No. 23-204

In The

Supreme Court of the United States

WY PLAZA, LC,

Petitioner,

v.

SAFEWAY STORES 46 INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. KURTZ, JR.
Counsel of Record
KURTZ LAW PLLC
910 W. Main Street, Ste. 364
Boise, ID 83702
Telephone: (208) 287-8167
Fax: (208) 287-8130
jfk@kurtzlawllc.com

FREDERICK J. HAHN, III
HAHN LAW OFFICE
P.O. Box 50698
Idaho Falls, ID 83405
Telephone: (208) 506-5825
fjh@hahn-law.net

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In an appeal from the district court's rulings on cross-motions for summary judgment, did the Tenth Circuit err by reversing the district court's order denying summary judgment in favor of the appellant where the district court's sole basis for denying summary judgment for appellant was the appellee's affirmative defense of laches, which was erroneously applied by the district court, and the appellee never argued on appeal that the district court's decision should be affirmed based on any other defense and never argued on appeal that the case should be remanded to the district court to give the appellee another opportunity to pursue additional affirmative defenses that it had previously raised in the district court?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

CORPORATE DISCLOSURE

Respondent Safeway Stores 46, Inc. states that it is wholly owned by Albertsons Companies, Inc. ("Albertsons") and that no parent or publicly held company owns 10% or more of Albertsons' stock with the following exception: Cerberus Capital Management, L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

INTRODUCTION AND SUMMARY OF ARGUMENT

This Respondent's Brief in Opposition is filed by Plaintiff/Appellant Safeway Stores 46, Inc. ("Safeway") in response to Defendant/Appellee WY Plaza, LC's ("WY Plaza") Petition for Writ of Certiorari to this Court.

WY Plaza's Petition seeks a review of the Tenth Circuit's decision to "decline to sua sponte remand on affirmative defenses that WY Plaza has dropped on appeal." *Safeway Stores 46, Inc. v. WY Plaza, LC*, 65 F.4th 474, 496 (10th Cir. 2023). As explained by the majority:

> In responding to Safeway's summary-judgment motion on the claim for declaratory relief, WY Plaza relied in district court not only on laches but also four other affirmative defenses:
>
> 1. Estoppel
> 2. Accord and satisfaction
> 3. Waiver
> 4. Failure to mitigate damages
>
> The district court didn't address these defenses, and WY Plaza doesn't mention these defenses here.
>
> Given Safeway's appeal from the denial of its own summary-judgment motion, WY Plaza could have:

- raised these affirmative defenses as alternative grounds to affirm; or
- urged us, in the alternative, to remand for the district court to consider these defenses in the first instance.

WY Plaza bypassed both options, and we must decide Safeway's appeal based on the arguments presented to us. Based on those arguments, we reverse the denial of Safeway's summary-judgment motion; we see no need to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages.

The dissent suggests that WY Plaza had no reason to present these defenses on appeal. We disagree. Safeway appealed the denial of its summary-judgment motion, so WY Plaza should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion. Rather than present these four defenses or request a remand, WY Plaza chose to rely here solely on laches. 65 F.4th at 496.

In its Petition for *En Banc* Hearing, WY Plaza relied upon the dissent's statement that the majority's implied rule contradicts a long-standing rule in the Tenth Circuit that "[a]lthough the [appellees] could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, a party is not required to raise alternative arguments,"

citing *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1249 (10th Cir. 2010).

The majority, however, aptly explained why its decision was not in conflict with *Oldenkamp*, because in *Oldenkamp* the disposition of the appeal necessitated a remand for further proceedings where the appellee would be able to present further issues to the district court, and that is not the circumstance here. In this case, Safeway appealed not only the summary judgment against it, but also the denial of summary judgment in its favor. Although WY Plaza would not have necessarily waived its right to assert affirmative defenses if the case were remanded to the district court, the majority's decision granting summary judgment to Safeway concludes the case and eliminates any reason for a remand in which WY Plaza could further pursue its defenses to Safeway's summary judgment. Accordingly, it was incumbent upon WY Plaza to present on appeal all of its arguments against Safeway's summary judgment or a request to remand for the district court to address those arguments. Such a requirement is straight-forward and fair to all parties.

STATEMENT OF THE CASE

Safeway filed this lawsuit against WY Plaza alleging claims for: (1) Breach of Contract, (2) Anticipatory Breach, (3) Breach of the Covenant of Good Faith and Fair Dealing, (4) Money Had and Received, (5) Money Paid by Mistake, and (6) Declaratory Relief.

Safeway holds the lessee's leasehold interest in certain real property located in Laramie, Wyoming (the "Premises") pursuant to a Shopping Center Lease dated January 28, 1980 (as amended, the "Lease").

The Lease provided that Safeway would be reimbursed for its construction costs to expand the Premises by deducting such costs from its "Percentage Rent" obligation,[1] that would otherwise be owed annually following year end.

Thereafter, Safeway did expand the Premises by constructing a building addition that was completed on May 1, 2001, at a cost exceeding $2.5 million. ("Addition Costs").

It is undisputed that Safeway has never deducted any of the Addition Costs or accruing interest against its Percentage Rent.

Safeway's claims in this case fall into three categories. The first is for the recovery of amounts mistakenly paid by Safeway for Percentage Rent for calendar years 2012 through 2017.

The second is the recovery of amounts paid by Safeway under protest and a reservation of rights for calendar years 2018 and 2019 after WY Plaza disputed

---

[1] Percentage Rent is a payment obligation whereby Safeway agrees to pay WY Plaza 1.25% of its annual sales, allowing WY Plaza to share financially in Safeway's business success above certain agreed upon sales levels. The higher the sales, the higher the Percentage Rent.

Safeway's right to deduct its Addition Costs or accrued interest.

The third category involves Percentage Rent for calendar years 2020 and thereafter.[2] Safeway sought a declaratory judgment that no Percentage Rent will be due from Safeway to WY Plaza until Safeway has deducted the full Addition Costs, plus accrued interest, against the Percentage Rent otherwise due.

The dissent in the Tenth Circuit Court of Appeals' decision "parts ways" with the majority only on the majority's reversal of the district court's denial of summary judgment in favor of Safeway on its claim for declaratory judgment regarding future deductions against Percentage Rent; and that is the sole issue for which WY Plaza requested an *en banc* review and has now filed its Petition.

In its Order denying WY Plaza's petition for rehearing, the Tenth Circuit stated:

> The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

[2] The Lease is an executory (live) contract with a current term through February 17, 2026, with control (through options) through February 17, 2041. Since the Complaint was filed in July 2019, Safeway paid WY Plaza, under protest, Percentage Rent for calendar years 2019 and 2020. (2020 was paid in February 2021).

REASONS THE PETITION SHOULD BE DENIED

I. AS THE TENTH CIRCUIT HELD, ITS PRIOR DECISION IN *OLDENKAMP* IS DISTINGUISHABLE FROM THIS CASE.

WY Plaza argues its Petition should be granted because the Tenth Circuit's decision in this case conflicts with other circuit courts of appeals. In making that argument, WY Plaza includes the Tenth Circuit's prior decision in *Oldenkamp v. United Am. Ins. Co*, 619 F.3d 1243, 1249 (10th Cir. 2010) as one of the cases with which this case is in conflict. However, that argument was directly refuted by the majority's decision.

In its Petition for *En Banc* Rehearing, WY Plaza relied upon the dissent's statement that the majority's implied rule contradicts a long-standing rule in this circuit that "[a]lthough the [appellees] could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, a party is not required to raise alternative arguments," citing *Oldenkamp v. United Am. Ins. Co*., 619 F.3d 1243, 1249 (10th Cir. 2010).

The majority, however, explained that *Oldenkamp* was inapposite because it was a case requiring remand following the appeal, while the present case is not. The majority said:

> The dissent points out that WY Plaza didn't waive the other four defenses by failing to present them here. We agree, and WY Plaza could have reasserted these defenses if the case had resumed in the district court. We addressed

that situation in *Oldenkamp v. United American Insurance Co.*, 619 F.3d 1243 (10th Cir. 2010). The dissent seizes on one sentence in that opinion, where we acknowledged that the appellees hadn't waived an affirmative defense by failing to assert it on appeal. Dissent at 499 (quoting *Oldenkamp*, 619 F.3d at 1249). But we have no occasion to consider waiver, and *Oldenkamp* doesn't apply.

There we reversed the grant of summary judgment for the defendant. *Oldenkamp*, 619 F.3d at 1252. But the Oldenkamp plaintiffs hadn't appealed the denial of their own motion for summary judgment. So, the reversal of summary judgment for the defendant required a remand for further consideration of the plaintiffs' claims; no other disposition would have made sense. Given the need to remand for further argument, we pointed out that the revival of the plaintiffs' claims would trigger the defendant's right to reassert whatever defenses had been preserved in the district court. *Id.* at 1249.

Our case has little in common with *Oldenkamp.* If we were just reversing the grant of summary judgment to WY Plaza and remanding for further consideration of the merits, WY Plaza could reassert whatever defenses it had preserved in the district court. Here, though, we must decide whether the district court should have granted summary judgment to the plaintiff itself. That issue didn't exist in *Oldenkamp*, and we have no

> issue involving waiver of an affirmative defense.
>
> We reverse the denial of summary judgment to Safeway on the claim for a declaratory judgment rather than sua sponte remand for the district court to consider defenses that WY Plaza chose to forgo on appeal. So we remand for the district court to grant summary judgment to Safeway on its claim for a declaratory judgment. *Id*. at 497.

The majority cogently responded to the dissent's suggestion that WY Plaza had no reason to present its affirmative defenses on appeal:

> The dissent suggests that WY Plaza had no reason to present these defenses on appeal. We disagree. Safeway appealed the denial of its summary-judgment motion, so WY Plaza should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion. Rather than present the four defenses or request a remand, WY Plaza chose to rely here solely on laches.
>
> The dissent points out that we could affirm on an alternative ground. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018); *see* Dissent at 498–99. But the dissent doesn't suggest that we should affirm or even consider the four affirmative defenses briefed in district court. After all, we consider alternative grounds for affirmance based in part on whether the appellee has briefed the ground on appeal. *Elkins v. Comfort*, 392 F.3d 1159,

> 1162 (10th Cir. 2004). And we generally consider it imprudent to consider grounds for affirmance that the appellee has not argued on appeal. *See United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020) (stating that it would be imprudent for us to sua sponte affirm on alternative grounds that the appellee has not briefed on appeal); *United States v. Woodard*, 5 F.4th 1148, 1154 (10th Cir. 2021) ("Given our role as arbiter of the parties' arguments, we don't typically 'craft[ ] arguments for affirmance completely *sua sponte* and, more specifically, without the benefit of the parties' adversarial exchange." (quoting *Chavez*, 976 F.3d at 1203 n.17)). So we would ordinarily decline to sua sponte address the four affirmative defenses that WY Plaza has bypassed in the appeal.
>
> WY Plaza had other options besides urging us to affirm on alternative grounds. For example, WY Plaza could have asked us to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages. But WY Plaza didn't do that either. WY Plaza instead chose to rely solely on its laches defense. So we limit our consideration to this defense. 65 F.4th at 496-497.

Thus, as explained by the majority, the issue decided in *Oldenkamp* was significantly different than the issue decided by the majority here. In *Oldenkamp* the appellee would have known that a reversal on appeal would result in a remand to the district court,

where the case would continue. In contrast, Safeway appealed the district court's denial of its motion for summary judgment, which if granted would end the case, with no reason to anticipate a remand where WY Plaza would have an opportunity to make arguments that it chose to forgo on appeal.

As the majority recognized, in this case "we must decide whether the district court should have granted summary judgment to the plaintiff itself. That issue didn't exist in *Oldenkamp*, and we have no issue involving waiver of an affirmative defense." *Id*. Consequently, the majority concluded that reversal of the denial of summary judgment was appropriate "rather than sua sponte remand for the district court to consider defenses that WY Plaza chose to forgo on appeal." 65 F.4th at 497.

The other Tenth Circuit decision cited by WY Plaza, *Haynes Trane Service Agency, Inc. v. American Standard, Inc.*, 573 F.3d 947, 963 (10th Cir. 2009), also is not inconsistent with the 10th Circuit's decision here. In *Haynes*, the Court ultimately ruled that "we are not presented with a circumstance in which the law-of-the-case doctrine should be applied with leniency to the former appellee." Prior to reaching that conclusion, the Court stated:

> We recognize that the law-of-the-case doctrine is "prudential, not jurisdictional," calling "for the exercise of an appellate court's sound discretion." *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000). And courts exercise "a degree of leniency in applying [this] rule

> to issues that could have been raised by *appellees* on previous appeals," *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995) (emphasis added), because we do not ordinarily require appellees to raise every possible ground for affirmance in their appellate briefs, *see id.* at 740–41; *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657–58 (3d Cir. 2007). But the rule has properly been applied to appellees in some cases. *See*, *e.g.*, *Kessler*, 203 F.3d at 1059–60; *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358–59 (7th Cir. 1996). This is such a case.

Thus, *Haynes* recognized that the rule requiring appellees to raise every possible ground for affirmance should be applied in some cases. Similarly, in this case, the majority correctly concluded that because WY Plaza decided to rely solely on its laches defense in this appeal, the Court properly limited its consideration of the district court's denial of Safeway's motion for summary judgment to the arguments presented on appeal.

It would be illogical, and the height of judicial inefficiency, to not resolve Safeway's appeal of the denial of its motion for summary judgment when WY Plaza neither argued on appeal that its additional affirmative defenses provided alternative grounds for affirming the district court's decision denying Safeway's motion for summary judgment, nor urged the court, in the alternative, to remand for the district court to consider these defenses in the first instance.

II. THE TENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH PRECEDENTS IN OTHER CIRCUITS.

The majority opinion does not create a circuit split. As with *Oldenkamp*, the cases relied upon by WY Plaza from other circuits are distinguishable from the majority opinion in this case. In most of those cases there had been a prior appeal that necessitated a remand to the district court, and on the second appeal, the appellate court addressed whether the appellee in the first appeal had waived arguments that were not raised in the first appeal. In those cases, as in *Oldenkamp*, the appellee would have known that a reversal in the first appeal would result in a remand to the district court for further proceedings. In other words, a decision adverse to the appellee would not result in the case ending because the only relief being sought by the appellant was a reversal and remand to the district court.

The decisions in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995); *Independence Park Apartments v. United States*, 449 F.3d 1235 (Fed. Cir. 2006); and *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007), like *Oldenkamp*, involved situations in which the reversal of a motion for summary judgment in favor of the appellees automatically resulted in a remand. Thus, those cases are not in conflict with the majority opinion in this case.

Similarly, *Ms. S. v. Regional School Unit 72*, 916 F.3d 41, 48-49 (1st Cir. 2019), also addressed what

arguments could be raised by an appellee on remand. Thus, that case is not in conflict with the majority opinion in this case. Moreover, the court expressly stated that "'an appellee might in some situations be required to raise' an alternative argument supporting affirmance 'in its appellate briefs' to preserve that argument for later appeals." *Id*.

In concluding that an appellee in a previous appeal may not be required to raise all possible alternative grounds for affirmance to avoid waiving those grounds when the case is remanded, some courts have suggested that the full application of the waiver rule applied to appellants may put the appellee in a dilemma between procedural disadvantage and improper use of a cross-appeal. However, as recognized in *Crocker*, cross-appeals are required only when the party prevailing below seeks to enlarge the scope of the judgment, and are not necessary when the party simply presents alternative bases for affirmance. 49 F.3d at 741. WY Plaza had no basis for enlarging the judgment that it obtained from the district court, so filing a cross-appeal would have been prohibited.

The holding in *Schering Corporation v. Illinois Antibiotics Company*, 89 F.3d 357 (7th Cir. 1996) is not in conflict with the majority opinion in this case. The court here held under doctrine of law of the case, testimony that had been excluded in the initial hearing before the district court was properly excluded in the second trial conducted after a remand. The court explained:

> To put this differently, by reserving their challenge to the district court's evidentiary ruling they have put themselves in the position of asking us to reexamine our previous ruling on the basis of newly discovered evidence. Only, of course, it is not newly discovered. It was there all along. If they thought it material to the meaning of the injunction they should have challenged its exclusion in the first round.
>
> The particular wrinkle in the doctrine of the law of the case that is presented by this appeal is novel, but we believe our conclusion is sound in principle, and is supported by *United States v. Duchi*, 944 F.2d 391, 392 (8th Cir. 1991). 89 F.3d at 359.

In *Kessler v. National Enterprises, Inc.*, 203 F.3d 1058 (8th Cir. 2000), the court granted a third-party defendant's motion to dismiss a cross-appeal because the party seeking to pursue that claim had not cross-appealed the earlier dismissal of that third party defendant. Thus, the holding in *Kessler* is inapposite and is not in conflict with the majority opinion in this case.

Thus, the Petitioner has not shown that the majority opinion in this case is in conflict with other circuit courts of appeals.

III. WY PLAZA'S OTHER REASONS DO NOT SUPPORT GRANTING THE PETITION FOR WRIT OF CERTIORARI.

A. The Decision of the Tenth Circuit Does Promote Judicial Efficiency and Procedural Fairness to the Parties.

The Petitioner argues that the "No-Waiver-by-Appellee Rule" has been widely adopted because it promotes judicial efficiency and ensures procedural fairness to appellees. However, there is no support for a conclusion that the Tenth Circuit's decision in this case was not judicially efficient or was unfair to the Petitioner.

In this case the Court was dealing with appeals from orders granting summary judgment in favor of WY Plaza and denying summary judgment in favor of Safeway.

The Tenth Circuit recognized that WY Plaza could have argued that the denial of Safeway's motion for summary judgment should be affirmed based on WY Plaza's four other affirmative defenses. If WY Plaza had taken that approach, the Tenth Circuit could have affirmed the summary judgment on alternative grounds or determined that the affirmative defenses were not sufficient as a matter of law to preclude summary judgment for Safeway. Either of these results would have been judicially efficient because they would have precluded the need for additional proceedings in the district court. This approach also would have been fair to WY Plaza because it had already

presented those alternative defenses to the district court.

However, the Tenth Circuit also expressly stated that, alternatively, WY Plaza could have requested a remand to obtain a decision from the district court on the alternative affirmative defenses that the district court had not previously addressed. The Tenth Circuit's only requirement for such a remand was some indication from WY Plaza that it was not abandoning its other affirmative defenses and a request to remand to the district court to consider these defenses in the first instance. That requirement is neither burdensome nor procedurally unfair to an appellee.

As recognized in a case cited by Petitioner, *Grede v. FCStone, LLC*, 867 F.3d 767, 776 (7th Cir. 2017) at n. 4: "As a matter of appellate advocacy, it would ordinarily be prudent for an appellee who deliberately chooses not to argue alternative grounds for affirmance to alert the appellate court to the existence of those alternative grounds."

B. Contrary to Petitioner's Arguments the Tenth Circuit's Decision is Well-Defined.

Petitioner argues that the Tenth Circuit's decision is untenable, ill-defined and will have the same effect as no rule at all. That argument requires a wholesale misinterpretation of the Tenth Circuit's statements.

The Tenth Circuit's decision in this case is easily applied in future cases. When an appellee is responding to an appeal in which the appellant contends that a district court decision should be reversed and that a judgment should have been entered in favor of the appellant, the appellee must either (a) present to the appellate court its alternative arguments not addressed by the district court, or (b) notify the appellate court that those additional arguments were preserved below and request remand for consideration of those alternative arguments by the district court. Otherwise, the appellate court will rule based upon the arguments actually presented on appeal. Such a rule is well-defined and easy for appellees to follow.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN F. KURTZ, JR.
Counsel of Record
KURTZ LAW PLLC
910 W. Main Street, Ste. 364
Boise, ID 83702
Telephone: (208) 287-8167
Fax: (208) 287-8130
jfk@kurtzlawllc.com

FREDERICK J. HAHN, III
HAHN LAW OFFICE
P.O. Box 50698
Idaho Falls, ID 83405
Telephone: (208) 506-5825
fjh@hahn-law.net