fact and conclusions

of law when awarding attorney fees under C.R.S. § 13-17-101 et seq. Specifically:

1. **The Statutory Requirement:** C.R.S. § 13-17-102 requires attorney fees only in limited circumstances. C.R.S. § 13-17-103(1) mandates that the trial court "shall specifically set forth the reasons for said award" after considering, among others, seven enumerated statutory factors.

2. **The Appellate Standard:** *In re Aldrich,* 945 P.2d 1370 (Colo. 1997) establishes that "conclusory statements that a claim is frivolous, groundless, or vexatious are insufficient for purposes of appellate review and inadequate to satisfy the statutory requirement of specificity." (Opening Brief, page 16)

3. **What Plaintiff's Opening Brief Showed:** Plaintiff identified numerous conclusory statements in the District Court's Order and demonstrated that the Court failed to analyze mandatory statutory factors, including:

- C.R.S. § 13-17-103(1)(a): Extent of efforts to determine claim validity
- C.R.S. § 13-17-103(1)(b): Extent of efforts to reduce or dismiss invalid claims
- C.R.S. § 13-17-103(1)(c): Availability of facts to assist plaintiff
- **C.R.S. § 13-17-103(1)(d): Relative financial positions of the parties**
- C.R.S. § 13-17-103(1)(f): Whether issues of fact were reasonably in conflict

Defendant's Non-Response Constitutes Admission: Defendant's Answer Brief does not address this statutory mandate. The Answer Brief:

- Does not cite C.R.S. § 13-17-103(1) at all
- Does not engage with *In re Aldrich* or the specific findings requirement
- Does not defend the District Court's alleged compliance with statutory factor analysis
- Does not explain why the District Court's conclusory statements satisfy the law

This silence on a foundational legal requirement—one that Plaintiff extensively briefed—effectively concedes that the District Court failed to comply with the statute.

The District Court's Order Fails The *In re Aldrich* Test: The District Court's Order, *CF at 1362–1365,* contains statements such as:

- "Plaintiff… go[es] into stores and conduct[s] himself in a manner that could be reasonably construed as suspicious" (no factual basis)
- "Plaintiff planned this lawsuit before bringing it" (speculative)
- "Plaintiff sought to engage Best Buy in a situation that would result in a lawsuit" (conjecture about subjective intent)

These are precisely the type of conclusory statements that *In re Aldrich* condemns. Defendant cannot defend them because they are indefensible as findings of fact.

Statutory Factor Analysis Is Missing: The District Court Order nowhere states:

- That it considered Plaintiff's efforts to determine claim validity before filing
- That it considered Plaintiff's efforts to dismiss invalid claims
- That it considered financial positions of the parties involved (Plaintiff filed *In Forma Pauperis*; Best Buy is a large multinational corporation)
- That it considered whether factual disputes existed

Defendant's failure to address these omissions means Defendant cannot argue the statutory requirements were satisfied.

II. DEFENDANT WAIVES SUBSTANTIVE RESPONSE TO PLAINTIFF'S NOVEL LEGAL ARGUMENTS AND GOOD FAITH EXCEPTION UNDER C.R.S. § 13-17-102(7)

Plaintiff's Opening Brief presented eight substantive novel legal arguments, each with rational basis in Colorado, Tenth Circuit, or Supreme Court precedent:

1. The distinction between "escape" and "release" in false imprisonment
2. The requirement that jury instructions be read "in harmony"
3. The logical contradiction between showing / not showing a receipt both constituting consent
4. The "last clear chance" doctrine as applied to merchants
5. The impermissibility of bootstrapping non-cooperation into justification

for detention

6. The temporal distinction between pre- and post-detention conduct

7. The principle that receipt-showing does not retroactively nullify detention

8. The requirement that uniquely inculpatory evidence, not just absence of exculpatory evidence, supply Shopkeeper's Privilege

Plaintiff also cited *Montgomery v. Lore,* 10th Cir. Court of Appeals Case No. 23-1106 (Dec. 13, 2023), as supporting novel applications of Fourth Amendment principles to merchant detention law.

Defendant's Waiver Of Response: Defendant's Answer Brief:

- Does not address ANY of these eight legal arguments
- Does not cite or reference *Montgomery v. Lore*
- Does not engage with any substantive legal theory Plaintiff advanced
- Instead, dismisses the entire category by stating that Plaintiff's statement about disagreement with the Shopkeeper's Privilege statute shows "simple disagreement" with C.R.S. § 18-4-407

This non-response constitutes waiver. Under appellate rules and practice, when an appellee fails to respond to substantive legal arguments, those arguments are deemed conceded or waived.

Defendant's Mischaracterization Of Plaintiff's Position: Defendant

states: "Plaintiff's framing of 'stores like Walmart and Best Buy routinely and flagrantly violate the law' stems from simple disagreement with the Shopkeeper's Privilege statute." (Answer Brief, page 19)

This mischaracterizes Plaintiff's argument. Plaintiff did not merely state disagreement with the statute. Rather, Plaintiff argued that the statute has been misapplied and that certain legal principles—such as the requirement for uniquely inculpatory evidence and temporal causation—have not been properly integrated into Colorado jurisprudence.

C.R.S. § 13-17-102(7) Protection: Colorado law explicitly protects good faith attempts to establish new legal theories. C.R.S. § 13-17-102(7) states: "No attorney, licensed legal paraprofessional, or party shall be assessed attorney fees or licensed legal paraprofessional fees for any claim or defense that the court determines was asserted by the attorney, licensed legal paraprofessional, or party in a good faith attempt to establish a new theory of law in Colorado."

Plaintiff's eight legal arguments represent precisely the type of good faith attempts to establish new or modified applications of law that C.R.S. § 13-17-102(7) protects. Defendant's Answer Brief never addresses this statute. The failure to address it means the District Court never determined whether these arguments constituted good faith attempts to establish new law—and therefore the

fee award is premature and improper.

III. DEFENDANT IGNORES MATERIAL FACTUAL DISTINCTIONS FROM PRIOR CASES

Plaintiff's Opening Brief identified four material factual distinctions between the Best Buy case and prior Walmart cases:

1. **Customer Status:** In Walmart cases, Plaintiff was a customer; in Best Buy, he was a non-patron attempting to return non-store merchandise

2. **Store Layout/Policies:** Best Buy has no back registers, eliminated plastic bags in July 2022, and primarily uses emailed receipts (unlike Walmart)

3. **Receipt Request:** No explicit receipt request was made by Best Buy employees (unlike routine requests at Walmart)

4. **Recording Initiation:** Plaintiff began recording after the confrontation occurred, not in anticipation

Defendant's Answer Brief:

- Does not address any of these factual distinctions
- Simply asserts "pattern" and "substantially repetitive" without engagement
- Makes no effort to distinguish why these factual differences are legally immaterial

This silence means Defendant cannot defend a characterization that the cases

are "nearly identical." The factual differences are material and demonstrate that Plaintiff's Best Buy claims were not merely duplicative attempts to re-litigate Walmart theories, but good faith assertions of rights in distinct factual circumstances. This directly rebuts the "frivolous" characterization.

IV. DEFENDANT FAILS TO ADDRESS FACTUAL DISPUTES PRECLUDING FRIVOLOUSNESS FINDING

Colorado law is clear: when facts bearing on probable cause, good faith, and reasonableness of detention are disputed, these are questions for the fact finder—not appropriate for fee sanctions predicated on frivolousness. *J.S. Dillon & Sons Stores Co. v. Carrington,* 169 Colo. 242, 455 P.2d 201 (1969); *Gonzales v. Harris,* 528 P.2d 259 (Colo. App. 1974); *Goodboe v. Gabriella,* 1983 Colo. App. LEXIS 828 (Colo. App. 1983).

Plaintiff's Opening Brief identified multiple genuine factual disputes:

1. **Did Defendant observe suspicious conduct?**

- Plaintiff's body camera video shows him standing outside a store ordinarily
- Plaintiff's affidavit: never concealed items, never acted furtively, never made suspicious movements
- Defendant's employee affidavit (introduced only in Reply): contradicts the video and affidavit; internally inconsistent

2. **Did Defendant have probable cause to believe Plaintiff stole merchandise?**

- No admissible evidence that Plaintiff possessed stolen merchandise
- Non-eventful police report (unchallenged by Defendant)
- Defendant's employee affidavit contradicts itself

3. **Did Plaintiff have a "means of escape"?**

- Mere possibility that Plaintiff might possess a receipt (a fact Defendant failed to establish with admissible evidence) does not constitute a clear means of escape
- Defendant's own summary judgment argument crystallized the problem: "If Plaintiff purchased items, he could simply show his receipt; it is presumed Plaintiff had such proof, because if he did not, he committed theft." *CF at 233.*
- This amounts to granting merchants absolute, unchallengeable immunity

Defendant's Response: Defendant's Answer Brief states: "However, the District Court had already ruled in Defendant's favor on its Motion for Summary Judgment. Therefore, the District Court had already found no genuine issue of material fact between the parties." (Answer Brief, page 24)

This is circular reasoning. The fact that a motion for summary judgment was granted does not retroactively establish that no factual disputes existed.

Rather, it shows that the trial court concluded that when viewing facts in favor of Plaintiff (the proper MSJ standard), Plaintiff could not prevail as a matter of law.

The Distinction Matters For Attorney Fees: The presence of genuine factual disputes is precisely what precludes a finding that a claim is "frivolous." *See Munoz v. Measner,* 247 P.3d 1031 (Colo. 2011) (a court does not abuse its discretion by failing to award fees when a plaintiff attempts to present evidence in good faith in support of their claims, but simply falls short of what is required to create an issue of material fact); *Kemp v. State Board of Agriculture,* 790 P.2d 870 (a court is not permitted to use summary judgment victory as an automatic justification for frivolousness findings).

Defendant's failure to engage with this principle and these factual disputes constitutes waiver of the argument that they are immaterial.

V. DEFENDANT'S BAD FAITH THEORY RESTS ON PROCEDURAL VIOLATIONS AND INADEQUATE PROCESS

Plaintiff's Opening Brief established that bad faith and frivolousness are separate categories: frivolousness addresses claim merit (evaluated when filed); bad faith addresses litigation conduct (evaluated during litigation). *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063 (Colo. 1984); *In re Parental Responsibilities of I.M.,* 410 P.3d 488 (Colo. App. 2013).

Plaintiff further established that Defendant's bad faith theory fails because:

1. **Defendant Never Filed A Rule 37 Motion To Compel:** Plaintiff's Opening Brief (pages 33–37) demonstrated that if Defendant genuinely believed Plaintiff was maintaining the suit in bad faith through discovery evasion, Defendant would have sought C.R.C.P. Rule 37 sanctions when deficiencies were discovered, not after winning summary judgment.

Timeline:

- July 25, 2024: Defendant's MSJ filed without mentioning any disclosure/discovery deficiencies
- October 10, 2024: Defendant introduces employee affidavit and receipts for FIRST TIME in Reply (violating *Wallman v. Kelley*)
- November 19, 2024: Defendant's MSJ granted; District Court order makes no reference to disclosure/discovery issues
- March 18, 2025: Only AFTER obtaining favorable MSJ does Defendant raise disclosure/discovery conduct as evidence of bad faith

Defendant's Response: Defendant does not address this timeline or procedural failure. Defendant does not explain why, if discovery conduct was genuinely obstructive, no Rule 37 motion was filed. This silence is damning. The absence of a Rule 37 motion when one was clearly available—and when Defendant

claims to have discovered "evasive" conduct—demonstrates that Defendant did not genuinely believe Plaintiff was in bad faith. Rather, Defendant is engaging in post-hoc narrative construction to support a frivolousness finding already made.

2. **Plaintiff Proactively Cured Alleged Deficiencies Before Judgment:** Plaintiff's Opening Brief (page 34) established that Plaintiff filed supplemental disclosures, *CF at 1022,* and supplemental discovery responses, *CF at 1026,* without compulsion, curing any alleged deficiencies before Defendant's MSJ was decided (November 19, 2024).

A party genuinely maintaining a lawsuit in bad faith would not voluntarily cure alleged deficiencies. The act of curing is affirmative evidence of good faith.

Defendant's Response: Defendant does not address this curative conduct. Defendant does not explain how Plaintiff's proactive curing is consistent with bad faith maintenance of suit. This silence concedes the point.

3. **Due Process Violation – Plaintiff Received No Notice:** Plaintiff's Opening Brief (page 34) established that Plaintiff received no formal notice through a Motion to Compel that his discovery responses would be used against him in sanctions proceedings. Due process requires notice and opportunity to cure before conduct is used as evidence of bad faith. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

Here, Defendant never gave Plaintiff notice before using discovery conduct

against him. Plaintiff was "ambushed" post-judgment with a retroactive bad faith characterization.

Defendant's Response: Defendant does not address this due process argument. Defendant does not explain why Plaintiff should be sanctioned for conduct that he was never formally notified would be used against him. The absence of response constitutes waiver.

4. **C.R.C.P. Rule 37(c) Proportionality Requirement:** Plaintiff's Opening Brief (page 35) established that even if discovery deficiencies existed, C.R.C.P. Rule 37(c) requires that sanctions be proportional to the violation. The alleged deficiencies were minimal (omission of one witness, "I do not recall" responses) and cured before judgment. No spoliation, calculated evasion, ongoing defiance, or prejudice occurred.

Appropriate sanctions for such minor, cured violations might include payment of Defendant's attorney fees specifically related to the discovery dispute (calculated by Plaintiff to be 8.40 hours, equaling perhaps $1,000–$3,000), not a $36,124.50 award for the entire case.

Defendant's Response: Defendant does not address proportionality at all. Defendant does not engage with Rule 37(c) or explain why a $36k+ sanction is proportional to alleged minimal discovery violations that were cured before judgment.

5. **The YouTube Video And Deposition Quotes Are Misinterpreted:** Defendant relies on selective quotations from a YouTube video and deposition statements as proof of bad faith. But:

Regarding the YouTube video: Plaintiff's Opening Brief (pages 26–27, 31) explained that Plaintiff's YouTube comments were not an expression of "no intention of cooperating in good faith," but a reasoned response to a pattern of judicial and legal abuses Plaintiff has repeatedly faced. The comments addressed the structural problem that merchants cannot be held accountable: once detained, a customer's "failure to show a receipt" (which may not exist) becomes the very justification for detention. Plaintiff's concern is legally sound, not evidence of bad faith intent at the time of filing.

Regarding the deposition: Plaintiff's "baiting" comments and "bait car" analogy were made in response to specific questioning and reflected Plaintiff's understanding of his own investigative tactics—attempting to create scenarios that would test merchant conduct. This is not evidence that the lawsuit itself was frivolous, only that Plaintiff was strategic in his store visits.

Defendant does not distinguish between (a) strategic conduct in planning store visits and (b) frivolous litigation. These are not the same thing.

VI. DEFENDANT IGNORES LOGICAL

INCONSISTENCIES IN THE BAD FAITH FINDING

Plaintiff's Opening Brief (page 36) identified a logical inconsistency: The District Court found that Plaintiff:

(1) Planned the lawsuit to provoke Best Buy, yet

(2) Maintained it in bad faith through evasive discovery

These are logically incompatible. If Plaintiff planned to sue Best Buy over a meritorious false imprisonment claim (which he believed he had), he would cooperate with discovery to support that claim—which he did, by proactively curing deficiencies.

Defendant's Response: Defendant does not address this logical inconsistency. No attempt is made to reconcile these findings. The absence of response suggests they are irreconcilable.

Reply To Issue 2 – The District Court Erred In Granting Defendant's Motion For Extension Of Time To File Attorney Fees Computation

I. DEFENDANT'S MOTION WAS PREMISED ON FALSE FACTUAL ASSERTIONS

Defendant's Motion For Extension Of Time, *CF at 1418–1422,* cited the following reasons for purportedly justifying its requested extension:

1. Case exceeded one year; bills "consist of hundreds of pages of

documents" requiring reformatting to remove privileged information

2. Plaintiff had "six active cases" against Best Buy, all "factually near identical," in "different phases of litigation or appeal," each with "disjointed schedule and deadlines"

3. This created "difficulties in keeping cases organized and separate," which "regrettably resulted in calendaring errors"

These assertions were factually false: Plaintiff's Response, *CF at 1631–1640,* demonstrated:

- At the time of the April 8, 2025 deadline, there were NOT six active cases against Best Buy in different phases with materially different deadlines
- The alleged "competing deadlines" Defendant cited either did not exist or were remote in time
- Defendant cited cases in different phases, but failed to identify what specific competing deadline existed on or near April 8, 2025
- Defendant's assertion that cases were "factually near identical" is itself debatable

Defendant's Response: Defendant's Answer Brief (pages 19–22) does not defend the factual accuracy of these assertions. Instead, Defendant simply restates that the District Court's decision "rests within the sound discretion of the trial court"

and that Plaintiff "has not demonstrated a clear showing of abuse of discretion."

But the question is not simply whether the trial court had discretion. The question is whether Defendant's factual representations were true. If they were false, the District Court's grant of the extension was premised on false information —which constitutes abuse of discretion.

Defendant's failure to defend the factual accuracy of its representations concerning competing deadlines effectively concedes they were false or highly misleading.

II. DEFENDANT FAILS TO ESTABLISH "EXCUSABLE NEGLECT" UNDER C.R.C.P. RULE 6(B)

Defendant's Motion claimed "calendaring errors." But C.R.C.P. Rule 6(b) requires "excusable neglect" for an enlargement of time to be granted after the deadline has passed.

Colorado law, however, does not define "excusable neglect" to include mere "garden-variety" calendaring mistakes, particularly when:

- The deadline was stated unambiguously in a Court Order
- The party claiming neglect (Defendant) manages multiple lawsuits and is represented by counsel

Defendant's Response: Defendant's Answer Brief (pages 19–22) does not

discuss what "excusable neglect" means or defend why Defendant's alleged "calendaring errors" satisfy the standard. Defendant merely cites that the District Court has "broad discretion" and that rules should be "liberally construed."

But Defendant does not explain how a law firm's calendar error—occurring while managing multiple cases for the same client—rises to "excusable neglect" when a clear deadline was stated in a Court Order. The failure to explain this suggests Defendant recognizes that pure calendaring errors may not satisfy the "excusable neglect" standard.

Reply To Issue 3 – The District Court Erred In Granting Defendant's Attorney Fees Computation

I. THE DISTRICT COURT FAILED TO PERFORM MANDATORY STATUTORY FACTOR ANALYSIS

Plaintiff's Opening Brief established that C.R.S. § 13-17-103(1) requires the trial court to consider several specific factors when computing attorney fees:

(a) The extent of the plaintiff's efforts to determine the validity of the action or defense

(b) The extent of the plaintiff's efforts to reduce or dismiss claims found not to be valid

(c) The availability of facts to assist plaintiff in determining the validity of

his claims

(d) The relative financial positions of the parties involved

(f) Whether issues of fact were reasonably in conflict

The District Court's Order, *CF at 1704–1708,* does not specifically analyze these factors. Instead, the Order contains general statements about complexity, amount in controversy, length of time, degree of success, and public importance—language that does not track these explicit 13-17-103(1) statutory factors.

Defendant's Critical Admissions:

1. **Defendant agrees** the District Court did not fully grant its requested fees ($42,083 reduced to $36,124.50)

2. **Defendant agrees** the District Court "does not contest the lodestar amount" (Answer Brief, page 15)

3. **Defendant does NOT contest** that the lodestar calculation was properly reduced

This means Defendant is NOT defending the methodology or the statutory factor analysis. Defendant has conceded that this issue is contested.

But Defendant Does Not Address:

- How the District Court satisfied the statutory requirement to analyze factor (a): Plaintiff's efforts to determine claim validity

- How the District Court satisfied factor (b): Plaintiff's efforts to reduce or dismiss invalid claims
- How the District Court satisfied factor (c): Availability of facts
- How the District Court satisfied factor (d): Relative financial positions
- How the District Court satisfied factor (f): Whether factual issues were in conflict

The Answer Brief's silence on these statutory requirements constitutes waiver of any defense that the necessary statutory analysis was performed.

II. FINANCIAL DISPARITY AND *PRO SE* STATUS WERE INADEQUATELY CONSIDERED

Defendant's equivocation of "*pro se* status" with "pecuniary status" in its Answer Brief (pages 23–24) constitutes a categorical error that fundamentally misunderstands both Colorado statutory law and the economic realities of civil litigation. This conflation deserves emphatic correction.

a. The Legal Distinction Under C.R.S. § 13-17-103(1)(d)

The relevant statute explicitly requires courts to consider "the relative financial positions of the parties involved." (C.R.S. § 13-17-103(1)(d)). This statutory language compels analysis of **actual pecuniary circumstances**—income, assets, liabilities, and ability to bear attorney fees burdens—not a party's litigation status.

Defendant's argument reduces this statutory mandate to a mere restatement of Plaintiff's *pro se* status, then cites a completely unrelated statute: "Parties appearing *pro se* shall not be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that the party's action or defense...was substantially frivolous." (C.R.S. § 13-17-102(6), quoted in Defendant's Answer Brief, page 23). However, this statute addresses the **threshold question of frivolousness**, not the **economic impact analysis** mandated by § 13-17-103(1)(d).

b. *Pro Se* Status Is Procedural; Pecuniary Status Is Substantive

***Pro se* status** describes a **procedural choice**—a party's election to represent themselves without retained counsel. This status reflects nothing about financial condition. A self-employed entrepreneur, a successful small business owner, a professional with substantial assets, or even a wealthy retiree may all choose to represent themselves *pro se* for various reasons: confidence in their legal abilities, familiarity with procedural rules, desire to maintain direct control over their case, or philosophical preference for self-representation. Conversely, a *pro se* litigant may be indigent and unable to afford counsel. Thus, *pro se* litigants exist across the entire economic spectrum.

Pecuniary status, by contrast, reflects **substantive financial reality:** earned income, savings, property ownership, debt obligations, and ability to satisfy

substantial monetary judgments.

These are fundamentally distinct inquiries, thus requiring courts to analyze the latter question, not assume it from the former.

c. The District Court's Omission Regarding In Forma Pauperis

The record reveals a significant gap in the District Court's analysis that Defendant conveniently ignores. Plaintiff filed a Motion to Proceed **In Forma Pauperis** on the same date as his Complaint (November 21, 2023; *CF at 5*), which the District Court **granted.** This filing constitutes direct, admissible evidence of actual financial hardship sufficient to justify waiver of court filing fees—a determination made upon sworn evidence or declaration of financial status.

The District Court's Order contains no acknowledgment of this In Forma Pauperis status, no analysis of Plaintiff's actual financial resources, and no explanation for why a party previously found too poor to pay a $265 filing fee should now be assessed $36,124.50 in attorney fees.

Defendant's Answer Brief fails entirely to acknowledge this In Forma Pauperis filing, instead conflating the entirely separate concept of "*pro se* representation" with financial inability to pay. This omission is striking and undermines Defendant's entire position on this statutory factor.

d. The Incoherence Of Defendant's Position

If Defendant's logic were sound—that *pro se* status automatically satisfies the pecuniary analysis—then several absurd consequences would follow:

1. A wealthy party choosing self-representation would receive identical fee consideration as an indigent party choosing self-representation, rendering the statutory factor meaningless.

2. No *pro se* litigant could ever successfully argue financial hardship because their self-representation status would supersede all inquiry into actual finances.

3. The statutory requirement to analyze "relative financial positions" would become surplusage, eliminated by the mere fact of self-representation.

None of these consequences comport with Colorado statutory law, common sense, or the purpose of fee awards—which is to sanction bad litigation conduct while remaining proportionate to the parties' circumstances.

e. Proper Application Of C.R.S. § 13-17-103(1)(d)

A proper pecuniary analysis would require the District Court to consider:

- **Plaintiff's financial resources:** Income, savings, employment status, asset ownership, and debt obligations
- **Defendant's financial resources:** A multinational corporation (Best Buy, L.P.) with revenues likely exceeding $40 billion annually and resources to retain four attorneys and three paralegals (with 81+ years of combined experience) on a

single civil case

- **Proportionality:** The relative financial burden of a $36,124.50 judgment on an In Forma Pauperis *pro se* litigant versus the cost to a Fortune 100 retailer of funding litigation through routine business operations

- **Impact on access to justice:** Whether the magnitude of the fee award effectively bars Plaintiff from meaningful future access to Colorado courts

The District Court made no such analysis. Instead, it merely noted only that Plaintiff appeared *pro se* and cited a statute about frivolousness—then proceeded to uphold a fee award that, by any reasonable measure, represents a staggering economic burden to a litigant with documented financial hardship. This is not analysis; it is abdication of statutory duty.

III. PROPORTIONALITY DEMANDS REVERSAL FOR AN AWARD THAT BEARS NO REASONABLE RELATIONSHIP TO THE VIOLATION

Even accepting *arguendo* that some fee award was warranted, the $36,124.50 award bears no reasonable relationship to any actual violation.

Why Proportionality Requires Reversal:

1. **The Underlying Case Was Straightforward:** The District Court itself acknowledged this: "[A]lthough the [District] Court acknowledges Plaintiff's litigiousness, this case was a relatively straightforward tort case against a *pro se*

plaintiff that was dismissed on summary judgment." *CF at 1725.*

2. **Alleged Discovery Violations Were Minimal And Cured:** Plaintiff's discovery "deficiencies" consisted of:

- Omission of one witness (brother) from initial disclosures
- Some "I do not recall" responses initially
- Both cured proactively before judgment

These are NOT the types of violations that warrant $36k+ in fees.

3. **No Calculation Of Fees Specifically Attributable To The Alleged Violation:** Defendant's fee computation does not segment fees attributable to discovery disputes versus fees for representation generally. The $36,124.50 figure represents fees for the entire case—MSJ briefing, summary judgment hearing, discovery work, etc.

Proper proportionality analysis would identify:

- Fees specific to responding to alleged discovery deficiencies (perhaps $1,000-$3,000)
- Fees for work that would have been necessary regardless (the balance)

Then, only fees attributable to the alleged violation would be considered for potential sanctions.

4. **Chilling Effect On *Pro Se* Litigants:** A $36k+ fee award against a *pro*

se litigant in a case where the underlying claims were "straightforward" and the violation was minimal and cured is draconian. It will chill legitimate litigation by *pro se* parties who cannot afford such massive counterclaims.

Defendant's Response: Defendant does not address proportionality at all. Defendant does not explain why $36k+ is proportional to alleged minimal discovery violations. Defendant does not segment the fees to show what portion relates to actual discovery misconduct versus general representation.

The absence of proportionality analysis suggests Defendant recognizes that $36k+ cannot be justified as proportional to the alleged misconduct.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant's arguments in its Answer Brief fail on multiple levels:

First, Defendant does not address the statutory mandate for specific findings of fact and analysis of C.R.S. § 13-17-103(1) factors. This silence constitutes an admission that the statutory requirements were not met.

Second, Defendant completely waives substantive response to Plaintiff's arguments concerning: (1) novel legal theories protected by C.R.S. § 13-17-102(7); (2) material factual distinctions from prior cases; (3) genuine factual disputes precluding

frivolousness; and (4) procedural violations undermining bad faith findings.

Third, Defendant's bad faith theory depends on discovery conduct, but Defendant never pursued statutory remedies (i.e. Rule 37 motion), Plaintiff cured alleged deficiencies proactively, and Defendant's post-judgment invocation of discovery issues demonstrates post-hoc narrative construction.

Fourth, Defendant ignores logical inconsistencies, procedural failings, due process violations, and proportionality concerns that require reversal.

For these reasons, Plaintiff respectfully requests that this Court of Appeals:

1. **REVERSE** the District Court's Order granting Defendant's Motion for Attorney Fees, and **REMAND** with directions to **DENY** the motion in its entirety; or, alternatively,

2. **VACATE AND REMAND** for entry of adequate findings of fact and conclusions of law complying with C.R.S. § 13-17-102 and § 13-17-103, after affording Plaintiff full due process including an evidentiary hearing if appropriate;

3. **REVERSE** the District Court's Order granting Defendant's Motion for Extension of Time to File Attorney Fees Computation;

4. **REVERSE** the District Court's Order adopting Defendant's Attorney Fees Computation and **VACATE** the award of $36,124.50; or, alternatively,

5. **VACATE AND REMAND** for a thorough reasonableness determination

consistent with the *Hensley* framework, addressing all required statutory factors with particular emphasis on the relative financial positions of the parties;

6. **AWARD** Plaintiff his costs on appeal, including preparation and filing fees, under C.A.R. Rule 39; and

7. **GRANT** such other and further relief as this Court deems just, proper, and equitable under the circumstances of this case.

Respectfully submitted on this, **the 21st day of January, 2026.**

William Montgomery
William Montgomery

CERTIFICATE OF SERVICE

I hereby certify that on this, **the 21st day of January, 2026,** 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:

Lori K. Bell
Sarah K. Vogel
Montgomery | Amatuzio
720 S Colorado Blvd, Suite 1200-N
Denver, CO 80246
T: (303) 592-6600
F: (303) 592-6666
lbell@mac-legal.com
svogel@mac-legal.com

Attorneys for Defendant

William Montgomery
William Montgomery