Supreme Court, State Of Colorado 2 East 14th Ave Denver, CO 80203 (720) 625-5150	
On Certiorari To The Colorado Court Of Appeals Colorado Court Of Appeals Case No: **2025CA327**	
WILLIAM MONTGOMERY Plaintiff / Petitioner-Appellant vs. **BEST BUY STORES, L.P.** Defendant / Respondent-Appellee	▲ Court Use Only ▲
	Colorado Supreme Court Case No: **2026SC236** Colorado Court Of Appeals Case No: **2025CA327** Jefferson County District Court Case No: **2023CV226**
BRIEF OF *AMICI CURIAE* IN SUPPORT OF GRANTING PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI	

Amici Curiae respectfully submit to the Colorado Supreme Court the following BRIEF OF *AMICI CURIAE*, and in support thereof, state as follows:

CERTIFICATE OF COMPLIANCE

Amici hereby certify that this BRIEF OF *AMICI CURIAE* complies with all applicable requirements of C.A.R. 29, 32, and 53. Specifically, the undersigned certify that this BRIEF contains **3,122** words, which does not exceed the 3,150 word limit allowed by the rules.

[Amici Signature Placeholder]

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INTEREST OF *AMICI CURIAE*

Amici are attorneys and civil rights advocacy organizations from across the country committed to protecting procedural fairness in civil litigation and ensuring that courts of last resort exercise supervisory authority when intermediate appellate decisions depart from established law. *Amici* have no financial stake in the outcome of this case. They file this brief to address the systemic implications of the decision below—implications that extend far beyond the parties to this case and threaten the integrity of summary judgment practice in Colorado and nationally.

[Amici Curiae: Please Edit / Replace This Entire Section Accordingly]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case calls upon the Court to exercise the supervisory authority C.A.R. 49 contemplates. The Court of Appeals' unpublished decision does not simply apply existing doctrine to a difficult record; it introduces a set of interlocking procedural innovations that conflict with multiple controlling Colorado precedents and lack any foothold in the text of C.R.C.P. 56 or 121. In doing so, the Panel alters the basic architecture of summary judgment in a way that, if left uncorrected, will shape how trial courts handle similar motions for years to come.

Amici adopt the factual recitation set forth in Montgomery's Petition and do not repeat it here. For present purposes, it is enough to note that the summary-judgment proceedings involved a defendant that filed an opening motion unsupported by affidavits or business records, and then presented foundational evidence for the first time in reply—a sequencing that makes this case a clean vehicle for examining the Panel's four legal rulings.

The Panel's decision generates four distinct legal errors, each independently warranting this Court's review:

First, the Panel announced a new, uncodified forfeiture rule under which a non-movant waives objections to reply-only evidence unless he first moves to

strike or seeks leave to file a surreply. *Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1999), imposes no such requirement, and *Amada Family Ltd. Partnership v. Pomeroy*, 2021 COA 73, confirms that the protection against reply-brief ambush is not lost simply because a litigant did not file such motions.

Second, the Panel treated the plaintiff's reply in support of his own cross-motion for summary judgment as a *functional surreply* to the defendant's separate motion. That approach conflicts with *Morlan v. Durland Trust Co.*, 127 Colo. 5, 252 P.2d 98 (1952), and *Central Bank & Trust Co. v. Robinson*, 137 Colo. 409, 326 P.2d 82 (1958), which require each summary judgment motion to be considered independently on its own evidentiary record.

Third, the Panel permitted the defendant's first evidentiary submissions in reply to be characterized as "rebuttal" even while acknowledging that the plaintiff had offered no contrary evidence to rebut. That reasoning erodes the movant's initial burden under C.R.C.P. 56 and is at odds with Colorado and federal authority requiring the movant to make a sufficient evidentiary showing before any obligation falls on the non-movant.

Fourth, the Panel held that the defendant's evidence-free opening motion nevertheless "put [the non-movant] on notice" because it "specifically claimed" certain facts. That holding cannot be reconciled with *Suncor Energy (U.S.A.), Inc. v.*

Aspen Petroleum Products, Inc., 178 P.3d 1263 (Colo. App. 2008), which rejects the proposition that detailed assertions in a brief may substitute for supporting proof.

ARGUMENT

Amici address Issues I–IV of the Petition for Writ of Certiorari, which present pure questions of procedural law of statewide importance. Issue V, which concerns the Panel's factual conclusions, is fully briefed in the Petition itself.

I. THE PANEL'S NOVEL "NO-MOTION-TO-STRIKE" FORFEITURE RULE HAS NO BASIS IN COLORADO LAW AND CONFLICTS WITH FEDERAL AUTHORITY

The Panel held that the plaintiff forfeited all objections to the defendant's reply-only evidence by failing to file a motion to strike or request for surreply before the District Court entered summary judgment. This uncodified forfeiture rule has no basis in *Wallman v. Kelley*, is expressly foreclosed by *Amada Family Ltd. Partnership v. Pomeroy*, and conflicts with the approach of federal courts across multiple circuits.

Wallman addressed facts materially identical to those here: the defendant raised a causation argument for the first time in his summary judgment reply brief. The Court held: "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." 976 P.2d at 332. The

Court reversed the grant of summary judgment, holding: "because plaintiff was not given notice... we conclude that the trial court incorrectly relied upon the lack of such evidence in granting the motions." *Id.* Critically, *Wallman* imposes *no* requirement that the plaintiff must first move to strike or seek leave for surreply before raising that objection: the procedural protection against reply-only evidence is automatic, not contingent upon the non-movant taking additional procedural steps.

Furthermore, enforcing a strict forfeiture rule under these circumstances diametrically conflicts with *Amada Family Ltd. Partnership v. Pomeroy*. In *Amada,* the court excused an identical failure to preserve a *Wallman* objection precisely because the litigant was stripped of a genuine, legally recognized opportunity to respond. The Panel's rigid forfeiture rule here revives the exact uncodified trap that *Amada* expressly forecloses.

This forfeiture rule also conflicts with federal authority recognizing the unfairness of permitting movants to introduce new reply-only evidence without affording an opportunity to respond. The Eleventh Circuit, in *Atlantic Specialty Ins. Co. v. Digit Dirt Worx, Inc.*, 793 F. App'x 896 (11th Cir. 2019), vacated a summary judgment because the district court relied on a new declaration submitted in a reply brief while denying the non-movant's request for a surreply—holding that a court must either permit a response or disregard the new evidence entirely. The Tenth

Circuit enforces the identical rule under Fed. R. Civ. P. 56 in *Beaird v. Seagate Tech., Inc.,* 145 F.3d 1159, 1164 (10th Cir. 1998). In *Knowlton v. Shaw*, 791 F. Supp. 2d 220, 228 (D. Me. 2011), the Court explained that summary judgment rules do not "allow the movant to add new facts at this late stage" because "[b]oth efficiency, and fairness to one's adversary, militate in favor of requiring a movant's opening brief [to serve as] a conclusive statement of its position."

Finally, the Panel's rule creates serious practical difficulties for trial courts and litigants. C.R.C.P. 121 generally disfavors surreplies and permits them only with leave of court, and motions to strike evidentiary submissions at the summary-judgment stage are likewise committed to judicial discretion. Conditioning preservation of a *Wallman*/*Amada* objection on a non-movant's success in obtaining such discretionary relief shifts the burden of enforcing Rule 56's structure from the offending party to the party that has already been disadvantaged by the reply-only submission. In *amici's* experience, rules that operate in this way tend to function as traps for unrepresented or resource-constrained litigants rather than as neutral case-management tools. The Court should clarify that the prohibition on reply-brief ambush is a *limitation* on what may support summary judgment in the first place, not a *privilege* forfeited by failing to pursue disfavored motions.

II. THE PANEL DEPARTED FROM THE BEDROCK RULE THAT CROSS-MSJS MUST BE CONSIDERED INDEPENDENTLY

The foundational principle of summary judgment with cross-motions is that each motion is evaluated separately on its own evidentiary record. *Morlan* stated this rule plainly: "Each of such motions is to be considered and ruled upon separately." 252 P.2d at 100. *Central Bank* reinforced the point: "Each motion, together with evidentiary matters tendered in support thereof, must stand on its own and cannot be aided by the motion of the opposing party." 326 P.2d at 83. *Morlan* went further, holding that "concessions" made in support of a cross-motion "terminate" once that motion is overruled and cannot "carry over" into the opposing party's motion, which must be "completely unsupported by anything except such as it had itself placed in the record." 252 P.2d at 101. In *amici's* experience, clear adherence to this separation prevents cross-motions from silently shifting burdens or expanding the evidentiary record without transparent notice to either side.

This principle is not parochial to Colorado. The Ninth Circuit held, in *Fair Housing Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001), that when parties file cross-motions for summary judgment, "[e]ach motion must be considered on its own merits" and the court must evaluate each independently to determine whether genuine issues of material fact exist.

The Panel's holding departs from this structure. It reasoned that the plaintiff "had the opportunity to respond to the affidavit and receipts when he submitted his reply in support of his cross-motion for summary judgment," effectively treating that filing as a surreply to the defendant's separate motion. But a reply in support of a cross-motion serves a different function: it argues that no genuine dispute of material fact exists as to the cross-movant's claims. Under *Morlan*, any concessions implicit in that posture "terminate" once the cross-motion is denied and cannot be carried over to shore up an opposing motion that must stand on its own proof.

From *amici's* perspective, the problem is not unique to this case. If cross-motion replies may routinely be treated as surrogate surreplies, litigants who file cross-motions will be worse off than those who do not: their filings will be used to fill gaps in an opponent's record in a way *Morlan* and *Central Bank* do not permit. That asymmetry undermines the predictability of summary judgment practice and discourages parties from using cross-motions to frame issues efficiently. The Court should reaffirm that each summary-judgment motion must be evaluated on its own evidentiary record and that exercising the right to file a cross-motion does not waive the protections those cases provide.

III. THE PANEL NULLIFIED THE MOVANT'S INITIAL BURDEN BY PERMITTING "REBUTTAL" EVIDENCE WITHOUT ANY PRIOR FACTUAL DENIAL

The cornerstone of summary judgment practice under C.R.C.P. 56 is the movant's initial burden. Under Colorado law, the moving party bears a two-component burden: first, an initial burden of production to demonstrate the absence of a genuine issue of material fact; and second, a final burden of persuasion if the non-movant's showing is made. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 710 (Colo. 1987). Only after the movant satisfies their initial production burden does the burden shift to the non-movant to establish that a triable issue of fact exists. *Woodward v. Bd. of Directors of TACO*, 155 P.3d 621, 626 (Colo. App. 2007). In cases *amici* have litigated, that allocation has been essential to ensuring that summary judgment does not function as a one-sided pleading device. However, in this case, Best Buy's opening MSJ contained no affidavit, no receipt, and no business record—only conclusory argument. It therefore failed to satisfy the initial production burden as a matter of law.

The non-movant correctly identified this deficiency in his Response, noting the complete lack of tangible, admissible evidence in the opening motion to substantiate the accusations. These are burden-of-proof arguments, not factual denials, and they are precisely the arguments the non-movant is entitled to make when the movant has failed to satisfy its initial burden. The Panel, however, characterized the plaintiff's arguments as factual "denials" about "exiting the store,

having merchandise, and having a receipt," and held that Best Buy's reply-only evidence was "rebuttal" to those denials.

This characterization is self-defeating. The Panel simultaneously held that the plaintiff "does not deny having a receipt at the time of the incident" and "provided no contrary evidence about his actions inside the store." But if the plaintiff made no factual denials and presented no contrary evidence, then the defendant's reply-only evidence cannot logically constitute "rebuttal"—by definition, rebuttal responds to something. Evidence introduced to prove a fact never disputed is not rebuttal; it is belated foundational evidence that should have accompanied the opening brief. And if, on the other hand, the plaintiff's arguments *did* constitute denials sufficient to trigger a rebuttal response, those denials *themselves* created genuine disputes of material fact independently requiring denial of the defendant's MSJ. The Panel's own logic leads inescapably to the same conclusion either way: Best Buy's MSJ should have been denied.

The Panel's reasoning thus allows a movant to postpone its evidentiary showing until reply while still claiming the benefit of the "rebuttal" label and a strict forfeiture rule. In practical terms, a party could file an opening brief resting solely on attorney argument, wait to see how the non-movant responds, and then submit foundational proof in reply while asserting that any objection has been waived. That

sequencing is difficult to reconcile with the front-loaded design of C.R.C.P. 56 and with decisions holding that the movant must make a sufficient evidentiary showing before any burden shifts to the non-movant. *Amici* respectfully submit that this Court should clarify that "rebuttal" evidence presupposes an evidentiary showing to rebut; it cannot be used to supply the movant's initial burden in the first instance.

IV. THE PANEL REDEFINED "RAISING AN ISSUE" TO MEAN TOPIC DISCUSSION WITHOUT EVIDENCE, CONTRAVENING *SUNCOR*

The Panel committed an independently fatal error by holding that Best Buy's evidence-free opening brief "put Montgomery on notice" of the need to present evidence. The Panel reasoned that the MSJ provided notice because it "raised the shopkeeper's privilege and specifically claimed that he exited the store with merchandise, refused to show a receipt, and was suspected of theft." *Opinion at ¶ 35.* This holding directly contravenes *Suncor v. Aspen*, which holds that "a conclusory statement made without supporting documentation or testimony is insufficient to create an issue of material fact."

The words "specifically claimed" are critical to the Panel's rationale—and *Suncor* expressly rejects them. *Suncor* holds that no matter how specifically a movant states a proposition, the statement is legally insufficient to discharge its burden under C.R.C.P. 56 *without supporting evidence*. The specificity of the

language does not transform bare argument into evidentiary substance. Best Buy's opening brief contained no affidavit attesting to observed theft, no receipt, and no business record—only counsel's assertions. An attorney's assertion in a brief is not evidence; it is argument. And argument, however pointedly phrased, cannot substitute for the evidentiary showing C.R.C.P. 56 requires.

The Panel's rule substantially weakens *Suncor's* protection. If "specifically claiming" facts in an evidence-free brief suffices to "raise an issue" under C.R.C.P. 56, movants may file skeletal opening submissions and reserve the presentation of actual proof for reply, while non-movants are expected to anticipate and counter factual showings that have not yet been made. In *amici's* view, that approach collapses the distinction between argument and evidence that *Suncor* draws and makes it difficult for courts to determine, at the opening-brief stage, whether the movant has carried its initial burden. No Colorado precedent endorses this type of placeholder practice, and *Suncor* strongly indicates that it is impermissible.

The combined effect of the Panel's holdings in Sections III and IV is particularly corrosive. Under the Panel's framework, a movant may file an evidence-free brief that "specifically claims" key facts; the non-movant, getting no notice of what actual evidence exists, raises burden-of-proof arguments; the movant then introduces foundational evidence in reply; and the court treats the

reply-only evidence as proper "rebuttal" because the non-movant was "on notice" from the original evidence-free assertions. This closed loop renders the movant's initial burden under C.R.C.P. 56 entirely illusory—a procedural fiction that the Panel has substituted for the substantive rule this Court has consistently applied.

V. THE DECISION ENDANGERS ACCESS TO JUSTICE FOR ALL *PRO SE* LITIGANTS

The Panel's four errors do not operate in isolation. Together, they create a procedural framework that is especially difficult for *pro se* and resource-constrained litigants to navigate, even though those litigants comprise a substantial share of Colorado's civil docket. In *amici's* experience representing civil-rights plaintiffs and low-income clients, rules that condition preservation on sophisticated motion practice in reply-brief settings tend to function as traps rather than as neutral case-management tools. The same dynamics also affect represented parties who face well-resourced opponents willing to exploit the procedural openings the Panel has created.

The Panel's "no-motion-to-strike" forfeiture rule demands that a litigant—upon seeing new evidence introduced in an opposing reply brief—immediately recognize the procedural significance of that evidence, identify the applicable motion practice, and file a motion to strike or a request for leave to file a surreply, without delay, before summary judgment is entered. *Wallman* imposes no such

requirement. The Panel created it for everyone, without acknowledging that its burden falls most heavily on those without legal training. Courts have long recognized that procedural rules must not become traps that cause inadvertent forfeitures, particularly for unrepresented parties. *Findlay v. Lewis*, 831 P.2d 830, 833 (Ariz. Ct. App. 1991). *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

The Panel's "sufficiently raised" error further compounds these dangers. Under the new "specifically claimed" standard, a movant need never produce a single piece of evidence in its opening brief to place the non-movant "on notice." It need only assert—confidently and specifically—what it expects its evidence to eventually show. The non-movant must then anticipate, gather, and produce rebuttal evidence against a factual case that has not yet been made. For *pro se* litigants without discovery counsel, investigative resources, or legal training, this is an impossible task. But even for represented parties, it is fundamentally unfair: C.R.C.P. 56 requires the movant to come forward with evidence first, not last.

As *Smith v. Mills,* 123 Colo. 11, 225 P.2d 483 (1950), instructs, courts "should not deny a litigant a trial where there is the slightest doubt as to the facts." The combination of rules endorsed by the Panel—imposing automatic forfeiture in the absence of a motion to strike or request for surreply, conscripting a cross-motion reply to serve as a surrogate surreply, allowing reply-only evidence to serve

as both foundation and "rebuttal," and treating unsupported assertions as sufficient "notice,"—makes it significantly easier for meritorious claims to be resolved on procedural grounds rather than on the evidence. From *amici's* perspective, that development is inconsistent with Colorado's longstanding commitment to resolving civil disputes on their merits and warrants this Court's supervisory intervention under C.A.R. 49(b), (c), and (d).

CONCLUSION

The decision below conflicts with multiple controlling Colorado precedents, creates procedural forfeitures unsupported by any rule or prior case law, alters the allocation of the movant's initial burden under C.R.C.P. 56, and dilutes the distinction between argument and evidence by treating "specifically claimed" assertions as if they were proof. In *amici's* view, these errors are likely to recur in other cases and, if left uncorrected, will weaken basic procedural protections for civil litigants throughout the state.

WHEREFORE, for the foregoing reasons, *Amici* respectfully urge this Court to **GRANT** the Petition For Writ Of Certiorari.

Respectfully submitted on this, the 4th day of June, 2026.

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CERTIFICATE OF SERVICE

Amici hereby certify that on this, the 4th day of June, 2026, the foregoing **BRIEF OF *AMICI CURIAE* IN SUPPORT OF GRANTING PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI** was filed with the Court, and a true and correct copy of it was electronically sent to the following people:

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