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Scott Ockey and Catherine Condas v. Iron Mountain Alliance, Inc., Iron Mountain Holding Group L.C., Iron Mountain Associates, LLC, White Pine Associates, Inc., George Condas, Nick J. Condas, Chris Condas, Ellen Bayas, John Lehmer, Alexandra Ockey, John COndas, Susi Kontgis, Marina Condas, Hermione Bayas, Ellen Ockey-Johnson, Keith Kelley, Walt Brett and Tom Guald : Reply Brief

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IN THE UTAH SUPREME COURT

SCOTT OCKEY and CATHERINE CONDAS, Plaintiffs/Appellant and Cross-Appellee, v. IRON MOUNTAIN ALLIANCE, INC., a Utah Corporation, IRON MOUNTAIN HOLDING GROUP, L.C., IRON MOUNTAIN ASSOCIATES LLC, WHITE PINE ASSOCIATES LTD., WHITE PINE ASSOCIATES, INC., GEORGE CONDAS, NICK J. CONDAS, CHRIS CONDAS, ELLEN BAYAS, JOHN LEHMER, ALEXANDRA OCKEY, JOHN CONDAS, SUSI KONTGIS, MARINA CONDAS, HERMIONE BAYAS, ELLEN OCKEY-JOHNSON, KEITH KELLEY, WALT BRETT and TOM GUALD, *Defendants/Appellees* and Cross-Appellant.	Supreme Court No. 20060142

REPLY BRIEF OF CROSS-APPELLANT JOHN LEHMER

APPEAL FROM THE RULINGS OF THE THIRD DISTRICT COURT,
SUMMIT COUNTY, HONORABLE ROBERT K. HILDER

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ISSUE ON CROSS APPEAL

The only issue relevant to John Lehmer's cross-appeal is whether the trial court erred, as a matter of law, when it ruled that Scott Ockey, the plaintiff, did not have the burden of proving he had no adequate remedy at law before he was entitled to equitable relief.[1] See Thurston v. Box Elder County, 892 P.2d 1034, 1040 (Utah 1995) (the availability of an equitable remedy is reviewed for correctness). The trial court instead ruled that Mr. Lehmer, a defendant, had the burden of proving Mr. Ockey did have an adequate remedy at law. As demonstrated in Mr. Lehmer's cross appellant brief and below, the trial court's ruling is contrary to Utah law.

To place this issue in proper perspective, Mr. Lehmer notes that the cross appeal becomes relevant only if Mr. Ockey first overcomes three grounds sufficient to affirm the trial court's dismissal of his conversion and breach of fiduciary duty claims. First, Mr. Ockey must demonstrate that his conversion claim is not barred by the three-year statute of limitations, as the trial court made a factual finding that Mr. Ockey was aware of the facts underlying his claim well before the limitations period expired and yet failed to file his claim until much later. (R. 4598-99.) Second, Mr. Ockey must demonstrate that he did not ratify the transactions underlying the conversion and breach of fiduciary duty claims, as the trial court made an (unchallenged) factual finding that those transactions caused a family real estate development to be "much more valuable" and that after Mr. Ockey learned of the transactions he accepted (and continues to accept) benefits from that development, which total more than $2 million and will total more than $10 million. (R. 4601, TT:710-14.)

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[1] Mr. Ockey complains that the issue presented in Mr. Lehmer's brief differs from the one presented in his docketing statement. (Ockey Reply Br. at 25 n.15.) However, "[a]n issue not listed in the docketing statement may nevertheless be raised in appellant's opening brief." Utah R. App. P. 9(f).

Finally, Mr. Ockey must demonstrate that the sole remedy he sought at trial was available, as his choice of remedy was inconsistent with his own theory of the case. The remedy sought by Mr. Ockey was an order requiring Mr. Lehmer to give Mr. Ockey some of Mr. Lehmer's stock in a family company. However, under Mr. Ockey's own theory of how the stock originally should have been distributed, two other family members—not Mr. Lehmer—received Mr. Ockey's stock, and Mr. Ockey voluntarily dismissed those other family members just before trial. For reasons outlined in Mr. Lehmer's response brief, these three grounds are adequate to affirm the trial court's dismissal of Mr. Ockey's conversion and breach of fiduciary duty claims. (Lehmer Resp. Br. at 29-45.)

ARGUMENT

The issue on Mr. Lehmer's cross appeal is a fourth ground upon which to affirm the trial court's dismissal of Mr. Ockey's conversion and breach of fiduciary duty claims. Just before trial, in an apparent attempt to avoid a jury trial, Mr. Ockey dismissed his claims against numerous family-member defendants and waived his right to damages. (R. 4591-92; TT:1045-47.) Mr. Ockey's pretrial maneuvers left only his cousin, Mr. Lehmer, and a family-owned company, Iron Mountain Alliance, Inc. ("IMAI") as defendants and left only two claims, conversion and breach of fiduciary duty. (R. 4591.) At trial, Mr. Ockey sought a single equitable remedy: Return of some stock issued by IMAI, allegedly wrongfully withheld from Mr. Ockey in 1993. (R. 4592, TT:1045-47.)

At the end of Mr. Ockey's case in chief, Mr. Lehmer moved for a directed verdict on the ground that Mr. Ockey had failed to present any evidence that a remedy at law was unavailable. (R. TT:659.) During the hearing on the motion, Mr. Lehmer argued that Mr. Ockey, as the plaintiff, had the burden of proving a remedy at law was unavailable, whereas Mr. Ockey argued that he had no such burden. (R. TT:672.) The trial court

rejected Mr. Lehmer's argument, and instead ruled that Mr. Lehmer had the burden to prove that a remedy at law was available: "If the defense comes in now and shows that the[re] could have been a value applied, [Mr. Ockey does] not [get] to pursue the equitable remedy because [he] had the choice of damages." (R. TT:680) It is this ruling that is at issue on cross appeal. (Lehmer Resp. Br. at 4.)

A. The Issue on Cross Appeal Could Be Fashioned as an Alternative Ground to Affirm

The issue presented in Mr. Lehmer's cross appeal is a question of law that could be viewed as an alternative ground to affirm. The Court may affirm the judgment appealed from "'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.'" Bailey v. Bayles, 2002 UT 58, ¶10, 52 P.3d 1158 (quoting Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225); see also 5 C.J.S. Appeal & Error § 714 (1993) ("Generally, the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court."). Even where an alternative ground is not briefed, the court may affirm as long as the grounds to do so are apparent on the record. State v. Robison, 2006 UT 65, ¶19, 147 P.3d 448.

In Mr. Ockey's reply brief, he repeatedly complains that Mr. Lehmer raises numerous issues not presented to the trial court. (Ockey Reply Br. at 1-2, 6-7.) Mr. Ockey misapprehends the nature of the affirm-on-alternative-grounds doctrine. Mr. Lehmer's brief provides sufficient factual and legal bases to affirm on numerous alternative grounds, including the issue presented on cross appeal. (Lehmer Resp. Br. at 21-26, 31-32.) Whether these issues were presented to the trial court is irrelevant.

Bayles, 2002 UT 58 at ¶10 (appellate courts can affirm on an alternative ground even if it "was not raised in the lower court"). The relevant question is whether the record is adequate to affirm on any of these additional grounds. In any event, the issue raised in Mr. Lehmer's cross appeal was presented to the trial court, and therefore, there is no question the issue is before the Court. (R. TT:1002, 1011-14.)

B. Mr. Ockey Failed to Satisfy His Burden of Proving He Had No Adequate Remedy at Law

Mr. Ockey did not present evidence, either before of during his case in chief, that a remedy at law was unavailable. Because it was Mr. Ockey's burden to prove he had no adequate remedy at law and he failed to satisfy that burden, Mr. Ockey is not entitled to an equitable remedy. For reasons outlined above, this provides an additional ground to affirm the trial court's refusal to grant Mr. Ockey the particular equitable remedy he sought at trial.

Under Utah law, "the general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury. Equitable jurisdiction is not justifiable simply because a party's remedy at law failed." Buckner v. Kennard, 2004 UT 78, ¶56, 99 P.3d 842 (citing 27A Am. Jur. 2d Equity §§ 30, 45, 48 (2003)). A plaintiff not only must plead that no adequate remedy at law exists, but also must establish this claim. See Belnap v. Blain, 575 P.2d 696, 700 (Utah 1978) ("There is an allegation there is no adequate remedy at law, but there are no facts pleaded or subsequently established by discovery or affidavit to sustain this claim."). In other words, a "plaintiff must affirmatively show a lack of an adequate remedy at law on the face of the pleading and from the evidence." 27A Am. Jur. 2d Equity § 29 (2006). Mr. Ockey failed to fulfill this obligation here.

In Mr. Ockey's response brief, he now appears to concede that the burden should have been placed upon him and not Mr. Lehmer. Mr. Ockey claims instead that even if

the trial court had properly placed the burden upon him, he met the burden. (Ockey Resp. Br. at 25.) To support this claim, Mr. Ockey cites testimony of Mr. Lehmer and Alexandra Ockey, Mr. Ockey's mother.[2] (Ockey Resp. Br. at 25.) Mr. Ockey argues that this testimony was sufficient to satisfy his burden of demonstrating no adequate remedy at law because (i) Mr. Lehmer testified that "there is no market for the stock, he does not know its value and, at least indirectly, the value of the stock depends on how well the underlying real estate development performs," and (ii) Alexandra "could not put a value on [the stock]." (Ockey Resp. at 25.)

As an initial matter, it is worth noting that this testimony is hardly sufficient to demonstrate the stock could not be valued, for reasons stated by Alexandra herself at trial. When asked whether she could "calculate the value of the stock," she answered, "No." (R. TT:521.) And when asked "Why not," Alexandra replied that "[i]t's too complex for me[, but] . . . an accountant might be able to figure it out . . . ." (R. TT:521.) Mr. Ockey did not provide any testimony that the stock could not be valued by an accountant, but instead merely asked two of his family members whether they could value it. This testimony comes nowhere near establishing the stock could not be valued, and the trial court never found that it did.[3]

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[2] The only other testimony cited by Mr. Ockey is that of Keith Kelly. (Ockey Resp. at 25.) However, Mr. Kelly did not testify as part of Mr. Ockey's case, and, in any event, Mr. Kelly's testimony does not show an accountant could not have placed a value on the stock in question. (R. TT:695.) In fact, the only expert testimony concerning valuation of the stock was that of Mr. Hoffman—Mr. Lehmer's expert—who testified that the stock could be valued. (R. TT:862-67.)

[3] This demonstrates why Mr. Lehmer had no marshalling obligation. The trial court never found that Mr. Ockey had satisfied the burden of showing no remedy at law was available because the trial court did not place that burden upon Mr. Ockey. Thus, there was no relevant factual finding to challenge. For similar reasons, there was no evidence to marshal concerning whether the stock could be valued, as the only evidence Mr. Ockey cites goes to whether two of Mr. Ockey's family members knew the value.

In the trial court, Mr. Ockey conceded what he now denies on appeal. During the hearing on Mr. Lehmer's motion for directed verdict, Mr. Ockey's counsel stated that "we have not presented any evidence of damages." (R. TT:657.) And Mr. Ockey's failure to present any evidence of damages is not explained by there being no such evidence—as he now maintains on appeal—but instead was the result of a strategic decision made by Mr. Ockey just before trial. Before trial, Mr. Ockey waived his right to recover damages, but at the hearing on the motion for directed verdict—perhaps realizing his waiver had been unwise—Mr. Ockey asked the trial court to make his election of remedies conditional, requesting that "if you rule as a matter of law that we don't get an equitable remedy, that we have to [present] a damages remedy or nothing at all. We've got the evidence." (R. TT:659 (emphasis added).) The trial court refused to permit the conditional election of remedies, ruling that Mr. Ockey was no longer entitled to damages. (R. TT:683.) Mr. Ockey's request is nonetheless telling, as it reveals that Mr. Ockey was prepared to prove damages if the trial court denied him equitable relief. Far from demonstrating damages could not be calculated, Mr. Ockey had witnesses waiting in the wings to demonstrate the opposite.

The transcript reveals that Mr. Ockey failed to demonstrate no remedy at law was available, and instead reveals that he merely waived his remedy at law. As the Court has explained, "[e]quitable jurisdiction is not justifiable simply because a party's remedy at law failed." Buckner, 2004 UT 78 at ¶56. Mr. Ockey was not entitled to equitable relief, and equitable relief is all he sought for his conversion and breach of fiduciary duty claims. This provides a fourth ground to affirm the trial court's dismissal of Mr. Ockey's conversion and breach of fiduciary duty claims. The Court should affirm.

C. Placing the Burden on Plaintiffs to Prove No Adequate Remedy Exists at Law is Especially Compelling in Stock Conversion Cases

Requiring a plaintiff first to prove that no adequate remedy at law is available before being entitled to equitable relief is especially important in the stock-conversion setting. To value stock in conversion cases, Utah follows the New York rule, which "sets the measure of damages as the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner receives notice of the conversion." Broadwater v. Old Republic Sur., 854 P.2d 527, 531 (Utah 1993). The purpose of the New York rule is to indemnify "the owner of the converted stock for his or her loss, while requiring the owner to mitigate damages by replacing the stock within a reasonable time after notice of the conversion." Id. The rule seeks to indemnify "a plaintiff for the conversion of stock without affording a windfall at the expense of the defendant." Id. at 532. Under the New York rule, had Mr. Ockey prevailed on the merits, he would have been entitled to recover only the value of the stock at a reasonable time after he first learned of the alleged conversion, which would have totaled around $1000. (Lehmer Resp. Br. at 33.)

By waiving his right to damages, Mr. Ockey sought to bypass the New York rule, and instead recover the value of the stock at the time of trial by recovering the stock itself, which was worth millions of dollars by the time of trial. (Id.) To permit Mr. Ockey to do so, however, would be to permit him essentially to nullify the New York rule. In other words, to allow a plaintiff to elect return of stock instead of damages without any showing that damages are unavailable would be to allow the very windfall the New York rule is designed to prevent. The Court should not permit Mr. Ockey to obtain in equity what is strictly forbidden at law. If a plaintiff, such as Mr. Ockey, can prove damages cannot be calculated, then permitting the plaintiff to proceed in equity makes sense, but without such a showing, it invites the very inequities addressed by the

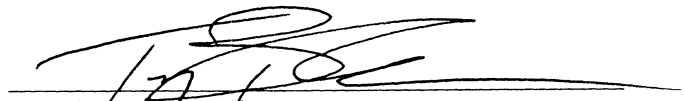
New York rule. For this reason, the trial court erred by failing to place the burden to demonstrate damages were unavailable upon Mr. Ockey, a burden he did not satisfy. The Court should affirm.

CONCLUSION

The trial court erred when it failed to place upon Mr. Ockey the burden of proving he had no adequate remedy at law. Mr. Ockey conceded that he could have proved damages if necessary, but instead chose not to do so. Under Utah law, Mr. Ockey failed to satisfy his burden, and therefore, he was not entitled to the equitable remedy he sought at trial. Because Mr. Ockey voluntarily waived his right to all other remedies, the failure of his equitable remedy means his conversion and breach of fiduciary duty claims fail, which is what the trial court concluded on other grounds. The Court should affirm.

DATED this 9th day of May, 2007.

SNELL & WILMER L.L.P.



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CERTIFICATE OF SERVICE

This is to certify that the foregoing Reply Brief of Appellee and Cross-Appellant John Lehmer was mailed, postage prepaid, this 9th day of May 2007, to the following:

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