

COLORADO COURT OF APPEALS 2 East 14th Ave Denver, CO 80203 (720) 625-5150	<p style="text-align: center;">▲ Court Use Only ▲</p>
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	
Party Without Attorney: William Montgomery 2443 S University Blvd # 129 Denver, CO 80210 (970) 412-5463 zoinbergs@gmail.com	Court Of Appeals Case No: 2025CA327 Jefferson County District Court Case No: 2023CV226
PLAINTIFF'S APPEAL REPLY BRIEF	

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

CERTIFICATE OF COMPLIANCE

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

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

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


William Montgomery

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ARGUMENT

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

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

In Defendant's Appeal Answer Brief, it claims that “The District Court committed no error in properly considering evidence included with Defendant's Reply and Response to Plaintiff's Cross Motion for Summary Judgment because such evidence did not raise any new issues for which Plaintiff had not been placed on notice in Defendant's original Motion for Summary Judgment.” *Def's Answer Brief at 12.* Defendant further asserts that “‘Issue’ is defined in Black's Law Dictionary as ‘the matter to be decided in court,’ and is separate from factual evidence,” *Def's Answer Brief at 16,* and that “Plaintiff had ample notice of the issues raised by Defendant in its Motion for Summary Judgment and expressly responded to such issues in Plaintiff's Response in Objection to Defendant's Motion for Summary Judgment.” *Def's Answer Brief at 17.*

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

Defendant's statement made that “The exhibits addressed by Plaintiff were provided in support of Defendant's argument as to the first issue of False Imprisonment, which Defendant raised in its original Motion for Summary Judgment and subsequently preserved throughout the briefing process,” *Def's Answer Brief at 21*, **is factually incorrect**. The record clearly shows that the receipts and the affidavit of Mahmoud Abu-Shaweesh were **NOT** provided with Defendant's original Motion for Summary Judgment, *CF at 227*. Instead, they were introduced for the very first time in Defendant's MSJ reply brief, *CF at 729 and 741*. Therefore, Defendant did not “raise” these specific ***factual*** issues, nor did it “preserve” them through the briefing process from the outset.

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

Thus, a “genuine issue” literally IS a factual dispute supported by evidence.

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

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

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

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

b. The District Court erred by relying on conclusory statements

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

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

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

“Plaintiff had notice in Defendant's Motion for Summary Judgment that Defendant had presented arguments with respect to Plaintiff's refusal to provide a receipt to relieve himself of the alleged detention.” *Def's Answer Brief at 21*. Defendant further claims that it “expressly addressed the Restatement (Second) of Torts § 36 and argued that it was unreasonable for Plaintiff to choose not to provide proof of purchase to end the interaction.” *Def's Answer Brief at 33*. However, merely “presenting arguments” in a motion for summary judgment opening brief, even those referencing legal treatises, *but whereby no supporting evidence is ever submitted*, is not enough to shift the burden as the movant. **Arguments must be supported by evidence, and conclusory statements will not suffice.** For example, Defendant's claim that “At all times, Plaintiff could have simply shown a receipt and ended the confrontation,” *CF at 231*, is a prime example of a conclusory statement. It lacks any evidentiary foundation, such as proof that a receipt existed, proof that Plaintiff possessed it, or proof that whatever he had on him was even store merchandise for which a receipt might be associated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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- 1 It should be noted that this is an **utterly terrible argument** in its own right. That is, it strains SERIOUS credulity that if Plaintiff *did* steal something from the store, then *did* return it upon being asked to, **that Defendant ***WOULD NOT*** ABSOLUTELY and UNQUESTIONABLY continue to detain him in the mean time until the police arrived to begin processing him!** At that point, the act of “returning stolen merchandise” would be *the exact opposite* of an “escape path.”
 - 2 Also worth noting is that ***EVEN IF*** Plaintiff were to “hand over” merchandise, *regardless of whether it be stolen, owned by him, or perhaps property that he had been erroneously attempting to return to the wrong store*, such would ***STILL*** not nullify his unlawful detention from having occurred in the matter. This is because **“The exercise of dominion over the property serves also to exercise dominion over the person owning such property.”** *Burrow v. K-Mart Corp.*, 166 Ga. App. 284, 285 (1983). That is, “it may be inferred that the employee intended to restrain and control both the property and the person of the plaintiff until the search was completed.” *Id.*

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

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

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

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

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

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

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

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

e. The District Court misinterpreted key jury instructions

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

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

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

Lopez, 916 P.2d 1187, 1192 (Colo. 1996). Most importantly, “**Courts may not impute their own meaning to otherwise clear statutory language, nor assume a legislative intent that would vary the words used by the General Assembly.**”

People v. Gholston, 26 P.3d 1, 7 (Colo. App. 2001).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even if the receipt exhibits were admissible absent an accompanied affidavit (which they are not), they do not demonstrate that *Plaintiff* made the purchase. In Defendant's Appeal Answer Brief, it claims that “To resolve the arguments which had been developed through briefing on the issue of false imprisonment, Defendant

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

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

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

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

a. Defendant's baseless arguments of “baiting” and “entrapment”

In Defendant's MSJ, it attempted to characterize Plaintiff's behavior as that of unlawful “targeting,” “baiting,” and “entrapment.” *CF at 231, 235, and 237.* Defendant now further asserts in its Appeal Answer Brief that “Plaintiff has further demonstrated through numerous lawsuits his modus operandi of targeting retail store locations which he has specifically identified as locations in which retail service workers routinely request customers present a sales receipt upon exit from the store premises,” *Def's Answer Brief at 22.* However, such a statement inadvertently *supports* Plaintiff's position. That is, Plaintiff's purported “targeting” of such locations has never been nefarious, but rather a necessary response to a widespread and legally problematic retail practice.

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

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

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

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

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

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

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

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

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

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

- Best Buy does not utilize “back” registers (they have registers littered all throughout their stores).
- Best Buy phased out plastic bags in July 2022, *CF at 907*.
- Best Buy moved to digital-only receipts in November 2017, *CF at 830*, eliminating the physical receipt to “refuse to show.”

Furthermore, the only “evidence” purportedly showing that Plaintiff “acted”

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

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

CONCLUSION

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

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

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

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


William Montgomery

CERTIFICATE OF SERVICE

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

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