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

Plaintiff, proceeding *pro se*, hereby submits to the Court his CROSS-MOTION FOR SUMMARY JUDGMENT, and in support thereof, states as follows:

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

Plaintiff certifies that he has conferred in good faith with Defendant concerning this CROSS-MSJ. Defendant indicates that it is opposed to the relief sought herein.

INTRODUCTION

One day Plaintiff was standing on the side of a Best Buy building, waiting for his brother, when Defendant decided to accost him. Having never met Defendant before in his entire life, Plaintiff was taken by surprise, and so he decided to start a video recording of the encounter with his body-worn pen camera. Throughout the encounter, Defendant – in front of many others – loudly and rudely accused Plaintiff of stealing, said to him that it had contacted the police, called him foul names, and even taunted him, all while repeatedly and incessantly begging for him to "return its

merchandise" to it. Of course, Plaintiff knew that Defendant was bluffing (and was resorting to petty bullying tactics to compensate for its lack of investigation) as he knew full-well that it had not collected even a single iota of actual information to reasonably suspect him of shoplifting in the matter (let alone that he was a customer, or even browser, of its establishment). In fact, Defendant was so clueless, that it didn't even tell the difference between what Plaintiff had been holding in his hands, and what had existed in one of his pant pockets (but whereby Plaintiff had never once placed into, or removed, anything from any pant pocket in front of anybody, ever, that day, period). As Plaintiff continued to try to peacefully leave the area, Defendant continued to stop him – both physically by way of stepping in front of him, and conceptually by way of threatening to "jump" him "around the corner" should he leave in that direction. Eventually, after hastily performing its failed investigation completely literally backwards, Defendant finally left the area so that Plaintiff could leave too, and to which he finally did 14 minutes later after feeling safe enough to do so. This here false imprisonment / defamation *per se* / assault lawsuit naturally followed.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *American Water Dev., Inc. v. City of Alamosa,* 874 P.2d 352, 360 (Colo. 1994). In deciding whether to grant a motion for summary judgment, a court must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any." *Cary v. United of Omaha Life Ins. Co.,* 68 P.3d 462, 466 (Colo. 2003) (quoting C.R.C.P. 56(c)); *see also AviComm, Inc. v. Colo. Pub. Util. Comm'n,* 955 P.2d 1023, 1029 (Colo. 1998). The burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* In determining when summary judgment is proper, the nonmoving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts. *Bayou Land Co. v. Talley,* 924 P.2d 136, 151 (Colo. 1996). However, once the moving party affirmatively shows specific facts probative of its right to judgment, it becomes

necessary for the nonmoving party to set forth facts by affidavit, or otherwise, showing that there is a genuine issue for trial. *Civil Service Com'n. v. Pinder,* 812 P.2d 645, 649 (Colo.1991).

TABLE OF AUTHORITIES

CASES

JURY INSTRUCTIONS

OTHER AUTHORITIES

PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On or about November 25, 2022, at approximately 2:19pm, Plaintiff was standing outside a Best Buy store located at 9369 Sheridan Blvd, Westminster, CO, 80031, waiting for his brother. *See Plaintiff's Affidavit (herein "PA") at ¶ 2. See Plaintiff's Cross-Motion For Summary Judgment (herein "PCMSJ") Exhibit #1, which is available for download here: https://www.mediafire.com/folder/hwh3yxn2hu7uj [which is the same as Def's MSJ Exhibit M].*

2. Plaintiff had been standing on the east side of said building for about five minutes before he was approached by several Best Buy employees. *See PA at ¶ 3.*

3. Two of the employees, identified by company name tag as "Mahmoud" and "Shane," were later accompanied by a third employee, who didn't have a name tag on him [and who will thus be referred henceforth in this C-MSJ as "John Doe"]. *See PA at ¶ 4. See PCMSJ Exhibit #1.*

4. Prior to approaching him, at no time whatsoever had Mahmoud, Shane, or John Doe ever once met, seen, identify, watch pass by, or been located anywhere physically near

Plaintiff on that day of November 25, 2022. Said employees had never been "posted up" at the store's exit, nor had they ever "followed" Plaintiff "out" of said store, either. Again, Plaintiff had been standing on the side of the Best Buy building for a full five minutes, "waiting for [them] to come out" (Defendant's words, not Plaintiff's, as Plaintiff was actually waiting for his brother at the time, see *Fact #1* above). *See PA at ¶ 5. See PCMSJ Exhibit #1 at timestamp 8:08.*

5. Upon approach, Mahmoud told Plaintiff something to the effect of, "I need my stuff back." Plaintiff was never asked to "show a receipt" by Mahmoud, Shane, or John Doe. *See PA at ¶ 6.*

6. Upon hearing Mahmoud's statement, Plaintiff discreetly activated his body-worn pen camera, located in his front jacket pocket, by pressing the power button on it. This video recording would later be stopped, saved, and labeled by Plaintiff based on the date/time he started recording it on/at. *See PA at ¶ 7. See PCMSJ Exhibit #1.* Later, a transcript of what Plaintiff personally heard that day was also prepared by him. *See Transcript Of Plaintiff's Bodycam Footage Of The Event.*

7. The three Best Buy employees' choice to interact with Plaintiff took him by surprise, as he had never had any adverse interactions with Best Buy or its employees in the past. That's why he had activated his body-worn pen camera only upon their initial accosting of him. *See PA at ¶ 8.*

8. Neither Mahmoud, nor Shane, nor John Doe, had any earthly idea, ***whatsoever***, the nature or identity of *whatever* Plaintiff had been holding in his hands when they initially approached him that day of November 25, 2022. The same goes for *whatever* existed in one of his pant pockets, too. Said employees did not know if what Plaintiff had on him was a) store merchandise, b) stolen store merchandise, c) non-store merchandise, d) previously paid for store merchandise chosen by Plaintiff not to be returned, e) non-store merchandise Plaintiff had erroneously attempted to return to the wrong store, f) personal items, g) medication, h) etc. Specifically, by their very own admissions, said Best Buy employees ***did not even tell the difference between*** what Plaintiff held in his hands, and what existed in one of his pant pockets, **but whereby Plaintiff had never once placed into, or removed, anything from any pant pocket in front of anybody, ever, that day, period.** *See PA at*

¶ *25. See PCMSJ Exhibit #1 at timestamps 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?"), 8:06 ("Oh we'll find out soon enough."), 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.").* Moreover, ***EVEN IF*** what Plaintiff had on him was, in fact, stolen merchandise, such would ***STILL*** not have changed the **COMPLETELY-UNKNOWN-TO-THEM-AND-COMPLETELY-UNIDENTIFIED-TO-THEM-AT-ALL-TIMES-AND-PLACES** nature of the item(s), as said employees would not have known literally anything about anything, ABOUT ANYTHING, *regardless of the situation,* and regardless of the pocket, because of how they had only seen Plaintiff **for the very first time standing outside their building** (and thereby would have never seen him take whatever-the-heck-he-may-have-had-on-him-that-day "from any walls, past any points of sale, and out any doors, *whatsoever*, **period**). *See PA at ¶ 5.*

9. At about a minute into the interaction, Plaintiff tried to walk away from where he had been standing, but was told by Mahmoud that, "You're not going anywhere, dude. You're not going anywhere." About a minute after that, John Doe told Plaintiff, "And you're not bigger than any of us." *See PA at ¶ 11. See PCMSJ Exhibit #1 at timestamps 1:08 and 2:04.*

10. For the next several minutes Plaintiff tried to step around Mahmoud, Shane, and John Doe, in order to leave the area, but whereby all three employees repeatedly physically prevented him from doing so. All three Best Buy employees had physically "corralled" Plaintiff against the building's wall, leaving him with no place to go [without otherwise having to physically touch the employees in order to move past them, but to which he was unable to do for fear that he would be assaulted in return]. *See PA at ¶ 12. See PCMSJ Exhibit #1 from timestamp 2:05 onward.*

11. At one point, John Doe called Plaintiff a "dumbfuck," followed shortly thereafter with the statement, "You're fucking a thief." These insults and accusations were made in a loud and brash tone, in front of several people walking by who would have also heard them be said to Plaintiff. *See*

PA at ¶ 13. See PCMSJ Exhibit #1 at timestamps 2:18 and 2:30. Later, John Doe continued to insult Plaintiff by repeatedly calling him a "miserable human being." *See PCMSJ Exhibit #1 at timestamp 10:54.* Toward the end of the interaction, Mahmoud said to Plaintiff, "You might be the dumbest motherfucker I ever met in my life." *See PCMSJ Exhibit #1 at timestamp 12:08.*

12. At another point, all three employees began taunting Plaintiff, telling him that it will be "fun" for them to watch the cops "jump him," "tase him," and "fuck him up." *See PA at ¶ 14. See PCMSJ Exhibit #1 from timestamp 2:51 to 3:20, and 6:06.*

13. Throughout the encounter, as Plaintiff continued to try to step around the Best Buy employees in order to leave the area, Mahmoud repeatedly affirmed his intent to detain him (accompanied by physical movements made by all three employees into the various directions Plaintiff attempted to go). *See PA at ¶ 15. See PCMSJ Exhibit #1 at timestamps 2:10 ("Give me my shit, or you're gonna be right fucking here."), 2:40 ("You're not going anywhere, you're giving us our shit back. You're not leaving."), 3:34 ("You're not going anywhere, bro, you can keep trying to take a step to the left, a step to the right, you're not moving. Until I have my product in my hand, you're staying here."), 3:51 ("Those are your only two options, you can keep looking around like something's gonna happen, and you're gonna be able to walk away, or you can give me my shit."), 4:03 ("You're not going anywhere, bro."), 5:11 ("You're not moving, dude. You're where you're gonna be until the cops get here. I don't know how else to explain it to you."), 6:00 ("Well then give me my stuff, dude. You're not moving, man. Give me my stuff."), 7:25 ("You're not going anywhere, dude."), and 8:51 ("Okay, then you're gonna stand there until the cops show up.").*

14. Finally, after being harassed and bullied by the three Best Buy employees for nearly ten minutes, John Doe finally told Plaintiff that he could leave. But then he immediately said to his fellow employees, "Or he can run off camera." John Doe then confirmed what he meant by that by telling Plaintiff, "Oh yeah. Wait 'til you get off camera. We'll be following you. We're gonna wait until you're not on camera." *See PA at ¶ 18. See PCMSJ Exhibit #1 from timestamp 9:23 to 9:33.*

15. Plaintiff then said to the three Best Buy employees, “I don't feel safe leaving now,” after which Mahmoud told him, “You shouldn't,” followed by some laughter. John Doe then chimed in and said to Plaintiff, “I wouldn't feel safe if I robbed somebody, either. Okay? When you rob somebody, or steal from somebody, I would feel threatened also.” *See PA at ¶ 19. See PCMSJ Exhibit #1 from timestamp 9:48 to 9:52.*

16. After being told once again by John Doe to “Walk away,” Plaintiff once again responded to the three Best Buy employees by saying, “Yeah I don't feel like getting jumped off camera.” Mahmoud replied by saying, “Then give me my stuff, dude.” A few second later, after Plaintiff reaffirmed that he “doesn't feel safe leaving now,” Mahmoud once again followed up by saying, “You'll have zero problems if you hand me what's in your pocket, and what's in your coat.” *See PA at ¶ 20. See PCMSJ Exhibit #1 from timestamp 10:07 to 10:48.*

17. Once again, after being told by Mahmoud of his “chance” to leave, Plaintiff told him, “Like I'm just gonna trust him that he's not gonna jump me.” Mahmoud then responded by saying, “You shouldn't trust him that he's not. You should give me my stuff. That's what you should do.” *See PA at ¶ 21. See PCMSJ Exhibit #1 from timestamp 11:27 to 11:36.*

18. Eventually, after nearly ten minutes of being detained by the three Best Buy employees, Mahmoud told Plaintiff to “Have a good one dude. See ya later.” All three employees then quickly stepped away from Plaintiff and proceeded back into the Best Buy building. *See PA at ¶ 22. See PCMSJ Exhibit #1 at timestamp 12:15.*

19. Plaintiff then spent the next 14 minutes standing in place, on the side of the Best Buy building, because of how unsafe he felt that he might still get jumped, off camera, by the three employees who said to him they would. [Throughout that 14 minutes, no cops ever came, either]. *See PA at ¶ 23. See PCMSJ Exhibit #1 from timestamp 12:16 to 26:16.*

20. During Plaintiff's detention by the three Best Buy employees, he counted at least 192 people that had walked past him [and who would have thus been within earshot of the conversation

that took place between he and the three employees]. *See PCMSJ Exhibit #1 generally.* Many times, people that were passing by looked directly at Plaintiff and the employees. One person even stopped literally *right* next to Plaintiff and the three employees to explicitly listen to the conversation that had been taking place between them. *See PCMSJ Exhibit #1 from timestamp 4:36 to 4:53.*

21. At no point in time, on that day of November 25, 2022, had Plaintiff ever once "concealed" anything in front of [let alone not in front of] anybody, ever, period. *See PA at ¶ 24.*

22. At no point in time, on that day of November 25, 2022, had Plaintiff ever once placed into, or removed, anything from any pant pocket in front of anybody, ever, period. Whatever was located in his pant pockets remained there before, throughout, and after his interaction with the Best Buy employees. *See PA at ¶ 25.*

23. At no point in time, in his entire life, has Plaintiff ever been made aware of any specific or official [let alone general or unofficial] policy employed [let alone enforced] by Best Buy regarding the act [compulsory or not] of "receipt showing." Nowhere has Plaintiff ever seen such a policy posted in any Best Buy store, nor spoken to him by any Best Buy employee, nor available for him [or any others] to review on Best Buy's [or any other's] publicly available website. To this date, Plaintiff still has literally no earthly idea, whatsoever, what Best Buy's policy actually is regarding "receipt showing" [if such a policy even exists, unofficial or not, in the first place]. *See PA at ¶ 26.*

24. On November 25, 2022, Defendant made no "calls for service" to Westminster Police, *whatsoever,* in reference to Plaintiff purportedly shoplifting from its store. *See PCMSJ Exhibit #2.*

25. Ultimately, Plaintiff experienced numerous manifestations of significant mental anguish and emotional distress both during and after his adverse encounter with Defendant. Such manifestations include (but are not limited to): helplessness, anger, frustration, shock, disappointment, inconvenience, embarrassment, humiliation, severe indignity, devastation, reputational damage, apprehensiveness, anxiety, mistrust in authority, marked diminishment in quality of life, bitterness, insomnia, and overwhelming grief. *See PA at ¶ 27.*

ARGUMENT

I. DEFENDANT FALSELY IMPRISONED PLAINTIFF, AND LACKED SHOPKEEPER'S PRIVILEGE FOR ITS ACTIONS

a. Defendant is liable for falsely imprisoning Plaintiff

In order to succeed on a claim for False Imprisonment, a Plaintiff must prove the following elements:

1) The Defendant intended to restrict the Plaintiff's freedom of movement;

2) The Defendant, directly or indirectly, restricted the Plaintiff's freedom of movement for a period of time, no matter how short; and

3) The Plaintiff was aware that their freedom of movement was restricted.

See Colorado Civil Jury Instruction 21:1. Additionally, regarding the second and third elements,

> A person's freedom of movement has been restricted when . . . the person complies with actual or apparent threats that he or she or a member of his or her family will be immediately harmed if he or she moves beyond or refuses to go to a certain area.

See Colorado Civil Jury Instruction 21:2(3).

Regarding the first element, it is emphatically indisputable that the three Best Buy employees at issue here today ***intended to*** – specifically *and* explicitly [by way of their very own words *and* actions] – "restrict Plaintiff's freedom of movement." *See Plaintiff's Undisputed Material Facts #9, #10, and especially #13, above.*

Regarding the second element, it is equally indisputable that said employees ***did,*** in fact, "restrict Plaintiff's freedom of movement" – for over ten minutes – by way of their continuing to step in front of him every time he tried to leave the area. *See Plaintiff's Undisputed Material Facts #9, #10, and #13, above. See PCMSJ Exhibit #1 from timestamp 1:08 to 12:15.* Moreover, Colorado Courts have long held that "Physical force is not required to complete a false imprisonment." *Crews-Beggs Dry Goods Co. v. Bayle,* 97 Colo. 568, 51 P.2d 1026 (1935). That is, "Without a showing of justification, any restraint, either by force or fear, is unlawful and constitutes a false imprisonment."

Ibid. See also McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

Regarding the third element, it is also indisputable that a reasonable person in Plaintiff's position would be "aware that their freedom of movement was restricted" – every time they were denied permission to leave [as Plaintiff was] upon every attempt made to do so [as Plaintiff did].[1]

b. Defendant lacked "shopkeeper's privilege" for its actions

Under certain circumstances, a Defendant is not legally responsible to a Plaintiff on a claim of False Imprisonment if the affirmative defense of a "privilege to detain for investigation" is proved. This defense is **only** proved if **all** of the following elements are met:

1) The Defendant was an owner or employee of a business establishment selling merchandise;

2) The Defendant acted in good faith and had probable cause based upon reasonable grounds to believe that the Plaintiff:

   a) Triggered an alarm or a theft detection device, or

   b) Concealed upon their person any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise, or

   c) Otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise; and

3) The Defendant detained and questioned the Plaintiff in a reasonable manner for the purpose of determining whether the Plaintiff committed theft.

See Colorado Civil Jury Instruction 21:7 (see also Colorado Civil Jury Instruction 21:8).

Regarding the first element, Plaintiff is not disputing that the three people who detained him on November 25, 2022 were employees of the business establishment known as Best Buy.

Regarding the second element, however, it is **categorically indisputable** that said three

1 It it wholly irrelevant that Plaintiff was initially "waiting" for his brother [or even for the Best Buy employees, for that matter] on the side of the building that day. This is because once he actively *tried* to leave the area [and was actively *denied* permission to do so] his false imprisonment was complete. "The fact that a plaintiff merely believes she is not free to leave is not enough to support a claim of false imprisonment. A plaintiff must make some 'attempt to determine whether his belief that his freedom of movement has been curtailed has basis.' This can be done, for instance, **by making a failed request to leave**." *Caswell v. BJ's Wholesale Co.,* 5 F. Supp. 2D 312, 319 (E.D. Pa. 1998) (citing *Chicarelli v. Plymouth Garden Apartments,* 551 F.Supp. 532, 540-41 (E.D. Pa. 1982)).

Best Buy employees **DID NOT** act in "good faith," **DID NOT** have "probable cause," and **DID NOT** act based upon "reasonable grounds" to fairly believe that Plaintiff stole merchandise from their business establishment [as will be discussed next]. Moreover, ***EVEN IF*** the three Best Buy employees at issue here today did, in fact, have "probable cause" (i.e. "shopkeeper's privilege" as we'll henceforth call it) to *initially* detain Plaintiff, they indisputably **LOST** that privilege once they began to question him **in an unreasonable manner** [as will also be discussed next], thereby rendering them unable to satisfy the third and final element of their affirmative defense, as well.

First, before delving into the various sub-elements of the second element, it cannot be stressed here enough that, when discussing civil False Imprisonment claims, **once a Plaintiff shows that a detention has occurred, THE BURDEN OF PROOF SHIFTS TO THE DEFENDANT who must then prove the existence of probable cause**. *See Crews-Beggs Dry Goods Co. v. Bayle,* 97 Colo. 568, 51 P.2d 1026 (1935); *see also Goodboe v. Gabriella,* 663 P.2d 1051 (Colo. App. 1983). This is because "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).

Now, regarding the sub-elements of the "shopkeeper's privilege" affirmative defense, let's begin with sub-element (2)(a). Here, Defendant has failed to provide this Court with any tangible, admissible evidence, *whatsoever*, that Plaintiff ever "triggered an alarm or a theft detection device."

Next, regarding sub-element (2)(b), Defendant has likewise failed to provide this Court with any tangible, admissible evidence, *whatsoever*, that Plaintiff ever "concealed upon his person any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise." Indeed, not only has Defendant failed to provide this Court with any evidence whatsoever of "concealment" (such as a witness affidavit attesting to such),[2] Plaintiff *has* provided

2 In fact, Defendant **can't even get its own facts straight** on this particular subject. *Compare its statement made*

definitive evidence to the exact contrary (via his own witness affidavit attesting to such) that he "had **[NOT]** ever once 'concealed' anything in front of (let alone not in front of) anybody, ever, period," that day. Additionally, regarding the contents of Plaintiff's pant pockets, Plaintiff likewise "had **[NOT]** ever once placed into, or removed, anything from any pant pocket in front of anybody, ever, period," that day. *See Plaintiff's Undisputed Material Facts #21 and #22, above. See also Chelette v. Wal-Mart Stores, Inc., 535 So. 2d 558, 561 (La. Ct. App. 1989)* (held that because Plaintiff made no "effort to conceal" the merchandise that he had recently purchased, Defendant lacked "facts justifying a belief (a reasonable belief) on [their] part [] that Plaintiff intended to commit a theft.").

Next, regarding sub-element (2)(c), Defendant has likewise failed to provide this Court with any tangible, admissible evidence, *whatsoever*, that Plaintiff ever "otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or business establishment selling merchandise." This is because Defendant has failed to provide this Court with any evidence, whatsoever, ***that Plaintiff was even located inside its store in the first place, EVER – customer, browser, *or* thief – that day of November 25, 2022***. Remember, Defendant has failed to provide this Court with any tangible, admissible evidence, *whatsoever*, that it had "ever once met, seen, identify, watch pass by, or been located anywhere physically near Plaintiff on that day of November 25, 2022" prior to approaching him for the very first time, ***outside***, on the side of its particular building. *See Plaintiff's Undisputed Material Fact #4, above.* Nor has Defendant shown this Court that it had ever been "posted up" at its store's exit, or that it had "followed" Plaintiff "out" of its store, either, as evidenced by its very own self-admitting statement made of, "we haven't had people stand here and wait for us to come out and get 'em though." *See PCMSJ Exhibit #1 at timestamp 8:08*. Thus, ***even if*** it could be assumed that Plaintiff had entered [then exited] the store at issue, such would *still* not bring Defendant any closer to actually showing that

on page 8 of its MSJ ("Here, Plaintiff intentionally concealed merchandise...") *with its statement made on page 10 of its MSJ* ("Plaintiff left the store with merchandise that was not in a bag...").

Plaintiff **was even a customer, let alone a thief, of it.** Indeed, Plaintiff could have just as easily been *a wholly unrelated third or fourth category of person,* i.e. one who might have been holding "previously paid for store merchandise chosen by him not to be returned," or one holding "non-store merchandise he had erroneously attempted to return to the wrong store." *See Plaintiff's Undisputed Material Fact #8, above.* Under both these circumstances, it would be unreasonable to assume that Plaintiff would have been EITHER "a shopper" OR "a thief" that day [for which Defendant might have some argument for in one direction or the other]. In other words, **it can never legally be assumed, IN EITHER DIRECTION** (i.e. that Plaintiff was either a customer, or he was a thief) just because he was merely located "near" [and thus potentially at one point in time "inside"] the store, **because of how such an argument is simply a false dichotomy.** Moreover, ***EVEN IF*** it could be assumed that Plaintiff had, *in fact*, entered [then exited] the store, **AND** that Defendant had, *in fact*, been "posted up" at its exit, such would ***STILL*** do absolutely nothing to even begin to substantiate that Plaintiff "otherwise carried away any **unpurchased** goods" from the store. This is because when merely carrying out of a store unbagged merchandise located on one's person, "The absence of any indication that the merchandise [is] 'unpurchased' justifies the conclusion of the court that there [is] no reasonable grounds for believing that [a customer] [is] shoplifting." *Henry v. Shopper's World,* 200 N.J. Super. 14, 18 (App. Div. 1985). *See also Coblyn v. Kennedy's Inc.,* 359 Mass. 319, 320 (Mass. 1971); *see also Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 520 (Tex. App. 1996) (held that "little more than unfounded naked suspicion" existed to "formulate the [reasonable] belief that [Plaintiff] had stolen anything" where Defendant "never saw [Plaintiff] anywhere in the store until they were walking out of the store.").

Finally, regarding element (3) of the "shopkeeper's privilege" affirmative defense, Defendant has failed to satisfy this element, as well, due to the **patently unreasonable manner** in which they executed their 10+ minute detention of Plaintiff. "In other words, the qualified privilege under the statute does not give the merchant the right to **embarrass** or **harass** individuals suspected, in public

view of every one, **in a rude manner**." *J. C. Penney Co. v. Cox,* 246 Miss. 1, 12-13 (Miss. 1963). Specifically, Plaintiff's detention involved John Doe calling him a "dumbfuck," followed shortly thereafter with the statement, "You're fucking a thief." His detention also involved John Doe repeatedly calling him a "miserable human being." At one point, all three employees publicly taunted Plaintiff by telling him that it will be "fun" for them to watch the cops "jump him," "tase him," and "fuck him up." Then, toward the end of his detention, Mahmoud said to Plaintiff, "You might be the dumbest motherfucker I ever met in my life." *See Plaintiff's Undisputed Material Facts #11 and #12, above.* Additionally, ***and perhaps more importantly***, were the implicit threats made by Defendant to "jump" Plaintiff "off camera" should he attempt to leave in that direction. While the three Best Buy employees didn't personally use the word "jump" in their correspondence with Plaintiff, every single time that Plaintiff used the word "jump" himself, **they actively chose to not correct him.** This "choice to not correct" only confirmed to Plaintiff that such threats made toward him were more likely credible, than not. *See Plaintiff's Undisputed Material Facts #14 through #17, above. See more specifically PCMSJ Exhibit #1 from timestamps 10:17 to 10:19, 10:44 to 10:47, and 11:28 to 11:31.* In the end, under the totality of the circumstances, such flagrantly vulgar and inappropriate insults and threats – made in full view and earshot of over 192 people that passed by that day – rendered Defendant's detention of Plaintiff, *even if justified at the outset*, ultimately unlawful due to the **"unreasonable manner"** in which it was executed. No human being deserves to be treated like Plaintiff was that day, *regardless* of whether or not he may have stolen something [which, again, Defendant has failed to provide this Court with any tangible, admissible evidence for, *whatsoever,* that that would have even been – *or not* – the case].

Now, when analyzing "shopkeeper's privilege," Courts have long held that "The test of liability is not based on the store patron's actual guilt or innocence, but rather on the reasonableness of the store employee's action under the circumstances." *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 520 (Tex. App. 1996). "And whether reasonable belief is established, is

usually an issue of fact to be determined by the trier of facts from a full and thorough consideration of all of the evidence bearing on the question." *Id.* However, when the facts are not in dispute (as appears to be the situation in Plaintiff's instant case), "reasonable belief," or "probable cause" as Colorado Revised Statutes § 18-4-407 codifies it, "is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention." *J. C. Penney Co. v. Cox,* 246 Miss. 1, 10 (Miss. 1963).

"A person under the law has a right to protect his own property from injury, but at the same time he must have probable cause to believe that his property is really going to be injured or taken." *J. C. Penney Co. v. Cox,* 246 Miss. 1, 10 (Miss. 1963). **"Probable cause," however, "cannot be based on mere belief [ ] that somebody did or did not do something."** *Id.* "The investigation should be based on more than mere conjecture or suspicion. It must be grounded on some definite information from some person **that saw enough to justify [their] belief** that a theft had been made, and that a person was guilty of shoplifting." *Id. See also Mullins by Mullins v. Friend,* 449 S.E.2d 227, 231-32 (N.C. Ct. App. 1994) (upholding trial court's finding that store manager did not have probable cause to believe Plaintiff committed a crime where store clerk reported hearing rustling of paper coming from Plaintiff's direction but "admitted to [manager] that she never saw plaintiff conceal anything"). *See also Zenik v. O'Brien,* 137 Conn. 592 (Conn. 1951) ("Mere conjecture or suspicion is insufficient to establish probable cause. Moreover, belief alone, **no matter how sincere it may be**, is not enough, since it must be based on circumstances which make it reasonable.").

Here, today, in Plaintiff's instant case, Defendant has failed to provide this Court with **LITERALLY ANY EVIDENCE**, *whatsoever*, to support it's affirmative defense of "shopkeeper's privilege." Defendant has not shown that it saw Plaintiff *enter its store*. It has not shown that it saw him *anywhere in its store*. It has not shown that it saw him *shop [or not shop]*. It has not shown that it saw him *take anything off a shelf*. It has not shown that it saw him *pay [or not pay]*. It has not shown that it saw him *conceal [or not conceal] anything on his person*. It has not shown that it saw

him *use [or not use] a plastic bag*. It has not shown that it saw him *leave its store*. It has not shown that it *called the police*. It has not shown that it even *asked Plaintiff to show a receipt* [let alone that he *refused to show one*, let alone that he *had one on him in the first place,* let alone that *whatever he had been holding in his hands that day was even store merchandise for which one might have been associated*]. In the end, it is painfully apparent that Defendant has failed to show this Court, *with literally ANY evidence at all,* that it **ever once** saw – be it by way of personal affidavit or by video surveillance otherwise – Plaintiff **do literally anything** "until the confrontation occurred" outside its particular building. **Absolutely ZERO evidence has been provided by the Defendant to substantiate its hasty, sloppy, frantic, careless, rude, inappropriate, post-hoc, bootstrapped detention of Plaintiff for purportedly shoplifting from its store.** Therefore, "When we consider all of the evidence bearing on reasonable belief to detain we are confronted with little more than **unfounded naked suspicion**. There is no reasonable basis to formulate the belief that [Plaintiff] had stolen anything." *Wal-Mart Stores, Inc. v. Odem,* 929 S.W.2d 513, 520 (Tex. App. 1996). As such, because Defendant completely and wholeheartedly lacked "shopkeeper's privilege" to detain Plaintiff – **by way of failing to satisfy EVEN A SINGLE IOTA of EVEN ONE of its critical elements of its affirmative defense on the subject** – it is indisputably liable for falsely imprisoning him.

II. DEFENDANT IS LIABLE FOR DEFAMING PLAINTIFF, *PER SE*, AS A THIEF

In order to succeed on a claim for Defamation *Per Se*, a Plaintiff must prove that the Defendant "published a defamatory statement concerning him." *See Colorado Civil Jury Instruction 22:4*. A statement is "published" when it is communicated – either orally or in writing – to [and is understood by] some person other than the Plaintiff. *See Colorado Civil Jury Instruction 22:7.* A statement is "defamatory" if it tends to harm the person's reputation by lowering the person in the estimation of at least a substantial and respectable minority of the community. *See Colorado Civil Jury Instruction 22:8.* ***HOWEVER*, accusing someone of being A THIEF, when such accusation is untrue and is overheard and understood by a third person, is defamation**

"actionable *per se.*" Restatement (Second) Of Torts § 570; *Denver Publ'g Co. v. Bueno,* 54 P.3d 893, 899 n. 9 (Colo. 2002); *Miles v. Nat'l Enquirer, Inc.,* 38 F.Supp.2d 1226, 1229 (D. Colo. 1999). "Actionable *per se*" means that without adducing any evidence that he has in fact been harmed by the accusation, the Plaintiff may recover general damages for injury to his reputation. P.H. Winfield, A Text-Book Of The Law Of Tort § 74, at 249 (5th ed. 1950). This distinguishes defamation *per se* from the general case of defamation where the Plaintiff would otherwise be required to allege and prove "special damages" in order to establish a cause of action. **The rationale for this is that some kinds of defamatory statements are so likely to cause damage to reputation that such damage may be presumed.** 2 Harper et al, supra note 2, § 5.11, at 118. Moreover, while "[a] store manager may have [] a perfect right to question [a] plaintiff whom he suspected of shoplifting . . . the rights and qualified privilege granted by the statute do not clothe the storekeeper with immunity when [the] manager resort[s] to slander. The accusation of theft against [a] plaintiff made in the presence of other persons [is] at the risk of the storekeeper if the suspicion of shoplifting prove[s] baseless." *Chretien v. F.W. Woolworth Company,* 160 So. 2d 854, 856 (La. Ct. App. 1964). In other words, the affirmative defense of privilege is lost if the Plaintiff proves the Defendant "abused the privilege." This can be proven by showing that the statement in question was made "**with knowledge that the statement was false" [or that Defendant acted with reckless disregard for whether the statement was true or false].** *See Colorado Civil Jury Instruction 22:18*.

As laid out in Plaintiff's instant case, Defendant **impermissibly**, **specifically** and **repeatedly** imputed the crime of larceny onto him. Not only did Defendant loudly and rudely call Plaintiff "fucking a thief," *(PCMSJ Exhibit #1 at timestamp 2:30),* it said to him, "I got you concealing, I have you walking out without paying," *(timestamp 4:46),* "You can steal the rest of the day, just not here," *(timestamp 5:36)*, "Go steal the rest of your life away," *(timestamp 10:54)*, and "You know how much we have to do, to deal with people like you, who just come in and steal from us?" *(timestamp 11:05)*. This isn't even counting the **THIRTY EIGHT** times Defendant told Plaintiff, in

one form or another, to "give us our shit back." *See PCMSJ Exhibit #1 at timestamps 0:22, 0:52, 0:58, 1:01, 1:13, 1:27, 1:36, 1:51, 2:01, 2:10, 2:11, 2:16, 2:20, 2:30, 2:33, 2:43, 2:51, 3:31, 3:40, 3:43, 3:55, 4:38, 5:32, 6:00, 6:05, 8:55, 10:14, 10:19, 10:20, 10:22, 10:29, 10:47, 10:48, 11:42, 11:43, 11:45, 11:47, and 11:49.* Additionally, all these implicit *and* explicit accusations of theft **were made in the presence of OVER 192 PEOPLE that Plaintiff counted had walked past he and Defendant that day.** *See Plaintiff's Undisputed Material Fact #20, above.*

Most importantly on this subject*,** is that Defendant made these baseless accusations **"with knowledge that they were false, or with reckless disregard for whether they were true or false."** This is because Defendant **utterly lacked** "shopkeeper's privilege" to **fairly** and **reasonably** believe that Plaintiff had stolen anything from it that day. *See Section I (b), above.* As such, Defendant is indisputably liable for defaming Plaintiff, ***PER SE*, in front of numerous others*, as a "thief."

III. DEFENDANT IS LIABLE FOR ASSAULTING PLAINTIFF

In order to succeed on a claim for Assault, a Plaintiff must prove the following elements:

1) The defendant intended to cause an offensive or harmful physical contact with the Plaintiff or intended to place the Plaintiff in apprehension of such contact; and

2) The Defendant placed the Plaintiff in apprehension of immediate physical contact; and

3) That contact [would be, or would appear to be] harmful or offensive.

See Colorado Civil Jury Instruction 20:1.

The term "apprehension" is defined as "a state of mind experienced when a person anticipates immediate harmful or offensive physical contact." *See Colorado Civil Jury Instruction 20:2.*

The phrase "intends to place another in apprehension of physical contact" is defined as when a person either "acts with the purpose of causing apprehension of physical contact," or they "know that such conduct will probably place the other person in apprehension of physical contact." *See Colorado Civil Jury Instruction 20:3.*

Contact [that would be, or would appear to be] "harmful" is defined as contact that

"[would] cause physical pain, injury, illness or emotional distress," and contact [that would be, or would appear to be] "offensive" is defined as contact that "would offend another's reasonable sense of personal dignity." *See Colorado Civil Jury Instruction 20:6.*

Importantly, while "Mere words alone, unless accompanied by an actual act of hostility [does] not justify an assault," *Goldblatt v. Chase,* 121 Colo. 355, 363, 216 P.2d 435, 440 (1950). "words, []accompanied by some act apparently intended to carry the threat into execution, can[] make the actor liable for an assault." *Restatement (Second) of Torts* § 31 (1965).

Regarding the first element, it is indisputable that Defendant specifically ***intended to*** "cause an offensive or harmful physical contact with Plaintiff [or otherwise] place him in apprehension of such contact." This is evidenced by its ***numerous*** THREATS made to "jump" Plaintiff "off camera" should he attempt to leave the area, s*ee Plaintiff's Undisputed Material Facts #14 through #17, above,* **ACCOMPANIED BY** its ***numerous*** PHYSICAL ACTS made to *actively* and *repeatedly* step in front of him in order to *actually* prevent him from leaving said area, s*ee Plaintiff's Undisputed Material Facts #10 and #13, above.* Moreover, while Defendant never personally used the word "jump" in its correspondence with Plaintiff, every single time that Plaintiff used the word "jump" himself, **it actively chose to not correct him.** This "choice to not correct" only confirmed to Plaintiff that such threats made toward him were more likely credible, than not. *See PCMSJ Exhibit #1 from timestamps 9:23 to 9:33, 9:48 to 9:52, 10:07 to 10:48, and 11:27 to 11:36.*

Regarding the second element, it is likewise indisputable that Defendant ***actually did*** "place Plaintiff in apprehension of immediate physical contact." This is evidenced by Plaintiff's ***multiple*** statements made [in direct response to Defendant's ***numerous*** threats and physical acts made], of "I don't feel safe leaving now," (*PCMSJ Exhibit #1 at timestamp 9:48),* "Yeah I don't feel like getting jumped off camera," *(timestamp 10:17),* "Like I said I don't feel safe leaving now, *(timestamp 10:44),* and "Like I'm just gonna trust him that he's not gonna jump me," *(timestamp 11:28). See Plaintiff's Undisputed Material Facts #15 through #17, above.*

Regarding the third element, it is equally indisputable that Defendant's THREATS and PHYSICAL ACTS were [or appeared to be] "harmful" or "offensive." This is evidenced by Plaintiff's reluctant decision made to – *even after* Defendant finally left the area – "spend the next 14 minutes standing in place, on the side of the Best Buy building, because of how unsafe he felt that he might still get jumped, off camera, by the three employees who said to him they would." *See Plaintiff's Undisputed Material Fact #19, above.*

As such, Defendant is indisputably liable for assaulting Plaintiff.

CONCLUSION

Plaintiff has satisfied each and every element of his false imprisonment, defamation *per se*, and assault claims, with indisputable facts to support each. Defendant, on the other hand, has failed to provide this Court with **any** tangible, admissible facts, *whatsoever*, to even begin to support its **naked and unfounded** affirmative defense of "shopkeeper's privilege" to otherwise lawfully detain him.

WHEREFORE, for all the foregoing reasons, Plaintiff respectfully requests that this Court **GRANT** his CROSS-MOTION FOR SUMMARY JUDGMENT in this matter.

Specifically, this Court should **A)** enter judgment in Plaintiff's favor on all issues of law and liability in all of his claims, and **B)** leave for the jury to decide the only remaining triable issue of fact regarding the amount of damages he should be awarded in his claims [as he has elected to not specify an exact dollar amount for what damages he has sustained].

Respectfully submitted on this, the 19th day of September, 2024.

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

CERTIFICATE OF SERVICE

I hereby certify that on this, the 19th day of September, 2024, the foregoing **PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** was filed with the Court, and a true and correct copy of it was electronically sent to the following people:

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

Attorneys for Defendant

William Montgomery
William Montgomery