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 REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION	

Plaintiff, proceeding *pro se*, hereby submits to the Court his REPLY to Defendant's RESPONSE to his MOTION FOR RECONSIDERATION, and in support thereof, states as follows:

ARGUMENT

I. DEFENDANT FAILED TO INCLUDE EVIDENCE AND ARGUMENTS IN ITS INITIAL MSJ FOR PLAINTIFF TO PROPERLY RESPOND TO, AND EVIDENCE IN ONE MOTION CANNOT BE USED IN ANOTHER

In Defendant's RESPONSE to Plaintiff's MOTION FOR RECONSIDERATION, it begins by claiming that "Both exhibits were properly offered in response to allegations by Plaintiff in his Response Brief. To wit, Defendant was responding to Plaintiff's allegations concerning his behavior immediately preceding the start of the video." *Def's Resp. To Ptf's MFR at page 3.* First, this argument **doesn't *ACTUALLY* address** what Plaintiff argued in his MFR [which is based on what the Court argued in its ORDER]. Specifically, the Court **erroneously** and **impermissibly** held that

"Defendant has submitted [a Best Buy receipt and an employee affidavit] satisfying its **"INITIAL"** burden as the movant . . . [but whereby] Plaintiff, in his **"RESPONSE"** . . . has made no statements and submitted no proof as to his actions inside the Best Buy immediately preceding the incident." *Order Granting Def's MSJ at pages 6 and 7.* Obviously, as has already been satisfactorily argued by Plaintiff in the Opening Brief of his MOTION FOR RECONSIDERATION, Defendant **DID NOT** submit any such argument or evidence, *whatsoever,* with its *****I-N-I-T-I-A-L***** Motion For Summary Judgment, **NOR DID** Plaintiff "fail" to "respond" to such **NON-EXISTENT,** *non-initially-provided* arguments or evidence, either. As such, and because Defendant has failed to *actually* address this *specific* **time-stamp-fudging, due-process-violation** argument put forth by Plaintiff in his MFR, it has hereby ***confessed*** the argument as true and valid [and whereby this Court should grant Plaintiff's MFR as a result]. Second, ***and perhaps more importantly,*** is that such an argument – that "Defendant was responding to Plaintiff's allegations concerning his behavior immediately preceding the start of the video" – is actually an argument **FOR** Plaintiff, rather than AGAINST him! This is because it literally contains within it ***the very confession*** that Plaintiff **DID INDEED** make specific enough allegations in his Response Brief "concerning his behavior immediately preceding the start of the video." BUT WAIT, isn't that **the exact opposite** argument that the Court made in its ORDER – that Plaintiff purportedly "***has provided no evidence*** as to his actions inside the Best Buy store" immediately preceding the start of the video? *Order Granting Def's MSJ at pages 7.* WHY, IT IS! **So, Defendant and Court, which is it?** Did Plaintiff "provide no evidence" in his RESPONSE to Defendant's MSJ [the Court's argument], or did he "provide evidence" [Defendant's argument]??? Ultimately, **it doesn't matter either way,** because both positions favor Plaintiff. Either Plaintiff **DID NOT** provide [specific enough] argument and evidence negating "shopkeeper's privilege" and "receipt possession" in his RESPONSE to Defendant's initial MSJ, but whereby he cannot be faulted for not doing so because of how Defendant **DID NOT** put him on FAIR NOTICE to be able counter such NON-EXISTENT arguments or evidence NOT initially put

forth by it, OR he **DID** provide [specific enough] argument and evidence negating "shopkeeper's privilege" and "receipt possession" in his RESPONSE to Defendant's initial MSJ, but whereby Defendant's REPLY "rebuttal" introducing the receipts and affidavit **is really just a moot point, as such does nothing more than merely confirm that a "genuine dispute of material fact" *does indeed* exist, that Plaintiff *already* legitimately created in his RESPONSE brief,** WHICH STILL TRIGGERS DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE OF HOW SUCH GENUINE DISPUTES OF FACT ARE ALWAYS SENT TO THE JURY FOR DELIBERATION. "In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952). "Any issue of fact must be determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment." *Primock v. Hamilton,* 168 Colo. 524, 452 P.2d 375 (1969).

Next, Defendant attempts to support its argument by pointing to *Tarpill v. Entelechy LLC,* No. 19CV30279, 2021 WL 4349996, at *2 (Boulder County Dist. Ct. Jan. 27, 2021) and *City of Thornton v. Bd. of Cnty. Comm'rs,* No. 2019CV30339, 2019 WL 3228258, at *4 n.6 (Larimer County Dist. Ct. July 16, 2019). However, both cases are utterly inapposite. Indeed, the Court in *Tarpill* even held "specifically, with respect to Plaintiff's first two arguments, the Court finds that the facts Plaintiff takes issue with **are contained in exhibits attached to Defendants' original Motion.** Plaintiff had an opportunity to respond to those facts in its Response." *Id.* Obviously, the same is **NOT EVEN REMOTELY TRUE** today with regard to Plaintiff's instant case, where "the facts Plaintiff takes issue with" **WERE NOT** "contained in exhibits attached to Defendant's original motion," and whereby he **DID NOT** "have an opportunity to respond to those facts in its Response." Seriously, did Defendant ***even read*** the whopping six page *Tarpill* order, or did it only have time to quote mine it? Anyways, same goes for *City of Thornton v. Bd. of Cnty. Comm'rs.* In *City of Thornton,* the Court likewise allowed "points raised for the first time in a reply brief," but again, **only when** they "are made in

response to arguments raised by a response brief." *Id.* **So we're back to square one,** where Plaintiff either **WAS NOT** specific enough in his RESPONSE brief regarding "shopkeeper's privilege" and "receipt possession" **such that he cannot be ruled against by this Court for not doing so** because of how Defendant failed to supply any receipts or affidavits in its OPENING brief for him to even counter, or Plaintiff **WAS** specific enough in his RESPONSE brief regarding "shopkeeper's privilege" and "receipt possession" such that Defendant **WAS** allowed to supply said receipts and affidavits in its REPLY brief **but to which doing so does literally nothing more than merely confirm that a genuine dispute of fact *does indeed* exist, that Plaintiff *already* legitimately created in his RESPONSE brief,** WHICH, AGAIN, STILL TRIGGERS DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. Indeed, *City Of Thornton* cites to *Sch. Dist. No. 1, City & Cty. of Denver v. Cornish,* 58 P.3d 1091, 1095 (Colo. App. 2002), which in turn cites to *People v. Czemerynski,* 786 P.2d 1100 (Colo. 1990), which, ***whaddayaknow,*** holds that "issues not raised in an appellant's opening brief will not be considered when raised for the first time in the reply brief."

Next, Defendant claims that "Plaintiff could have availed himself to a motion to strike these exhibits or requested a sur-reply brief, but Plaintiff failed to do so." *Def's Resp. To Ptf's MFR at page 3.* **Honestly, this is got to be the most laughable, preposterous argument proffered by Defendant to date.** As if Plaintiff "waived his rights" to have excluded from the record material impermissibly introduced into it for the first time by way of a REPLY brief just because he didn't file his own MOTION TO STRIKE or SURREPLY brief! Newsflash, it is the Defendant who already "waived its rights" to make such arguments and present such evidence, ***in the first place,*** **BY NOT INCLUDING SUCH IN ITS INITIAL MSJ OPENING BRIEF.** Never before has the Court required a MOTION TO STRIKE or a SURREPLY brief to be filed in order for such belated arguments and evidence to be held impermissible and thus be waived. *See Bslni, Inc. v. Russ T. Diamonds, Inc.,* 293 P.3d 598, 2012 COA 214 (Colo. App. 2012); *Jenkins v. Haymore,* 208 P.3d 265, 269 (Colo.App.2007); *People v. Czemerynski,* 786 P.2d 1100, 1107 (Colo.1990); *etc.* Indeed, even

the Colorado Rules Of Civil Procedure itself explicitly states that "**upon the court's own initiative AT ANY TIME,** the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper." *C.R.C.P. Rule 12(f).* As such, and because no prior cases have ***ever*** required a MOTION TO STRIKE or a SURREPLY be filed to attain such a result, this Court has an ethical obligation to strike, **on its own initiative,** any and all wholly impermissible "shopkeeper's privilege" and "receipt possession" arguments and evidence offered by Defendant *for the first time* in its MOTION FOR SUMMARY JUDGMENT **REPLY** brief only.

Next, Defendant claims that "[because] the exhibits at issue were also submitted in the briefings for Plaintiff's Cross-Motion for Summary Judgment[,] Plaintiff had the opportunity to respond to and rebut the exhibits in Plaintiff's Reply submitted in the Cross Motion for Summary Judgment." *Def's Resp. To Ptf's MFR at page 3.* The problem here is that Defendant's MSJ and Plaintiff's CROSS-MSJ **are not two halves of the same coin.** They are two completely separate documents, each requiring their own independent arguments and evidence to support them. "When a [Plaintiff's] motion for summary judgment is overruled, their admission of facts under their legal theory terminates, **and it is error for a trial court to give any consideration thereto in connection with its determination of [Defendant's] motion.** This leaves [Defendant's] motion for summary judgment completely unsupported by anything except such as it had itself placed in the record, and which definitely discloses uncertainty of fact and disputable issues for trial." *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952). In other words, just because ***PLAINTIFF'S*** CROSS-MSJ was overruled in this matter [by way of Defendant introducing evidence in its RESPONSE to the CROSS-MSJ so as to create a "genuine dispute of material fact" in the matter) **DOESN'T MEAN DEFENDANT NOW GETS TO AUTOMAGICALLY HAVE *ITS* MSJ GRANTED!** *It's* "motion for summary judgment [is still] completely unsupported by anything except such as it had itself placed in the record." *Id.* And of course, in the instant case, Defendant's ***I-N-I-T-I-A-L*** MSJ "placed in the record" **absolutely nothing** to *even begin to* legally support it, thus rendering the

motion **DENIED** in its entirety. Also, on this note, Plaintiff's CROSS-MSJ REPLY **isn't even an appropriate vehicle to use** as some SURREPLY to Defendant's MSJ REPLY, because it would be a *completely futile endeavor* to "rebut" any evidence provided by Defendant in its RESPONSE to the CROSS-MSJ [as Defendant otherwise claims Plaintiff must do], because at that point, Defendant has already created its own "genuine dispute of material fact" in its RESPONSE, upon which there is absolutely nothing Plaintiff could even do to "refute" such, as that would in effect be making, ***whaddayaknow,*** A FACTUAL DETERMINATION THAT IS SQUARELY UP TO THE JURY TO DECIDE. *Seriously, it should not be this difficult for a Court and attorneys to understand this stuff.* **FIRST,** Defendant filed an evidence-less, conclusory-statement-only MSJ, and Plaintiff either responded ***WITHOUT*** sufficiently particular evidence of his own [but whereby the MSJ gets denied anyways for being independently based on evidence-less, conclusory statements only], **OR** he responded ***WITH*** sufficiently particular evidence of his own [but whereby the MSJ still gets denied because of how such evidence created a "genuine dispute of material fact" in the matter]. **THEN,** Plaintiff filed his own CROSS-MSJ, upon which Defendant responded ***WITH*** evidence of its own[1] [which causes the CROSS-MSJ to get denied as well because of how such evidence also created a "genuine dispute of material fact" in the matter]. THAT'S IT. **Both** motions were filed. **Both** motions are [supposed to be] denied. **Again, the law is not such that if one party happens to have *their* motion denied, the other party now automagically gets to have *theirs* granted!**

Next, Defendant claims that "The Court ruled upon both summary judgment motions simultaneously and considered all evidence and arguments submitted with both briefings before ruling in Defendant's favor." *Def's Resp. To Ptf's MFR at page 3.* The problem here is that both summary judgment motions **were obviously not *filed* "simultaneously."** They were filed

1 Well, not really. Plaintiff still reserves the right to challenge, via appeal if necessary, that Mahmoud's affidavit "blatantly contradicts" the record [and as such, is **impermissible**]. Same goes for the affidavit-less business records (i.e. receipts) that were also **impermissibly** entered into the record. Disregarding both pieces of "evidence," as this Court should have done, rendered Plaintiff's CROSS-MSJ unrefuted, upon which it really should have been **GRANTED** in this matter.

separately, and more importantly, ***independently*** from each other. Again, the Court is not allowed to consider "evidence and arguments" submitted with *one* briefing, during the ruling of *another* briefing. *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952). Indeed, Defendant's following statement – that Plaintiff was purportedly "incentivized to provide stronger evidence in his cross-motion for summary judgment briefing, and yet, he still failed to present evidence sufficient to survive Defendant's motion for summary judgment," – underscores ***just how fried*** it is making this situation out to be. What is Defendant ***even doing*** trying to use evidence supplied [or not supplied] in a CROSS-MSJ, in another party's MSJ? *The Defendant itself even admits that the standards (i.e. burden levels) of each briefing are different from each other.* Indeed, Plaintiff ***agrees*** with Defendant that he "has a *higher* burden in proving his cross-motion for summary judgment."[2] **THAT MEANS HE HAS A LOWER BURDEN IN DISPROVING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT!** And that is exactly what he did. Defendant supplied evidence-less, conclusory-only argument in its MSJ, and Plaintiff 100% refuted such by simply pointing that out. Indeed, because Defendant didn't supply **ANY** evidence, *whatsoever,* with its initial MSJ, Plaintiff's burden to disprove its arguments was literally at the floor! ***Plaintiff didn't have to do ANYTHING AT ALL in order for Def's MSJ to be fairly denied in this matter,*** as the Court has consistently held that "A conclusory statement made without supporting documentation or testimony is insufficient to create an issue of material fact." *Suncor v. Aspen,* 178 P.3d 1263, 1269 (Colo. App. 2008).

II. DEFENDANT IS NOT ALLOWED TO BOOTSTRAP DETENTIONS, NOR IS IT ALLOWED TO HAVE CARTE BLANCHE AUTHORITY TO DETAIN ALL CITIZENS WHO DON'T COOPERATE WITH IT

In Defendant's RESPONSE to Plaintiff's MOTION FOR RECONSIDERATION, it also claims that "The Court did not need to consider Exhibits N, O and P of the motions for summary

2 This likewise means that *Defendant* also has an equally "high" burden when proving *its* MSJ. That is, Defendant was required to provide "stronger" evidence IN ITS **INITIAL** MSJ [in order to have *it* granted] than it was required to provide in Plaintiff's CROSS-MSJ [in order to have *it* denied]. Yet Defendant failed to provide such evidence IN ITS **INITIAL** MSJ. Why did Defendant fail to **INITIALLY** provide such evidence? Go ask Defendant. That's not Plaintiff's problem.

judgment in order to find in Best Buy's favor [because] [i]n the video of the incident, submitted as Exhibit M in Defendant's Motion for Summary Judgment, Best Buy employees repeatedly request that Plaintiff return the product in his possession, and Plaintiff remains silent. He does not deny that he has product in his possession nor did he make any effort to show the Best Buy employees that they were mistaken in believing Plaintiff had stolen product – perhaps by revealing whatever object was in his pockets." *Def's Resp. To Ptf's MFR at page 3.* The problem here is that this is LITERALLY, **word-for-word** what Courts have **unanimously** held as **utterly impermissible "bootstrapping."** "Moreover, it is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a 'consensual' encounter with the police." *Brief of the United States as Amicus Curiae Supporting Petitioner at 25,* Florida v. Bostick, No. 89-1717 (). "Any other rule would make a mockery of the reasonable suspicion and probable cause requirements, as well as the consent doctrine. These legal principles would be considerably less effective if citizens' insistence that searches and seizures be conducted in conformity with constitutional norms could create the suspicion or cause that renders their consent unnecessary." *United States v. Hunnicutt,* 135 F.3d 1345 (10th Cir. 1998). "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." *U.S. v. Carter,* 985 F.2d 1095, 1097 (D.C. Cir. 1993). "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick,* 501 U.S. 429, 437 (1991). "[A]nd it should go without saying that consideration of such a refusal would violate the Fourth Amendment." *United States v. Wood,* 106 F.3d 942, 946 (10th Cir. 1997). **Seriously, does Defendant *truly* not comprehend what "bootstrapping" is?** Does it *really* believe that merchants

can simply walk up to complete strangers, **collect absolutely ZERO inculpatory evidence prior to doing so,** and expect to justify their actions if their detainees simply "don't do" what they ask of them!? **Sorry, but no matter how you slice it, LACK OF EXCULPATORY DOES NOT EQUAL (AND WILL NEVER EQUAL) INCULPATORY!** In other words, because "shopkeeper's privilege" is the same exact legal standard as "probable cause" *(see Colorado Revised Statutes § 18-4-407)*, and "probable cause" is rooted **STRICTLY** in ***individualized*** and ***particularized*** suspicions, a merchant can **NEVER**, **by law and by logic**, achieve lawful justification to detain a person by simply pointing to their mere "refusal to cooperate" with them. **This is *especially* true because of how they (the merchants) are the ones who control who they ask.** Indeed, to argue the opposite would be to allow all merchants to ***SYSTEMATICALLY*** detain **literally all people** whom they ask to cooperate (which would mean *everybody!*), **thus effectively subjecting literally 100% of the population to "compulsory" detentions** [that is, through either voluntary consent, or forced detention otherwise]. THAT'S ILLEGAL, and not what the Legislature would have envisioned *in the least* when drafting the law of the land as it stands. "It is well known to the public that shoplifting is an everyday occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish **fixed checkpoints**, permanent or otherwise, outside of every shopping center in the area to question all exiting shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts **or be subject to arrest** everytime they go shopping? **The potential for abuse is apparent.**" *State v. Smith,* 674 P.2d 562 (Okla. Crim. App. 1984).

Finally, on this note, **listing off literally ALL possible actions** that are purportedly required for a person to perform in order to end [read: **undo**, as Defendant and prior Courts argue] their detention **effectively renders ALL detentions of people literally NON-EXISTENT,** and the bar to which merchants are required to have "shopkeeper's privilege" under *obviously cannot be set at the floor*. In other words, if there is ***ALWAYS*** something that ***ALL*** detainees can do, "in order to shorten

or end their detention," then there exists **NOT A SINGLE SITUATION** in which a merchant ***WOULD*** be liable for unlawfully detaining a person. *Which, of course, begs the question: why does "shopkeeper's privilege" even exist then? Why does the false imprisonment tort even exist?* ***WHY DOES COURT EVEN EXIST? Seriously!?!?!?!?*** First, it was argued that Plaintiff must "show his receipt." Then, it was argued that he must "not throw away his receipt." Now, it is being argued that he must "not remain silent," must "deny he has product," must "empty his pockets." Seriously, is there *anything* left for him TO NOT DO upon leaving a store [customer or not]? **Defendant has now included it all.** Yet doing such, *if it isn't obvious already,* has LITERALLY created a "bright line" rule where there literally exists **EVIDENTLY NOTHING** that a person **CANNOT** do to "end their own detention" – which, *if one hasn't comprehended this already, perhaps they never will,* SETS THE BAR AT THE ACTUAL FLOOR, literally giving ALL merchants ***CARTE BLANCHE*** authority to **indiscriminately** detain ALL people (YEAH, THAT MEANS EVERYBODY!) they so wish. All they gotta do now is walk up to complete strangers, perform no investigations beforehand, ask them whatever the heck they want, get them to do whatever the heck they want, and detain them if they don't follow every command made. YEAH, RIGHT! Such is obviously, emphatically, indisputably not the law. **Because it's called shopkeeper's PRIVILEGE, not shopkeeper's RIGHT.** And despite Defendant's incessant efforts to argue otherwise – a privilege, by definition, **CAN BE LOST.** ***Most importantly,*** is that if such *was* a right, then literally all people in this country "would in effect have no way of declining to participate in a 'consensual' encounter" with them. ***Such is not the law!***

CONCLUSION

"Where the record has not been adequately developed on a material factual issue, summary judgment is not proper." *Moore v. 1600 Downing St., Ltd.,* 668 P.2d 16 (Colo. App. 1983). "In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Morlan v. Durland Trust Co.,* 127 Colo. 5, 252 P.2d 98 (1952). "Any issue of fact must be

determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment." *Primock v. Hamilton,* 168 Colo. 524, 452 P.2d 375 (1969). "An issue not raised by the moving party in the motion or brief cannot serve as the basis for summary judgment because the non-moving party is not put on notice as to the need to present evidence concerning that issue." *Wallman v. Kelley,* 976 P.2d 330, 332 (Colo. App. 1999). "A conclusory statement made without supporting documentation or testimony is insufficient to create an issue of material fact." *Suncor v. Aspen,* 178 P.3d 1263, 1269 (Colo. App. 2008).

WHEREFORE, Plaintiff respectfully requests that this Court **GRANT** his MOTION FOR RECONSIDERATION, so that it may then **REVERSE** its most recent ORDER impermissibly GRANTING Defendant's MSJ, so that this case may proceed to **TRIAL**, by Jury, on its merits.

Respectfully submitted on this, the 31st day of December, 2024.

William Montgomery
William Montgomery

CERTIFICATE OF SERVICE

I hereby certify that on this, the 31st day of December, 2024, a true and correct copy of the foregoing **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION** was sent to the following people, via email:

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