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

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

<u>CERTIFICATE OF COMPLIANCE</u>

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

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

William Montgomery
William Montgomery

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Montgomery respectfully requests:

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

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

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

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

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

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

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

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

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

William Montgomery

William Montgomery

CERTIFICATE OF SERVICE

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

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