92441-4

Court of Appeals No. 72149-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

STERLING SAVINGS BANK,

Petitioner,

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.

STERLING SAVINGS BANK'S PETITION FOR REVIEW

Richard E. Spoonemore (WSBA #21833)
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 Petitioner
Sterling Savings Bank

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I. IDENTITY OF PETITIONER

Petitioner Sterling Savings Bank ("Sterling") asks this Court to accept review of the unpublished Court of Appeals decision terminating review designated in Section II of this petition.

II. COURT OF APPEALS DECISION

Sterling seeks review of a decision from Division I of the Court of Appeals affirming the denial of an offset to prevent a double recovery by Respondent Parkridge LLC ("Parkridge"). A copy of the Court of Appeals decision is attached hereto as ***Appendix A***, pages 1 through 12.

III. SUMMARY OF REASONS FOR REVIEW

Both Sterling and Parkridge were defrauded by Stanley Xu and Nanling Chen (collectively, "the Xus"). The Xus' fraud was facilitated by a letter written by the Xus' attorney. Parkridge was made whole by a decision from the trial court that awarded it damages against Sterling. Parkridge, however, had already received a $1 million malpractice settlement from the Xus' attorney for her role in fraudulent transaction.

When Sterling was ordered to pay to make Parkridge whole, it asked that its obligation be offset by the $1 million malpractice payment already received by Parkridge. The trial court refused, concluding that Sterling had not proven that the $1 million payment was not also related to disputes other than the fraudulent transaction. Because the record was devoid of any

evidence that the malpractice payment had anything to do with disputes outside the fraud, the trial court essentially required Sterling to prove a negative, *i.e.,* Sterling had to prove that there were no other claims also settled by the attorney's payment of $1 million. The Court of Appeals affirmed. As a result, Parkridge received a windfall recovery.

This aspect of the Court of Appeal's decision should be reviewed under RAP 13.4(b)(4) because it fails to advance Washington's strong public policy against double recoveries. *Rekhter v. DSHS*, 180 Wn.2d 102, 121, 323 P.3d 1036 (2014) ("Washington courts have consistently implemented rules designed to prevent double recoveries.").

Once Sterling established that the malpractice payment was related to the fraud, then the burden should have shifted to Parkridge to show that it was also related to other issues before an offset could be denied. Without such burden shifting, a party seeking an offset to avoid a plaintiff's double recovery must prove a negative. In short, where a party makes a *prima facie* case that a third-party recovery is related to the claim at issue, and the record is devoid of any evidence showing that other claims or issues were also resolved by that recovery, then an offset should be awarded to enforce Washington public policy.

The Court of Appeals further implied that because the damage award against Sterling arose from a challenge to a deed of trust, an offset

was not appropriate because "Sterling Bank had no right to the disputed sale proceeds." ***Appendix A***, p. 9. This holding permits a winning party in any quiet title action to enjoy a double recovery with impunity even if it could be demonstrated that it is receiving far more than its actual damages. This is not the law. *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"). Review of this specific issue is appropriate under either RAP 13.4(b)(1) or (4).

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in failing to offset a $1 million legal malpractice recovery when it assessed damages against Sterling because the Court improperly required Sterling to prove that the malpractice recovery was unrelated to claims other than the fraud at issue?

Answer: Yes. Sterling established that the $1 million malpractice recovery obtained by Parkridge was related to the fraud perpetuated by the Xus against Parkridge and Sterling. Having made a *prima facie* case of a double recovery, Sterling is not also required to prove that there were no other claims settled by the $1 million payment.

2. Did the Court of Appeals err in its alternative holding when it concluded that Sterling had no right to the disputed sale proceeds because the decision arose out of an action to quiet title?

Answer: Yes. The public policy behind preventing a double recovery extends to quiet title disputes, and the Court of Appeals' alternate holding fails to follow this authority.

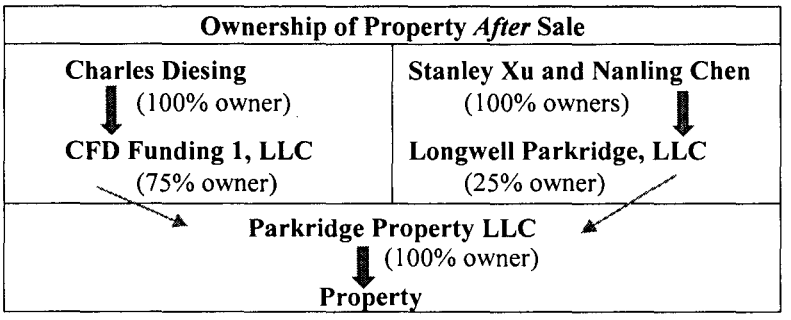
V. STATEMENT OF THE CASE

A. The Creation and Ownership of Parkridge.

CFD-Parkridge, LLC was the owner of a 249-unit apartment complex (the "Property"). CP 412 (Fact No. 1). Charles Diesing ("Diesing") was CFD-Parkridge's only owner. CP 412 (Fact No. 1).

Diesing was approached by the Xus about purchasing the Property. To facilitate a sale, the Xus and Diesing agreed to jointly form Parkridge. CP 413 (Fact No. 4); RP 86-87.

Diesing formed CFD Funding 1, LLC ("CFD Funding 1") to hold his interest in Parkridge. CP 414 (Fact No. 6). The Xus formed Longwell Parkridge, LLC ("Longwell"), to hold his interest. CP 414 (Fact No. 6). The ownership structure, graphically displayed, was as follows:



B. Parkridge's LLC Agreement.

The Limited Liability Company Agreement governing Parkridge was negotiated between attorneys Robert deNormandie on behalf of Diesing/CFD Funding 1 and Rebecca Wiess on behalf of the Xus/Longwell. CP 414 (Fact No. 8).

The LLC Agreement designated Longwell as Parkridge's managing member, and CFD Funding 1 as its non-managing member. CP 414 (Fact No. 9). Longwell, as the managing member, was given control over Parkridge's operations, subject to certain exceptions. CP 414 (Fact No. 9). One of those exceptions, as set forth in Section 7.5 of the LLC Agreement, required Longwell to obtain CFD Funding 1's written consent before refinancing any loans[1], or allowing a lien or other encumbrance to be filed against the Property. CP 414 (Fact No. 9).

C. The Xus Defraud Sterling.

The Xus came up with a scheme to pull equity out of the Property, and approached Sterling in January 2011 about obtaining an $18 million loan for Parkridge, secured by the Property. CP 416 (Fact No. 16). Of that sum, $15 million would be used to refinance the GE Capital loan. *Id.* The

[1] By agreement between Diesing/CFD Funding 1 and Xu/Longwell, Partridge was encumbered by a $14.95 million loan to General Electric Capital Corporation ("GE Capital"). CP 413 (Fact No. 3).

remaining $3 million would be paid directly to the Xus. *Id.*

As part of Sterling's loan application process, Stanley Xu signed documents in which he falsely represented that he and Chen were Parkridge's managing members and sole owners. CP 416 (Fact No. 17). As the trial court found, "Sterling wanted to make sure that Parkridge's Operating Agreement authorized Xu and Longwell to sign the documents for the Sterling loan." CP 417 (Fact No. 18). Sterling therefore asked for a copy of the Operating Agreement governing Parkridge. *Id.*

The Xus provided Sterling with a falsified limited liability company agreement and a false borrowing authorization certifying that they had the authority to sign the loan documents and encumber the Property. CP 417 (Fact No. 19). It was, as Parkridge's attorney stated at trial, "a complete fraud upon Sterling." RP 13, ln. 7.

D. Sterling Obtains a Letter from the Xus' Attorney Representing that the Xus Have the Authority to Enter into the Loan.

Sterling's counsel noticed a discrepancy in Parkridge's documents. Sterling therefore requested copies of all documents documenting changes in Parkridge's membership. CP 422 (Fact No. 30). In response, the Xus provided it with a falsified document entitled "First Amendment to Limited Liability Company Agreement of Parkridge Property, L.L.C." CP 422 (Fact Nos. 38, 39). This First Amendment purported to show that the Xus had

transferred to Longwell their phony 100% interest in Parkridge, and stated that Longwell had taken over as Parkridge's managing member. *Id.*

Sterling sought confirmation of the Xus' authority by asking for, and obtaining, an opinion letter from Parkridge's counsel (and the Xus' counsel), Wiess. CP 423 (Fact No. 40). Wiess drafted an opinion letter on Parkridge's behalf. CP 423 (Fact No. 42); EX 52; RP 3. In that letter, Wiess represented, among other things, that the "***execution, delivery and performance by [Parkridge] of the Loan Documents have been duly authorized by all necessary action of [Parkridge] and do not and will not ... violate any provision of the articles of organization or operating agreement of [Parkridge].***" EX 52, p. FNTC000545. The opinion letter from Wiess also opined that, upon execution, the loan documents would provide Sterling with a "good, valid and perfected security interest in the collateral" upon the recording of the deed of trust. EX 52, p. FNTC000546. However, as would later be alleged, Wiess, as the attorney who personally participated in the drafting of the true Limited Liability Company Agreement governing Parkridge, knew or should have known that the Xus had no ability to encumber the Property without CFD Funding 1's express consent. CP 414 (Fact No. 9).

As the trial court found, "Sterling approved the Loan based upon the false information that Xu provided." CP 425 (Fact No. 50); CP 426 (Fact

No. 54: "Sterling would not make the Loan without verifying that its Deed of Trust had priority over any other claim against the Property.").

E. The Xus Appropriate Parkridge's Loan Proceeds.

Of the $18 million in Sterling's loan proceeds, $15,014,646.77 was used to pay off the GE Capital loan. CP 425 (Fact No. 81). GE Capital's interest in the Property was released. CP 425 (Fact No. 81). After deducting fees and closing costs, Sterling paid the Xus the remaining loan proceeds of $2,757,880.99. CP 425 (Fact No. 51). Sterling filed a deed of trust to secure the $18 million that it had advanced. CP 424-25 (Fact No. 49).

F. Diesing Discovers the Xus' Fraud and Files Suit.

In July 2011, CFD Funding 1, through Diesing, discovered the Xus' fraud. CP 430 (Fact No. 69). CFD Funding 1 sued the Xus and Longwell. CP 430 (Fact No. 69). In addition, CFD Funding 1, derivatively on behalf of Parkridge, sued the Xus, Longwell and Sterling. CP 430-31 (Fact Nos. 70, 71). CFD Funding 1 obtained an order appointing a receiver to liquidate the Property. In December 2011, CFD Funding 1 obtained summary judgment against the Xus/Longwell. CP 431 (Fact No. 74).

G. The Property Is Sold by a Receiver for $17.85 Million.

In June 2012, a court-appointed receiver obtained a buyer for the Property. CP 432 (Fact No. 78). The proposed sale price was $17.85 million. *Id.* Sterling, CFD Funding 1, and Parkridge all agreed that

a sale at that price was in the best interests of all parties. *Id.*

The parties also agreed that Sterling had the right to approximately $15 million of the sale proceeds under the doctrine of equitable subrogation. CP 432-33 (Fact Nos. 79, 80); EX 68.

With respect to the proceeds in excess of that amount, the attorneys for Sterling, CFD Funding 1 and Parkridge agreed that the receiver would pay those sums to Sterling, without prejudice to the right to assert claims and defenses regarding priority to proceeds in excess of the approximately $15 million used to pay off the GE loan. CP 432-33 (Fact No. 80).

H. Wiess Settles for $1 Million.

In April 2013, after the Property was sold, Wiess was added as an additional defendant for her role in drafting the opinion letter that falsely represented that the Xus had the authority to enter into the Sterling loan. CP 434 (Fact No. 85). Wiess paid Parkridge $1 million in March 2014 to resolve the claims Parkridge made against her. CP 434 (Fact No. 85).

I. The Case Proceeds with Parkridge as the Sole Plaintiff.

Having settled with Wiess, Parkridge's remaining claim was against Sterling. It alleged that it had been harmed by Sterling's loan and deed of trust, and sought recovery of approximately $3 million in monetary damages. CP 435 (Fact No. 89) ("Parkridge alleged in its Second Amended Complaint that '[a]s a direct and proximate result of Sterling's actions and

inactions, Parkridge suffered damages in the amount of at least $3 million.'"). The trial court concluded that Parkridge had the ability to seek monetary damages under RCW 7.28.190 because the underlying property had been sold (rendering a quiet title judgment irrelevant):

> The Property was sold after Parkridge commenced this lawsuit but before trial commenced. RCW 7.28.190 specifically provides that under these circumstances, a quiet title action continues after the sale of the subject property:
>
> > If the right of the plaintiff to the possession of the property expire, after the commencement of the action and before trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages.

CP 437 (Conclusion No. 6) (quoting RCW 7.28.190). *See also* RP 995-996, lns. 25-26.

J. Damages, Plus Prejudgment Interest, Are Awarded to Parkridge.

At trial, Parkridge argued that it sustained damages in the sum of $2,699,374.07, the difference between the net proceeds from the agreed sale of the Property ($17,714,020.84) and the amount paid to refinance the GE Capital loan ($15,014,646.77). RP 990, lns. 2-5; RP 996, lns. 17-18; RP 791, lns. 2-3. The trial court agreed. Because it was awarding damages, the trial court also awarded prejudgment interest on this sum. CP 449 (Conclusion No. 52).

K. The Trial Court Refused to Offset Wiess' $1 Million Payment.

Given that Parkridge was awarded all of its damages, plus prejudgment interest and $451,460.03 in attorneys' fees and costs, Sterling argued that it was entitled to an offset related to the $1 million payment made by Wiess to Parkridge. RP 1124-25.

In its written Findings and Conclusions, the trial court refused to award an offset:

> Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset. Additionally, Parkridge incurred costs and attorney's fees in obtaining its settlement with Wiess. Sterling did not meet its burden of proving a double recovery and a set off is inappropriate.

CP 451 (Conclusion No. 58).

L. The Court of Appeals Affirms.

On appeal, the Court of Appeals affirmed. Like the trial court, it concluded that Sterling "did not meet its burden of showing it was entitled to an offset for the $1 million settlement with Wiess." ***Appendix A***, p. 9. Specifically, it concluded that Sterling had failed to "show what portion of the settlement is attributed to the asserted [fraud] claims." *Id.*, p. 10. It also concluded, with little analysis, that an offset was not proper because the action arose from a quiet title action, notwithstanding that damages and interest were awarded pursuant to RCW 7.28.190. *Id.*, p. 9.

VI. ARGUMENTS FOR REVIEW

A. Summary of Argument for Review.

The burden of proof required to establish a right to an offset—and avoid a double recovery—is an issue of substantial public interest. RAP 13.4(b)(4). This Court has long made clear that public policy is violated by a double recovery. *Rekhter*, 180 Wn.2d at 121 ("...Washington courts have consistently implemented rules designed to prevent double recoveries."). Closely related to this policy is the critical question of exactly how the burden of proof should be allocated in establishing the existence of a double recovery.

To be sure, the burden of proof is initially on the party who seeks an offset. But, if a party makes a *prima facie* case that a double recovery will occur, they should not be further required to prove the absence of a negative, *i.e.*, that there are no other possible claims extinguished by the settlement that created the double recovery. If the record shows no other claims encompassed by the settlement, then an offset should be awarded to prevent a double recovery.

B. Parkridge Obtained a Double Recovery.

Parkridge received a windfall. The math is straightforward:

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

(1) Parkridge sustained a ***$2,699,374.07*** loss as a result of the Xus' 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 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***.

C. A Double Recovery Is Abhorrent to Washington Law.

Washington 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 v. Safeco Ins. Co. of Am., 73 Wn. App. 426, 428, 869 P.2d 1093 (1994). *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).

D. The Court of Appeals Imposed an Improper Burden of Proof which Undermined Public Policy on Double Recoveries.

1. Sterling Established a *Prima Facie* Case that the Malpractice Settlement was Related to the Xus' Fraud.

Sterling set forth a *prima facie* case that the $1 million payment was

directly related to the false letter that Wiess drafted and provided to Chicago Title in order for the transaction to close.

From its inception through its conclusion, the claim against Wiess always boiled down to the simple fact that Wiess knew, or should have known, that Longwell/Xu did not have the authority to refinance the GE Capital loan without the approval of CFD Funding 1. CP 454-55; CP 468-71. This was clear by the testimony of Parkridge's own witness. RP 718, lns. 5-7 ("[W]e sued her because ... she issued this [letter] in connection with a fraudulent transaction."). That's it. As Parkridge itself described its claim against Wiess, this formed the sole basis for all the claims against her:

> Based on Wiess' testimony, Plaintiffs believed she breached the duty of care she owed to Parkridge by: (1) failing to verify that CFD approved the Sterling Loan, as required by the terms of the Parkridge Agreement; (2) failing to carefully review the Sterling loan documents and discover that Longwell was falsely representing itself to be Parkridge's sole member; and (3) issuing the Sterling Letter, in which she falsely represented that "Parkridge's execution, delivery and performance" of the loan documents "had been duly authorized by all necessary action" and did not "require any consent or approval of any members" of Parkridge or "violate any provision of the [Parkridge] articles of organization or operating agreement."

CP 455, lns. 10-18. *See also* CP 470, ¶ 9.12 (same breaches are listed in Parkridge LLC's Amended Complaint against Wiess).

The trial court's findings also indicate that the Wiess settlement was connected directly to the Xus' fraud. CP 423 (Finding No. 42) ("Rebecca

Wiess drafted an opinion letter on Parkridge's behalf [Exhibit 52]. The Xus e-mailed Wiess' 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 [Sterling's counsel] that Chicago Title had received the opinion letter, that it was on Wiess' letterhead and that Wiess had signed the letter.").

2. The Trial Court and the Court of Appeals Imposed an Additional Requirement on Sterling. They Required that Sterling Prove that the $1 Million Payment Did Not Also Resolve Other Unidentified Claims.

It was not enough that Sterling established that the $1 million payment was related to the malpractice claim arising from Wiess' letter. The Court of Appeals required that Sterling also show that no part of that amount was attributable to some other unidentified claim. ***Appendix A***, pp. 9-10 ("To meet this burden, the party seeking an offset must make an affirmative showing as to which portion, if any, of the recovery 'was attributable to the claim it seeks to offset.'") (*citing Puget Sound Energy v. ALBA Gen. Ins. Co.,* 149 Wn.2d 135, 141, 68 P.3d 1061 (2003)). But having imposed that burden on Sterling, the Court of Appeals proceeded to adopt an impossible standard:

> Settlements typically involve 'far more than a simple release of liability' for a particular claim alleged in the

> complaint. In many cases, the settling party "also purchase[s] certainty by avoiding the risks of an adverse trial outcome not to mention forgoing the expenses associated with a lengthy trial and appeal." As the trial court noted, the amount paid in a settlement often represents "a release from an unquantifiable basket of risks and considerations."

Appendix A, p. 10 (citations to *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000), omitted).

There are two problems with this standard: (1) if every payment in settlement is construed to include "a release from an unquantifiable" array of considerations, then it is virtually impossible to ever prove that the payment—or some part thereof—should be an offset; and (2) it assumes that every payment is in exchange for a release that covers multiple risks.

The first problem is easily stated. If the burden is on the party seeking an offset to prove "which portion, if any, of the recovery was attributable to the claim it seeks to offset," then this burden will never be met if a settlement represents "a release from an unquantifiable basket of risks and considerations."

This problem is related to the second issue. It is not true to assume that every settlement resolves a release of multiple risks, or that the risk cannot be quantified. The only real risk facing Wiess was her exposure over the letter that facilitated the Xus' fraud. And Wiess and Parkridge quantified that singular risk at $1 million.

The Court of Appeals, however, wanted Sterling to prove that there were no other claims or risks subsumed by the $1 million payment. It rejected Sterling's evidence not because it failed to show that the payment included a release for the letter—it certainly did—but because it failed to "show ***what portion*** of the settlement is attributed to the asserted claims." ***Appendix A***, p. 10 (emphasis added). But imposing this type of burden only makes sense if the record shows that the payment was to resolve more than just the single claim at issue. In the cases cited by the Court of Appeals, the record plainly indicated that the payments were for a variety of claims. *Weyerhaeuser Co.*, 142 Wn.2d at 672 (settlement with certain insurers over 42 potential clean-up sites, releases included all ***future*** insurance claims and trial court noted "the multiplicity of claims and parties" involved in the case); *Puget Sound Energy*, 149 Wn.2d at 673-75 (case against insurers involving multiple clean-up sites and multiple parties). It makes sense to require a party seeking an offset to show how the settlement should be applied among the various resolved claims. It makes no sense, however, to impose such a burden where, as here, the record is devoid of any evidence that the payment was for more than ***one single claim***.

The Court of Appeals' conclusion that "Sterling Bank did not meet its burden of establishing 'what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset'" is in error.

Appendix A, pp. 11-12 (quoting CP 451 (Conclusion No. 58)). It all was. The rationale behind this err should be corrected in order to advance Washington's long-standing public policy against double recoveries.

E. The Court of Appeals Improperly Rejected An Offset Because the Action was Originally Commenced as an Action in Equity to Invalidate a Deed of Trust.

Without explaining further, the Court of Appeals also rejected an offset because Sterling "had no right to the disputed sale proceeds." *Appendix A*, p. 9. Presumably the Court believed that because the action was originally commenced as an action to quiet title, and Sterling's deed of trust was invalidated, there could be no claim for offset. If permitted to stand, the decision would permit a party to obtain a double recovery in any equitable action to quiet title or to invalidate a deed of trust.

The fact that the action was originally commenced as an equitable claim to quiet title does not undermine the application of Washington's policy against double recoveries. *See Cummings*, 94 Wn.2d at 144-45 (order quieting title may be conditioned upon payment of certain "offsets we have approved"). The rule against double recoveries applies to all actions. As this Court has indicated, even if there is no existing authority to avoid a double recovery, it will be developed and applied wherever necessary. *Rekhter*, 180 Wn.2d at 121 ("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."). The failure to permit an offset here is contrary to the directive in *Rekhter*, and should be reviewed under RAP 13.4(b)(1).

It is undisputed that both Sterling and Parkridge were victims of the Xus' fraud. The important question is how to allocate the losses associated with that fraud. Parkridge, who prevailed on its claims against Sterling, is entitled to be made whole. With an award of damages, interest, and attorneys' fees, it certainly has been made whole. But Parkridge is not entitled to a windfall, particularly when its bonanza is at the expense of Sterling, the other defrauded party. The proper application of an offset would rectify this unjust allocation.

VII. CONCLUSION

Sterling asks that this Court accept review of the Court of Appeals' decision denying it an offset, and preventing Parkridge from obtaining a double recovery in violation of Washington's public policy.

DATED: October 28, 2015. SIRIANNI YOUTZ
SPOONEMORE HAMBURGER

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

CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on October 28, 2015, a true copy of the foregoing STERLING SAVINGS BANK'S PETITION FOR REVIEW 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] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [x] 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] By United States Mail [ ] By Legal Messenger [ ] By Facsimile [x] By Email *Tel. (206) 224-9818* *Fax (206) 623-6923* *dgvk@ydnlaw.com* *pdenormandie@ydnlaw.com*

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

Richard E. Spoonemore (WSBA #21833)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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; and PARKRIDGE PROPERTY, LLC, a Washington limited liability company, Respondents.	)	No. 72149-6-I DIVISION ONE UNPUBLISHED OPINION FILED: September 28, 2015

SCHINDLER, J. — Following a bench trial, the court entered a judgment against Sterling Savings Bank for approximately $2.7 million. Sterling Bank contends the court erred in denying its request for an offset. Because the unchallenged findings establish Sterling Bank had no right to the $2.7 million and Sterling Bank did not meet its burden of proving it was entitled to an offset, we affirm.

FACTS

Parkridge Property LLC

Charles Diesing owned a 249-unit apartment building in Everett. In 2008, Diesing agreed to enter into a partnership with Stanley Xu and his spouse to finance their purchase and make improvements to the apartment building.

Diesing through CFD Funding I LLC (CFD LLC) and Xu through Longwell Parkridge LLC (Longwell LLC) formed Parkridge Property LLC (Parkridge LLC). Parkridge LLC obtained a $14.95 million loan from General Electric Capital Corporation (GE Capital) to finance the purchase and make improvements to the apartment building. The loan was secured by a deed of trust on the apartment building.

CFD LLC agreed to provide $6 million in supplemental financing in exchange for a 75 percent equity interest in Parkridge LLC and a 7.5 percent preferred return on its capital contribution. CFD LLC and Longwell LLC agreed Parkridge LLC would redeem CFD LLC's ownership interest for $6 million within three years. Xu personally guaranteed the obligation to repay the $6 million by August 2011.

CFD LLC attorney Robert deNormandie and Longwell LLC attorney Rebecca Wiess drafted the operating agreement for Parkridge LLC. The agreement designates Longwell LLC as the managing member of Parkridge LLC and CFD LLC as a nonmanaging member.

The operating agreement requires Longwell LLC to "act in a fiduciary manner" on behalf of Parkridge LLC and CFD LLC. The agreement requires Longwell LLC to obtain the written consent of CFD LLC in order to borrow "any money" on behalf of Parkridge LLC. The agreement also requires Longwell LLC to obtain CFD LLC's written consent before granting "any lien, claim, encumbrance or security interest" against the property.

The agreement states, in pertinent part:

> (a) **Limitations on Authority.** The written approval of the Managing Member and the Non-Managing Member shall be required for each of the following actions:
>
> . . . .

> (iv) Any refinance or replacement of the Bank Loan or the borrowing of any money by the Company (other than trade payables incurred in the ordinary course of business) or the voluntary granting of any lien, claim, encumbrance or security interest by the Company with respect to any asset of the Company, as security for the debts and obligations of the Company or otherwise.

Sterling Savings Bank Loan

Without the knowledge or consent of CFD LLC or Diesing, Xu applied for an $18 million loan from Sterling Savings Bank (Sterling Bank) in January 2011. Xu represented that Longwell LLC had the authority to execute loan documents on behalf of Parkridge LLC in the loan application. Xu submitted a "forged fraudulent and false" operating agreement for Parkridge LLC that identified Xu and his spouse as the only members and the managing members.

Although it normally takes between 45 and 60 days to approve a commercial loan, Sterling Bank gave its attorney only 9 days to do so. Sterling Bank's attorney recommended the bank obtain a legal opinion from the attorney representing Parkridge LLC confirming the authority of Longwell LLC to execute loan documents on behalf of Parkridge LLC.

Attorney Rebecca Wiess drafted an opinion letter on behalf of Parkridge LLC. The letter states, in pertinent part, "The borrower has all requisite power and authority to carry on its business as now conducted, to own its property, and to execute and deliver and to perform all of its obligations under the loan documents." Neither Sterling Bank's attorney nor anyone at Sterling Bank read the opinion letter before closing the $18 million loan. The loan was secured by a deed of trust on the apartment building.

Sterling Bank paid off the GE Capital loan of approximately $15 million. Sterling Bank deposited the remaining $2.76 million directly into Xu's personal bank account.

CFD LLC Complaint against Xu, Longwell LLC, and Sterling Bank

After Diesing learned about the Sterling Bank loan, he filed a complaint on behalf of CFD LLC to quiet title and for damages against Xu, Longwell LLC, and Sterling Bank. The lawsuit alleged claims of breach of contract, breach of fiduciary duty, conversion, and unjust enrichment against Xu and Longwell LLC.[1] CFD LLC acknowledged Sterling Bank was entitled to reimbursement for the approximately $15 million paid to GE Capital. CFD LLC requested an award of damages "in an amount to be proven at trial, but not less than $3,000,000.00, plus penalties, interest, costs and attorneys' fees."

CFD LLC alleged the deed of trust that Longwell LLC executed to secure the loan from Sterling Bank was void. CFD LLC alleged the bank "knew or should have known" that Longwell LLC could not execute loan documents or grant a security interest against the apartment building on behalf of Parkridge LLC. The court granted CFD LLC's motion to appoint a receiver.

Summary Judgment against Xu and Longwell LLC

In December 2011, the court granted CFD LLC's motion for summary judgment against Xu and Longwell LLC. The court ruled as a matter of law that Xu and Longwell LLC were liable to CFD LLC for breach of contract and breach of fiduciary duty.

Sale of Property and CR 2A Agreement

In June 2012, the receiver negotiated the sale of the apartment building for $17.85 million. CFD LLC and Sterling Bank entered into a CR 2A settlement agreement. CFD LLC agreed Sterling Bank was entitled to approximately $15 million of the sale proceeds under the doctrine of equitable subrogation. The parties agreed that

[1] Upon learning that Sterling Bank deposited the loan proceeds directly into Xu's personal bank account rather than Parkridge LLC's corporate account, CFD LLC withdrew its claims for conversion and unjust enrichment.

distribution of the remaining net proceeds of approximately $2.7 million to Sterling Bank would be "without prejudice to either party to assert claims and defenses as to which party has priority to the proceeds in excess of the $14,950,000 amount claimed under the doctrine of equitable subrogation."

The court granted the receiver's motion to approve the sale. The order states, in pertinent part:

> [It is] FURTHER ORDERED that the sale of the Property shall be free and clear of any and all liens and of all rights of redemption and that any and all security interests and other liens encumbering the Property shall transfer and attach to the proceeds of the sale of the Property . . . in the same order, priority, and validity as such liens had with respect to the Property immediately before the sale.

Amended Complaint

In April 2013, the court granted CFD LLC's motion to amend the complaint to assert a legal malpractice and negligence claim against attorney Rebecca Wiess. The court also granted the motion to substitute Parkridge LLC as the real party in interest.

In answer to the second amended complaint, Sterling Bank asserted a counterclaim for breach of contract. Sterling Bank alleged Parkridge LLC defaulted on its repayment obligation under the loan agreement and requested judgment for the outstanding amount of the loan plus interest, costs, and attorney fees.

In February 2014, Sterling Bank filed a motion for summary judgment against Xu and his spouse for breach of the guaranty and fraud and requested an award of $676,217.42 in damages. The court granted the motion. The court entered judgment against Xu and his spouse in the amount of $676,217.42 plus attorney fees.

A month before the trial scheduled in April 2014, Parkridge LLC settled with Wiess for $1 million.

Trial

The only issue at trial was the dispute between Parkridge LLC and Sterling Bank over the approximately $2.7 million in sale proceeds. Sterling Bank claimed it had priority under the deed of trust that secured the loan to Parkridge LLC executed by Xu on behalf of Longwell LLC. Sterling Bank asserted the deed of trust was valid because Longwell LLC had actual and apparent authority to execute the loan documents. Sterling Bank argued it reasonably relied on the representations of Xu and Wiess in agreeing to make the $18 million loan. In the alternative, Sterling Bank argued it was entitled to enforce the deed of trust against Parkridge LLC as a bona fide encumbrancer. In addition to an award of the approximately $2.7 million in sale proceeds, Sterling Bank claimed it was entitled to a deficiency judgment against Parkridge LLC in the amount of $725,544.92.

A number of witnesses testified during the six-day bench trial including CFD LLC attorney Robert deNormandie, Sterling Bank attorney Ren Hayhurst, and Sterling Bank Executive Vice President Robert Williams.

When asked about the opinion letter written by Wiess, Hayhurst admitted he did not "actually read or review the opinion letter itself before the loan closed" and did not "even see the opinion letter until after this lawsuit started." Sterling Bank Executive Vice President Williams testified that neither he nor any employee of Sterling Bank read the opinion letter before the $18 million loan closed.

In closing, Sterling Bank argued it was not bound by the CR 2A agreement regarding the distribution of sale proceeds. The attorney asserted that "Parkridge, as far as I'm concerned, was not a party to that agreement" because "Parkridge was not

the plaintiff at the time." Sterling Bank also argued it would be inequitable to award Parkridge LLC the sale proceeds because of the settlements with Parkridge LLC, Sterling Bank, Xu, Longwell LLC, and Wiess.

The court ruled that because Longwell LLC did not have the authority to borrow money or grant a security interest without CFD LLC's consent, the deed of trust executed by Xu on behalf of Longwell LLC to secure the $18 million loan from Sterling Bank was void. The court found Sterling Bank should have conducted its own investigation to verify the authority of Xu on behalf of Longwell LLC to obtain the loan and execute the deed of trust. The court found the opinion letter written by Wiess "plays no role because it wasn't read, it wasn't reviewed, and it wasn't relied upon." The court awarded Parkridge LLC "$2.7 million roughly of proceeds over and above the $15 million necessary to pay off the loan."

At the conclusion of the oral ruling, the court asked, "Is there anything I failed to address?" Sterling Bank's attorney responded, "[W]hat has not been addressed is the $1 million payment that Rebecca Wiess' insurance carrier paid to the plaintiffs already and whether that's an offset to that." The court found there was no evidence "to support an offset to suggest that that is attributable to this dispute."

The court entered extensive written findings of fact and conclusions of law. The conclusions of law state the deed of trust was void "because it was granted without CFD's knowledge or consent in violation of the Parkridge Agreement."

The court found that Sterling Bank did not read or rely on the opinion letter drafted by Wiess and concluded the letter did not constitute a manifestation of apparent authority upon which Sterling Bank could reasonably rely. The court also found that

because "a reasonable further inquiry would have revealed that Xu was not authorized to enter into the loan on Parkridge's behalf," Sterling Bank was not a bona fide encumbrancer.

The court concluded that under the doctrine of equitable subrogation, "Sterling was entitled to an equitable lien on the Property" in the amount of $15,014,646.77 for paying the GE Capital loan.[2] The court concluded Sterling Bank was "bound by its [CR 2A] agreement" that the distribution of the sale proceeds to the bank "was without prejudice of either party to assert claims and defenses as to which party has priority to the proceeds in excess of the amount that Sterling Bank paid to GE Capital."

The court concluded Parkridge LLC was entitled to the sale proceeds that exceeded the equitable lien. The court entered judgment against Sterling Bank for $2,699,374.07. The court denied Sterling Bank's request for an offset, finding the bank "did not show what part, if any, of Parkridge LLC's settlement with Wiess was attributable to the claim it seeks to offset." The court concluded that in the absence of any evidence about the claims resolved in the settlement between Parkridge LLC and Wiess, Sterling Bank "did not meet its burden of proving" that it was entitled to the equitable remedy of an offset.

ANALYSIS

Sterling Bank appeals the denial of its request for an offset of the judgment. Sterling Bank does not challenge the determination that the deed of trust is void and that the bank is not a bona fide encumbrancer. Sterling Bank challenges only the

[2] See Columbia Cmty. Bank v. Newman Park, LLC, 166 Wn. App. 634, 644-45, 279 P.3d 869 (2012) (holding that under the doctrine of equitable subrogation, a lender who repaid the borrower's previous loan is entitled to assume the position of the first priority lienholder), aff'd, 177 Wn.2d 566, 570, 304 P.3d 472 (2013).

conclusion that the bank did not present any evidence to show what part of the Wiess settlement was attributable to the claim it seeks to offset and did not meet its burden of proving it was entitled to an offset.

We review a trial court's findings of fact entered after a bench trial to determine whether they are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Where a factual finding is denominated as a conclusion of law, we treat it as a finding of fact. State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 624 n.13, 829 P.2d 217 (1992). Where, as here, the findings of fact are not challenged, we treat the findings of fact as verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Because the unchallenged findings support the conclusion that the deed of trust is void and unenforceable, we conclude Sterling Bank had no right to the disputed sale proceeds. In any event, substantial evidence supports the conclusion that Sterling Bank did not meet its burden of showing it was entitled to an offset for the $1 million settlement with Wiess.

The party requesting an offset has the burden of proving the prevailing party recovered from two defendants for the same injury. Puget Sound Energy, Inc. v. Alba Gen. Ins. Co., 149 Wn.2d 135, 141, 68 P.3d 1061 (2003); Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 673-75, 15 P.3d 115 (2000). To meet this burden, the party seeking an offset must make an affirmative showing as to which

portion, if any, of the recovery "was attributable to the claim it seeks to offset." Puget Sound Energy, 149 Wn.2d at 141.

Settlements typically involve "far more than a simple release of liability" for a particular claim alleged in the complaint. Weyerhaeuser, 142 Wn.2d at 673. In many cases, the settling party "also purchase[s] certainty by avoiding the risks of an adverse trial outcome—not to mention forgoing the expenses associated with a lengthy trial and appeal." Weyerhaeuser, 142 Wn.2d at 673. As the trial court noted, the amount paid in a settlement often represents "a release from an unquantifiable basket of risks and considerations." Weyerhaeuser, 142 Wn.2d at 673.[3]

Sterling Bank relies on the complaint CFD LLC filed against Wiess, the testimony of CFD LLC attorney Robert deNormandie, and findings of fact 42 and 45 to argue it met its burden of proving it was entitled to an offset for the $1 million settlement between Parkridge LLC and Wiess.

Neither the allegations in the complaint against Wiess nor the testimony of deNormandie show what portion of the settlement is attributed to the asserted claims. DeNormandie testified that CFD LLC sued Wiess only "in connection with" the fraudulent loan transaction. The amended complaint alleges Wiess breached her duty of care by failing to confirm whether CFD LLC consented to refinancing the GE Capital loan, failing to "carefully review" the loan documents that Longwell LLC submitted, and

[3] Internal quotation marks omitted.

issuing the opinion letter to obtain the loan from Sterling Bank.[4]

Finding of fact 42 and 45 do not support the argument that the bank met its burden of proving it was entitled to an offset. Finding of fact 42 states:

> Rebecca Wiess drafted an opinion letter on Parkridge's behalf [Exhibit 52]. Xu e-mailed Wiess' opinion letter to Chicago Title on the evening of Sunday, January 30, 2011. The Loan closed on Monday, January 31, 2011.

Finding of fact 45 states:

> On the day the loan closed, a representative from Chicago Title informed [Sterling Bank's outside counsel] Hayhurst that Chicago Title had received the opinion letter, that it was on Wiess' letterhead and that Wiess had signed the letter.

Further, Sterling Bank ignores the unchallenged findings that establish neither Sterling Bank's attorney nor anyone at the bank read or relied on the opinion letter before closing the loan. Finding of fact 43 states:

> Sterling did not read Wiess' Opinion Letter before the Loan closed. Sterling did not rely upon Wiess' Opinion Letter in making the Loan.

Finding of fact 44 states:

> Neither Hayhurst nor any other attorney at [his law firm] read Wiess' opinion letter before the Loan closed. Hayhurst doesn't know when [his law firm] actually received a copy of the opinion letter. Hayhurst did not read the opinion letter until after the lawsuit was filed in July 2011.

Because substantial evidence supports the court's finding that Sterling Bank did not meet its burden of establishing "what part, if any, of Parkridge's settlement with

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[4] Paragraph 9.12 of the amended complaint alleges:

Wiess breached the duty of care she owed towards Parkridge by: (1) failing to verify that CFD approved the Sterling Loan, as required by the terms of the Parkridge Agreement; (2) failing to carefully review the Sterling loan documents and discover that Longwell was falsely representing itself to be Parkridge's sole member; and (3) issuing the [Opinion] Letter, in which she falsely represented that Parkridge's "execution, delivery and performance" of the loan documents "had been duly authorized by all necessary action" and did not "require any consent or approval of any members" of Parkridge or "violate any provision of the [Parkridge] articles of organization or operating agreement."

Wiess was attributable to the claim it seeks to offset," we conclude the court did not abuse its discretion in denying the request for an offset. See Scott's Excavating Vancouver, LLC v. Winlock Props., LLC, 176 Wn. App. 335, 348, 308 P.3d 791 (2013) ("We review a trial court's decision to grant an offset for abuse of discretion.").

We affirm entry of the judgment against Sterling Bank. Upon compliance with RAP 18.1, Parkridge LLC is entitled to attorney fees and costs on appeal as provided for in the deed of trust. See Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

WE CONCUR: