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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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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