72149-6

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NO. 72149-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STERLING SAVINGS BANK,

Appellant,

v.

STANLEY XU and NANLING CHEN, husband and wife and the marital community comprised thereof; LONGWELL PARKRIDGE, LLC, a Washington limited liability company; PARKRIDGE PROPERTY, LLC, a Washington limited liability company; and BRITTANY PARK APARTMENTS, LLC, a Washington limited liability company,

Respondents.

ON REVIEW FROM KING COUNTY SUPERIOR COURT
Case No. 11-2-25872-6 SEA (Hon. Barbara Linde)

APPELLANT'S REPLY BRIEF

Richard E. Spoonemore
SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
999 Third Avenue, Suite 3650
Seattle, Washington 98104
Tel. (206) 223-0303; Fax (206) 223-0246
Email: rspoonemore@sylaw.com
Attorneys for Appellant
Sterling Savings Bank

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I. INTRODUCTION

Parkridge never disputes that it stands to receive a windfall of nearly $1,000,000 if the trial court's decision is affirmed. It seeks to retain this bonanza by asserting that its action did not involve "damages." Instead, it argues, its case was really a quiet title action addressing possession of property, and the trial court did nothing more than simply adjudicate possession of that "property."

But Parkridge was more than happy to characterize its case as a "damage action" in order to obtain prejudgment interest in the sum of $591,510.62. CP 409 (awarding amount of prejudgment interest); CP 438 (Conclusion No. 9) ("Parkridge is entitled to recover ***its damages*** in this quiet title action."); CP 449 (Conclusion No. 51) ("Prejudgment interest is allowable ... when ***an amount claimed*** is liquidated...."). And, as Parkridge argued to the trial court, it was permitted to continue to litigate the case, and to seek prejudgment interest, precisely because RCW 7.28.190 permitted a quiet title action to continue as an action ***for damages***—a conclusion of law adopted by the trial court. CP 437 (Conclusion No. 6); CP 438 (Conclusion No. 9).

By the time this case was tried, it did not just involve title to real property. As a consequence of the sale of the property during the litigation, Sterling was required to pay Parkridge money—its damages—because Parkridge was not in exclusive possession of the Property at the time it sold. Parkridge also received interest (which would not otherwise be available in a quiet title action) because liquidated monetary damages were awarded:

> The net proceeds from the sale of the Property totaled $17,714,020.84. Sterling paid GE Capital $15,014,646.77. ***The $2,699,374.07 difference between these two amounts represents Parkridge's damages. This damage amount is liquidated,*** since it is determinable without reliance upon opinion or discretion. Parkridge is entitled to prejudgment interest from June 1, 2012 (the date the Property was sold) until the date of judgment.

CP 449 (Conclusion No. 52) (emphasis added).

But while Parkridge had been damaged in the amount of $2,699,374.07, ***it had already recovered $1,000,000 from Wiess for this same loss***. CP 434 (Fact No. 85). At the time of trial, Parkridge's remaining loss was far less than the $2,699,374.07 it was awarded by the trial court.

The trial court erred by failing to offset the Wiess recovery. A lawsuit is not a trip to Las Vegas to seek a jackpot, and Washington public policy will not permit a plaintiff to obtain a recovery in excess of its actual loss. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 121, 323 P.3d 1036, 1045 (2014) ("Washington courts have consistently implemented rules designed to prevent double recoveries."); *Barney v. Safeco Ins. Co. of Am.*, 73 Wn. App. 426, 428, 869 P.2d 1093, 1094 (1994), *overruled on other grounds, Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 946 P.2d 388 (1997) ("'Double' recovery 'violates public policy' because the applicable measure of damages ***is*** public policy with respect to how much a claimant should recover.") (emphasis in original).

II. ARGUMENT

A. By Not Permitting an Offset, the Trial Court Allowed Parkridge to Obtain a Double Recovery.

Parkridge fails to respond to Sterling's analysis that the trial court awarded Parkridge a windfall. *See* Appellant's Opening Brief, pp. 28-29. The math is straightforward and unrebutted:

Parkridge's Total Loss: $3,186,057.02, plus interest

(1) Parkridge sustained a ***$2,699,374.07*** loss as a result of Xu's fraud upon Sterling. CP 449 (Conclusion No. 52).

(2) Parkridge expended ***$486,682.95*** in fees and costs for its claims against Sterling and Wiess. CP 392; *Appendix A* to Appellant's Opening Brief (summary derived from CP 298-307).

(3) Parkridge's total loss, including fees and costs, is therefore ***$3,186,057.02***, plus interest.

Parkridge's Total Recovery: $4,150,834.10, plus interest

(1) Parkridge was awarded $2,699,374.07, plus interest against Sterling. CP 449 (Conclusion No. 52).

(2) Parkridge was also awarded $451,460.03 in attorneys' fees and costs against Sterling. CP 392.

(3) Parkridge recovered $1,000,000 from Wiess. CP 434 (Fact No. 85).

(4) Parkridge's total recovery is therefore $4,150,834.10, plus interest.

Parkridge's Windfall: $964,777.09

(1) Parkridge's total loss, all inclusive, is ***$3,186,057.02***, plus interest.

(2) Parkridge's total recovery is ***$4,150,834.10***, plus interest.

(3) Parkridge's windfall is therefore ***$964,777.09***.

B. Washington Law and Public Policy Will Not Permit a Double Recovery.

Washington law abhors a double recovery:

> Clearly, there is a "public policy" against "double" recovery. To say this, however, is to say only that recovery should not exceed the applicable measure of damages.... "Double" recovery "violates public policy" because the applicable measure of damages ***is*** public

> policy with respect to how much a claimant should recover.

Barney, 73 Wn. App. at 428. *See also Seafirst Ctr. P'ship v. Kargianis*, 73 Wn. App. 471, 476, 866 P.2d 60, 64 (1994) ("the law does not sanction a double recovery").

Washington Courts will apply—or even develop—rules to avoid a plaintiff's receipt of a double recovery:

> Although the parties cite no case law regarding this precise type of double recovery—judgment both for contractors that were not paid for providing services to clients and for the clients themselves—***Washington courts have consistently implemented rules designed to prevent double recoveries***. *See Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971) (adopting the election of remedies doctrine for "the sole purpose of preventing double redress for a single wrong"); *Rice v. Janovich*, 109 Wn.2d 48, 61-62, 742 P.2d 1230 (1987) (holding that the trial court erred by giving jury instructions for both assault and outrage for the same conduct because it allowed for the possibility of double recovery); *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 621-22, 160 P.3d 31 (2007) (discussing rules designed to prevent double recovery in the context of an underinsured motorist).

Rekhter, 180 Wn.2d at 121 (emphasis added).

In short, whenever possible, a court should apply an offset to avoid granting a double recovery: "It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the

same injury." *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898, 902 (2000). Even in a true quiet title action involving real property, a court should permit offsets in order to prevent a double recovery. *Cummings v. Anderson*, 94 Wn.2d 135, 144-45, 614 P.2d 1283 (1980) (order quieting title may be made after the payment of certain "offsets we have approved").

C. The Trial Court Erred in Rejecting an Offset to Prevent a Double Recovery.

1. The Wiess Letter was Directly Related to the Xus' Fraud.

In Conclusion of Law No. 58 the trial court held that "Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset." CP 451 (Conclusion No. 58). But Sterling did make such a showing: the Wiess settlement "arose out of her writing a letter to the bank which was part of the fraud." RP 1126, lns. 20-22. Wiess did nothing else, and there were no other claims made against her. CP 470, ¶9.12 (Parkridge's claim against Wiess arose solely out of the opinion letter).

The record established that the Wiess settlement was directly attributable to the Xus' fraud. This fact was ***admitted*** by Parkridge.

RP 718, lns. 5-7 ("[W]e sued [Wiess] because ... she issued this [letter] in connection with a fraudulent transaction."). There were no other claims or disputes with Wiess that gave rise to any claims, or any settlements. The sole dispute was her facilitation of the Xus' fraud by her letter.

The trial court's own findings indicate that the Wiess settlement was connected directly to Xu's fraud. CP 423 (Finding No. 42) ("Rebecca Wiess drafted an opinion letter on Parkridge's behalf [Exhibit 52]. Xu e-mailed Wiess's opinion letter to Chicago Title on the evening of Sunday, January 30, 2011. The Loan closed on Monday, January 31, 2011."); CP 424 (Finding No. 45) ("On the day the loan closed, a representative from Chicago Title informed Hayhurst that Chicago Title had received the opinion letter, that it was on Wiess' letterhead and that Wiess had signed the letter.").

The trial court went awry by speculating that the Wiess settlement might have had some relationship to CFD Funding 1 or Diesing such that there was no "clarity as to what costs will be defrayed." RP 1127, lns. 18-19. In other words, the trial court seemed to suggest that a settlement involving third parties might implicate

the Wiess settlement. RP 1127, lns. 13-15 ("[T]he settlement of that issue was not in this court, that was a lawsuit portion of it that was outside this court's ambit. There have been lots of costs incurred in tracing down all of the ripple effect that this fraud which the Xus caused. The court does not find that there is any clarity as to what costs will be defrayed, all of the costs incurred by that $1 million.").

Here is the problem with the trial court's analysis: it requires Sterling to establish not only that the plaintiff—Parkridge—has fully recovered all of its losses, but also to establish that ***third parties not involved in the case*** have also made a full recovery. RP 1127, lns. 20-23 ("And because there are costs ***outside of this***, I don't see a basis, and it hasn't been established that there is a basis for the offset.") (emphasis added).

Costs or losses incurred by entities other than plaintiff Parkridge, which has undeniably been made whole, are not relevant to the offset question. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC,* 176 Wn. App. 335, 348, 308 P.3d 791, 799 (2013) ("An offset is an equitable remedy to ensure that ***a plaintiff*** does not recover from two defendants for the same damage."). Parkridge was

the only entity with a claim against Wiess. CP 470, ¶9.12 ("Wiess breached the duty of care she owed towards Parkridge ...."), ¶9.13 ("As the direct and proximate result of Wiess' breach of duty of care, Parkridge suffered damages ...."). Neither CFD Funding 1 nor Diesing was a plaintiff at trial. CP 435 (Fact No. 88). The relevant question for offset purposes is whether Parkridge is receiving more than its actual losses. There is no authority for the proposition that Sterling is additionally required, as the trial court demanded, to show that non-parties impacted by the "ripple effect" have also recovered "all of [their] costs." RP 1127, lns. 15-19.[1]

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[1] Even if the losses of CFD Funding 1 and Diesing were relevant to the offset analysis—and they are not—the evidence shows that they have been compensated as well.

In denying an offset, the trial court specifically referenced the forced redemption payments due from Xu to CFD Funding 1, implying that those payments had been missed, presumably resulting in uncompensated harm to CFD Funding 1 and/or Diesing. RP 1127, lns. 8-15 ("The LLC agreement, the Parkridge Property agreement between its members, had financing agreement that required monthly payments, required this seven and a half percent ....").

But a fully collateralized settlement between Xu/Longwell and CFD Funding 1 accounted for the redemption amount ($6,000,000), plus interest (at 7.5%) and all attorneys' fees and costs. EX 68, §§ 1, 4; RP 158, lns. 5-11. As Finding of Fact No. 76 concluded: "In the Settlement, Xu and the Longwell defendants agreed to pay CFD approximately $11.1 million. The settlement amount reflects the forced redemption payments under the Parkridge and Brittany L.L.C. Agreements, plus interest and attorneys' fees." CP 432 (Fact No. 76). Even though Sterling was not required to show that non-plaintiff third parties had been compensated, it did so here.

Sterling fulfilled its burden of showing the connection between the Wiess letter (and claim arising therefrom) and Xu's fraud. The fact that this connection was admitted by Parkridge forecloses any argument otherwise. RP 718, lns. 5-7.

The trial court's conclusion that "Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset" is in error. CP 451 (Conclusion No. 58). It all was.

2. Parkridge Did Not Incur $1,000,000 in Attorneys' Fees and Costs in Advancing the Wiess Claim.

The second part of Conclusion of Law No. 58—the trial court's holding that "Sterling did not meet its burden of proving a double recovery" because "Parkridge incurred costs and attorney's fees in obtaining its settlement with Wiess"—is also in error. Given the quick settlement with Wiess, it defies common sense to believe that Parkridge's fees and costs related to that narrow claim could have possibly totaled $1,000,000 or more. It was evident that a double recovery would be awarded unless an offset was applied.

The precise amount of that offset, however, could not be known until after trial when Parkridge disclosed, for the first time,

its fees and costs detail. CP 270-371. At that point, Parkridge disclosed that its fees, ***for everything*** (including its actions against Xu, Chen and Longwell), totaled $657,043.91. CP 275, ¶16. Costs–for everything–came to $20,607.44. CP 275, ¶17. On its face, it was evident that the Wiess settlement exceeded the fees and costs associated with its pursuit.

The timesheets and attorney declaration first submitted after trial permitted further refinement of the actual amount spent on just the Wiess claim. Of $657,043.91 in total fees, $428,955.50 was spent on Parkridge's claim against Sterling. CP 275, ¶16. This amount was awarded to Parkridge in the judgment against Sterling. CP 392. Total uncompensated fees therefore totaled $228,088.41. CP 275, ¶16. At this point, and with no further refinement, Parkridge obtained a double recovery of ***at least $768,178.68***.

Further examination of the actual entries shows that just $35,222.91 in fees and costs were expended to obtain the Wiess recovery–a sum that Partridge does not dispute in its brief. *See* Sterling's Opening Brf., p. 28 and *Appendix A*. If affirmed, Parkridge will stand to receive a double recovery to the tune of $964,777.09.

D. Sterling's Alleged Negligence in Closing the Loan Does Not Justify Parkridge's Double Recovery.

In an argument devoid of any legal authority (*see* Parkridge Brf., pp. 32-38), Parkridge maintains that it is entitled to retain its nearly $1,000,000 bonanza because Sterling was "complicit" in Xu's fraud. Parkridge Brf., p. 32. Not only is this claim unsupported by the record, it is a non sequitur.

With respect to the factual findings, Parkridge overstates its case by improperly conflating the concepts of complicity and negligence. There is absolutely no finding that Sterling was an accomplice to, or knowing participant in, Xu's fraud. It was a victim. CP 416 (Fact No. 17) ("Xu signed the original loan application and represented to Sterling that he and Chen were Parkridge's only members and managing members. Because Xu claimed to be Parkridge's managing member, Sterling believed he was the appropriate person to provide this information."); CP 417 (Fact No. 19) ("Xu and Chen provided Sterling with a forged fraudulent and false limited liability company agreement for Parkridge."); CP 425 (Fact No. 50) ("Sterling approved the Loan based upon the false information that Xu provided."). At trial, Parkridge's counsel

admitted that Sterling was victimized along with Parkridge. RP 13, ln. 7 (Parkridge's attorney: "And we agree, it was a complete fraud upon Sterling, and it was a complete fraud against Parkridge.").

At most, the trial court found that Sterling could have done more to identify and prevent the fraud, *i.e.*, that Sterling was negligent in the way the loan was handled. Negligence, however, does not render the doctrine of offset inapplicable. Offsets are often applied to reduce the amount that a negligent party would otherwise be required to pay a plaintiff. *See, e.g., Coulter v. Asten Group, Inc.*, 155 Wn. App. 1, 11, 230 P.3d 169 (2010) (negligent asbestos manufacturer entitled to offset judgment with settlements received by plaintiff). A defendant's negligence never justifies a plaintiff's windfall recovery.

The relevant public policy question is whether Parkridge is receiving a double recovery. It indisputably is, and Sterling's alleged negligence cannot be used to justify Parkridge's boon.

E. Sterling Properly Preserved the Offset Issue for Appeal.

Parkridge argues that "Sterling effectively waived any argument that the trial court's conclusions of law were incorrect."

Parkridge Brf., p. 23. But, as Parkridge concedes, Sterling plainly argued in its opening brief that the trial court's conclusion of law number 58—the conclusion denying an offset—was in error. Parkridge Brf., p. 23. *See also* Sterling Brf., p. 3 ("Sterling assigns error to Conclusion of Law No. 58 ...."). This, of course, was the same objection that counsel raised before the trial court. RP 1124-26 ("Your Honor, I just would like clarification with respect to the $1 million payment from ... Ms. Wiess ... which arose out of her writing a letter to the bank which was part of the fraud, why that's not a proper offset. Why is that not properly attributed to the fraud claim that we've been discussing before the court?"). Sterling has not somehow "waived" the right to challenge the denial of an offset.

The amount of Parkridge's total fees and costs, including how much it would recover from Sterling, was neither known nor knowable until after the findings and conclusions were entered. Until it moved for fees and costs, Parkridge had never disclosed how much it had spent pursuing Wiess. CP 270-371.

Parkridge's only answer to this is that Sterling, after the findings and conclusions had been entered, "never asked the trial

court to reconsider its decision denying the offset." Parkridge's Brf., p. 42. But such a request would have been futile because the trial court had denied an offset for two reasons: (1) that Sterling had failed to show any connection between the Wiess claim and the quiet title action rendering an offset unavailable in any amount, *and* (2) there was no evidence of the exact amount of the fees and costs expended in pursuing Wiess. Moving for reconsideration on (2) because of the newly disclosed fee and cost disclosures would not have had any effect on (1), the wholesale rejection of any offset. Sterling's only practical choice was to appeal Conclusion No. 58 and obtain a reversal of the trial court's rejection of any offset, in any amount. Only after reversal of that overriding legal issue would an examination into the precise amount of such an offset be appropriate. That, of course, is exactly the course taken here.

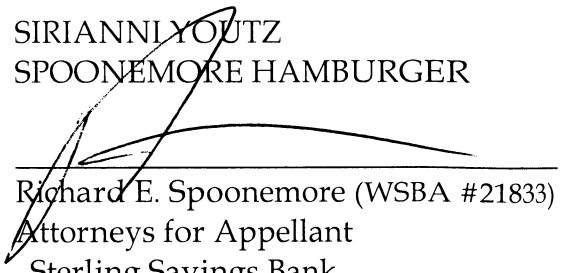
III. CONCLUSION

The trial court's denial of an offset for the Wiess payment should be reversed. Either (1) the judgment against Sterling should be reduced by the sum of $964,777.09, or (2) this case should be

remanded to the trial court with directions to compute the amount of offset due Sterling as a result of the Wiess payment.

DATED: April 28, 2015.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER



Richard E. Spoonemore (WSBA #21833)
Attorneys for Appellant
Sterling Savings Bank

CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on April 28, 2015, a true copy of the foregoing **APPELLANT'S REPLY BRIEF** was served upon counsel of record as indicated below:

Keith Allen Kemper ELLIS LI & MCKINSTRY PLLC 2025 First Avenue, Penthouse A Seattle, WA 98121 *Attorneys for Respondents Xu and Longwell Parkridge*	[x] [ ] [ ] [x]	By United States Mail By Legal Messenger By Facsimile By Email *Tel. (206) 682-0565* *Fax (206) 625-1052* *kkemper@elmlaw.com*
Dean G. von Kallenbach Robert L. deNormandie, Jr. YOUNG DENORMANDIE, P.S. 1191 Second Avenue, Suite 1901 Seattle, WA 98101 *Attorneys for Respondent Parkridge Property, LLC*	[x] [ ] [ ] [x]	By United States Mail By Legal Messenger By Facsimile By Email *Tel. (206) 224-9818* *Fax (206) 623-6923* *dgvk@ydnlaw.com* *pdenormandie@ydnlaw.com*

DATED: April 28, 2015, at Seattle, Washington.

Richard E. Spoonemore (WSBA #21833)