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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.

PARKRIDGE PROPERTY, LLC'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent Parkridge Property, LLC ("Parkridge") files this Answer to the Petitioner Sterling Savings Bank's ("Sterling") Petition for Review.

II. THE COURT OF APPEALS DECISION

Sterling seeks review of an unpublished decision filed on September 28, 2015 by Division I of the Court of Appeals ("Decision").

III. COUNTERSTATEMENT OF ISSUES RAISED BY THE PETITION AND SUMMARY OF REASONS FOR DENYING REVIEW

Sterling's Petition presents two issues: first, whether the Court of Appeals improperly concluded that Sterling had no right to the disputed sale proceeds because the decision arose out of an action to quiet title; and second, whether the Court of Appeals improperly required Sterling to prove that Parkridge's malpractice recovery was unrelated to claims other than the fraud at issue in the lawsuit.

Parkridge disagrees with Sterling's statement of issues. The Court of Appeals affirmed the trial court's judgment "[b]ecause 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[.]"[1] Consistent with the Court of Appeals' actual decision, Parkridge provides the following counterstatement of issues:

1. Parkridge did not obtain a double recovery "at Sterling's expense." The issue at trial was who had priority to the proceeds from the sale of *Parkridge's* property. The trial court determined that Sterling did not have a legal interest in the property and required it to return the money to Parkridge. Since Sterling did not suffer any damages, did the trial court and Court of Appeals properly determine that the doctrine of offset is inapplicable?

2. Sterling claims the Court of Appeals abused its discretion by not allowing Sterling's claim for an offset. However, Sterling does not challenge the Court of Appeals' determination that "substantial evidence supports the conclusion that Sterling Bank did not meet its burden of showing that it was entitled to an offset for the $1 million settlement with Wiess." Did the Court of Appeals properly determine that the trial court denied Sterling's request for an offset on tenable grounds and for tenable reasons?

As discussed below, Sterling's Petition does not meet any of the criteria in RAP 13.4(b) governing acceptance of review. The Petition does not challenge the Court of Appeal's conclusion that the doctrine of offset is inapplicable because Sterling did not have any damages to offset. Further, the Petition ignores the substantial evidence supporting the conclusion that Sterling did not meet its burden of showing entitlement to an

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[1] Decision, at 1.

offset. The Petition also fails to demonstrate that the Decision conflicts with any decision of this Court or the Court of Appeals. Finally, Sterling has not identified any issue of substantial public interest.

IV. COUNTERSTATEMENT OF FACTS

Stanley Xu and Nanling Chen (collectively "Xu") needed money for their real estate ventures. Without Parkridge's knowledge or permission, Xu applied for a loan with Sterling and submitted a "forged fraudulent and false" operating agreement that falsely identified him as Parkridge's only member and managing member. Xu represented to Sterling that he had the authority to enter into the loan on Parkridge's behalf.[2]

Sterling was so eager to make the loan that it ignored its standard procedures. In determining Xu's authority to bind Parkridge, Sterling relied entirely upon Xu's statements and the documents he provided. Sterling did not attempt to verify Xu's claims with any third party.

At Sterling's request, Xu had his attorney, Rebecca Wiess ("Wiess"), draft an opinion letter concerning his authority to act on Parkridge's behalf. Wiess' opinion letter stated that Parkridge had authorized Xu to execute Sterling's loan documents. However, none of Ster-

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[2] *Id.*, at 3.

ling's agents or employees actually read Wiess' letter before the loan closed. Sterling did not rely on Wiess' letter in deciding to make the loan.[3]

Ultimately, Sterling made an $18 million loan based entirely upon Xu's unconfirmed representations. After using $15 million to satisfy an existing deed of trust held by GE Capital, Sterling paid the remaining loan proceeds directly into Xu's personal bank account. As security for the loan, Xu signed an $18 million deed of trust ("Sterling DOT") that Sterling recorded against Parkridge's property ("Property").

Parkridge eventually discovered the fraud and filed a quiet title action to quash Sterling's DOT. Parkridge alleged that it did not authorize Xu to enter into the loan or to execute the Sterling DOT. Parkridge asserted that the Sterling DOT was *void ab initio* and did not convey to Sterling a security interest in the Property. Parkridge sought to have Sterling's DOT invalidated and title to the Property quieted against Sterling's claims for any amount above $15 million (the amount Sterling paid to GE Capital).[4]

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[3] *Id.*

[4] Petition, at 9. *See* Findings of Fact ("FOF") #'s 80, 84 and Conclusions of Law ("COL") #'s 12, 19. Parkridge agreed that, under the doctrine of equitable subrogation, Sterling was

Sterling denied Parkridge's allegations. Sterling claimed that Xu had the actual or apparent authority to sign the Sterling DOT. Alternatively, Sterling asserted that it was a bona fide encumbrancer and held a valid lien against the Property for $18 million.[5]

During the litigation, a third party offered to purchase the Property for $17.75 million. Sterling consented to the sale. The parties entered into CR 2A settlement agreement which provided that Sterling would receive $15 million from the sales proceeds as reimbursement for its payment to GE Capital. The parties further agreed that Sterling would hold the remaining proceeds (approximately $2.7 million) "without prejudice to either party's right to assert claims and defenses regarding priority to proceeds in excess of the approximately $15 million used to pay off the GE loan."[6]

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entitled to reimbursement for the $15 million it paid to satisfy GE Capital's deed of trust on the property. *See Columbia Cmtv. Bank v. Newman Park, LLC.*, 177 Wn.2d 566, 570, 304 P.3d 472 (2013) (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).

[5] CP 125-57, 234-35. *See* RP 378.

[6] *See* FOF #'s 80, 84 and COL #'s 12, 19.

In April 2013, the trial court granted Parkridge's motion to amend the complaint to add Wiess as an additional defendant. Parkridge alleged that Wiess breached her professional duty of care by: (1) failing to verify whether Parkridge had actually approved the Sterling loan; (2) failing to discover that Xu was falsely representing himself to be Parkridge's member and managing member; and (3) issuing an opinion letter incorrectly stating that Parkridge had authorized Xu to enter into the loan.[7]

Parkridge and Wiess settled their dispute in March 2014, with Wiess' insurer paying $1 million to Parkridge.[8] Sterling did not participate in Parkridge's litigation against Wiess, nor did it reimburse Parkridge for the costs, attorney fees, and expert expenses Parkridge incurred in litigating the claim against Wiess.[9]

Parkridge's action against Sterling proceeded to trial. The only issue at trial was the dispute concerning the remaining $2.7 million in sale proceeds. Sterling claimed that the Sterling DOT gave it priority to those funds. Sterling asserted the deed of trust was valid because Xu had the

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[7] Decision, at 8-9, n.4; CP 468-71.

[8] FOF # 85; RP 179-80.

[9] FOF # 86.

actual or apparent authority to execute the loan documents. Sterling further argued that it reasonably relied on the representations of Xu and Wiess in agreeing to make the $18 million loan. In the alternative, Sterling argued it was entitled to enforce the deed of trust against Parkridge as a bona fide encumbrancer.[10]

The trial court rejected Sterling's claims, finding that Sterling acted unreasonably in failing to investigate Xu's claim of authority. The trial court determined that Sterling would have discovered Xu's fraud had it conducted a reasonable inquiry. The trial court held that, but for "Sterling's unreasonable blind reliance" on Xu's representations, the fraudulent loan never would have occurred.[11]

The trial court declared the Sterling DOT invalid and unenforceable and held that Sterling was not a bona fide encumbrancer. The trial court ordered Sterling to return to Parkridge the $2.7 million of proceeds it was holding from the sale of the Property.[12]

Finally, the trial court denied Sterling's request to offset

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[10] Decision, at 6.

[11] *Id.*, at 7.

[12] *Id.*

Parkridge's settlement with Wiess against Sterling's "damages." The trial court concluded that in the absence of any evidence about the claims resolved in the settlement between Parkridge and Wiess, "Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset."[13] The trial court held that "Sterling did not meet its burden of proving a double recovery and a set off is inappropriate."[14]

Sterling appealed the trial court's decision to Division I of the Court of Appeals. Sterling did not challenge the trial court's determination that the Sterling DOT was void and that the bank was not a bona fide encumbrancer. Sterling only challenged the trial court's conclusion that the bank did not present any evidence to show what part of the Wiess settlement was attributable to the claim it sought to offset and did not meet its burden of proving it was entitled to an offset.[15]

The Court of Appeals denied Sterling's appeal, stating that "because the unchallenged findings support the conclusion that the deed of

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[13] *Id.*, at 8.

[14] *Id.*

[15] *Id.*, at 9-10. Sterling did not assign error to any of the trial court's 80 findings of fact and only assigned error to COL # 58, which dealt with Sterling's offset claim.

trust is void and unenforceable, we conclude Sterling Bank had no right to the disputed sale proceeds."[16] The Court of Appeals also rejected the appeal because "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."[17]

V. WHY THE COURT SHOULD DENY REVIEW

A. Parkridge did not obtain a double recovery "at Sterling's expense." Sterling did not have a legal interest in the Property and did not suffer "damages" when the trial court required it to return Parkridge's money.

Sterling claims that Parkridge obtained a double recovery "at the expense of Sterling."[18] In making this argument, Sterling represents that it suffered damages when the trial court ordered it to *return* the $2.7 million that *belongs to Parkridge*. However, Sterling concedes that it does not have a legal right to keep Parkridge's money. The doctrine of offset is inapplicable because Sterling does not have any damages to offset.

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[16] *Id.*, at 9.

[17] *Id.*

[18] *Id.*, at 20.

Offset is an equitable remedy that ensures a plaintiff does not recover from two defendants for the same damage.[19] While Washington has an interest in avoiding double damages, "the party claiming an offset has the burden of proving this claim."[20] Further, when a party seeks an offset against a judgment, he must show that he paid in the manner alleged, and that he "entitled to have the payment credited against the obligation embodied in the judgment."[21] Sterling cannot make this showing.

Parkridge brought this lawsuit to have the Sterling DOT declared invalid and title quieted in its property. An action to quiet title is an equitable proceeding "designed to resolve competing claims" regarding a property.[22] It allows a party in possession of real property to compel others who assert a hostile right—such as a deed of trust upon the proper-

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[19] *Scott's Excavating,* 176 Wn. App. 335, 348-349, 308 P.3d 791 (2013) (citing *Eagle Point Condo. Owners Ass'n v. Coy,* 102 Wn. App. 697, 702, 9 P.3d 898 (2002)).

[20] *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wash. App. 728, 735, 253 P.3d 101, 105 (2011) (citing *Maziarski v. Bair*, 83 Wash.App. 835, 841, 924 P.2d 409 (1996).

[21] *Maziarski,* 83 Wn. App. at 841.

[22] *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 502, 309 P.3d 636 (2013); *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 322, 308 P.3d 716 (2013).

ty—to submit that claim to judicial determination.[23] Without a quiet title action, Parkridge stood to lose $3 million in equity in the Property.[24]

Damages are not ordinarily allowed in a quiet title action, since it is a claim for equitable relief.[25] However, Parkridge sold the Property after it commenced this lawsuit but before trial. In that circumstance, RCW 7.28.190 provides that "the verdict shall be given according to the fact, and judgment shall be given only for the damages." The trial court interpreted this statute to mean that Parkridge was entitled to a determination regarding the validity and enforceability of the Sterling DOT.[26] The trial court's determination of that issue would decide which party had priority to the proceeds from the Property's sale.[27]

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[23] *Id. See Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001) ("An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination.").

[24] FOF # 71.

[25] *Kobza*, 105 Wn. App. at 95.

[26] COL # 6. *See Id.* ("Even if the claim asserted ... is absolutely invalid, the parties are still entitled to a decree saying so.").

[27] COL # 7.

During the litigation, the Property sold (with Sterling's consent) for $17.75 million. The parties agreed that Sterling would receive $15 million from the sales proceeds as reimbursement for its payment to GE Capital. The parties further agreed that Sterling would hold the remaining net proceeds (approximately $2.7 million) "without prejudice to either party's right to assert claims and defenses regarding priority to proceeds in excess of the approximately $15 million used to pay off the GE loan."[28] Thus, the lawsuit essentially became an action to quiet title to personal property; namely, the remaining proceeds from the Property's sale.[29]

Parkridge owned the Property, which means it had the unrestricted right to the Property's possession, use, and enjoyment.[30] Parkridge's right of ownership also included the right to sell the Property and receive

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[28] *See* FOF #'s 80, 84 and COL #'s 12, 19.

[29] *See* RCW 7.28.310 , which authorizes a quiet title action to determine rights to personal property; *e.g.,* the proceeds from the Property's sale.

[30] *Manufactured Housing Cmtys. v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000). *See Vaughn v. Montague*, 924 F. Supp. 2d 1256, 1265 (W.D. Wash. 2013) ("Absolute ownership" includes "the right to hold, possess, and enjoy to the exclusion of any other individual in the universe.") (quoting *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960)).

the proceeds of sale.[31] However, Sterling claimed priority to those funds under the Sterling DOT or as a bona fide encumbrancer. The trial court stated that the $2.7 million in remaining proceeds represented the "damages" at issue in the trial:

> 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.[32]

The trial court determined that Sterling's DOT was invalid and unenforceable and that Sterling was not a bona fide encumbrancer.[33] The trial court held that Sterling was entitled to an equitable lien on the Property for the $15,014,646.77 it paid to GE Capital, but that the remaining funds belonged to Parkridge:

> The bank here, Sterling—and this is not disputed—has a right to be made whole with respect to the underlying loan that it paid

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[31] *See Johnson v. Johnson*, 32 Wn. App. 147, 149, 646 P.2d 142 (1982) ("[I]t it is understood that implicit in ownership of an asset is the probability that it will eventually be sold; the right to sell an asset is incident to the right of ownership.[31] (citing *In re Seattle*, 81 Wn.2d 652, 656, 504 P.2d 292 (1972) and *Ackerman,* 55 Wn.2d at 409).

[32] COL # 52.

[33] COL #'s 20, 42, 47.

> off. But the proceeds, the excess amount that rightfully belongs to the owner of the apartment building, which is Parkridge, the L.L.C., is properly awarded to the plaintiff.[34]

The trial court concluded that Parkridge had priority to the $2.7 million remaining from the Property's sale and would receive those funds as "damages."[35]

Parkridge did not obtain a double recovery *at Sterling's expense*. Sterling did not pay *any* money to Parkridge when it originally made the loan: after satisfying the GE deed of trust, Sterling paid $2.75 million directly to Xu's personal bank account. Further, the trial court did not require Sterling to pay money to Parkridge from its own pocket; rather, it required Sterling to relinquish to Parkridge the proceeds remaining from the sale of *Parkridge's* property. Because Sterling doesn't have any right to keep Parkridge's money, it won't suffer any harm when it finally gives the money back. Simply put, the doctrine of offset is inapplicable because Sterling does not have any damages to offset.

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[34] RP 1122. *See* COL # 40.

[35] COL #'s 9, 48. The trial court also clarified that it was not using the term "damages" in the traditional sense of the word. RP 1118-19.

B. Sterling claims the trial court abused its discretion by not offsetting Sterling's "damage obligation." However, Sterling did not meet its burden of proving entitlement to an offset.

Sterling concedes that "the burden of proof is initially on the party who seeks an offset."[36] The Court of Appeals properly stated that to meet this burden, Sterling had to "make an affirmative showing as to which portion, if any, of the recovery 'was attributable to the claim it seeks to offset.'" The Court of Appeals held that "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."[37]

Sterling does not directly challenge this determination by the Court of Appeals. Sterling claims, however, that it "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."[38] Sterling asserts this should have been enough, but argues that the Court of Appeals improperly required it to "show that no part of

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[36] Petition, at 12.

[37] Decision, at 9.

[38] Petition, at 14-15.

that amount was attributable to some other unidentified claim."[39] Sterling contends that the Court of Appeals imposed an "impossible standard" by requiring Sterling to establish "that there were no other claims or risks subsumed by the $1 million payment" that Parkridge received in settlement of its claim with Wiess.[40]

Regardless of the standard applied, Sterling did not meet its burden of proving that Parkridge's settlement with Wiess was "directly connected with the Xus' fraud."[41] Parkridge alleged that Wiess breached her professional duty of care by: (1) failing to verify whether Parkridge had actually approved the Sterling loan, (2) failing to discover that Xu was falsely representing himself to be Parkridge's member and managing member; and (3) issuing an opinion letter incorrectly stating that Parkridge had authorized Xu to enter into the loan.[42]

Sterling focuses on the last claim, arguing that "[t]he only real risk facing Wiess was her exposure over the letter that facilitated the Xus'

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[39] *Id.*, at 16.

[40] *Id.*, 16-18.

[41] *Id.*, at 15.

[42] Decision, at 8-9, n.4; Petition, at 15.

fraud."[43] However, this argument "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."[44] The trial court found that "Wiess' letter did not constitute a manifestation of apparent authority upon which Sterling Bank could reasonably rely" and that the letter "plays no role because it wasn't read, it wasn't reviewed, and it wasn't relied upon."[45]

One of the required elements for a legal malpractice claim is that the attorney's negligence must damage the client.[46] The measure of damages in a legal malpractice claim is the "amount of loss actually sustained as a proximate result of the attorney's conduct."[47] Sterling made the loan without reading or relying upon Wiess' letter; thus, the letter could not have been the proximate cause of any loss to Parkridge.

Wiess' real risk of liability for professional malpractice was for her failure to verify whether Parkridge had actually approved the Sterling

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[43] Petition, at 17.

[44] Decision, at 11.

[45] *Id.*, at 7.

[46] *Schmidt v. Coogan*, 181 Wn.2d 661, 665, 335 P.3d 424 (2014).

[47] *Id.* (quoting *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000)).

loan and to discover that Xu was falsely representing himself to be Parkridge's member and managing member. These claims alleged that Wiess had breached the duty of professional care she owed to Parkridge, not that she assisted Xu in perpetrating his fraud against Sterling.

The appropriate amount of an offset, if any, is often difficult for a court to determine.[48] Acknowledging this difficulty, Sterling agrees that "[i]t makes sense to require a party seeking an offset to show how the settlement should be applied among the various resolved claims."[49] However, Sterling never made this showing to the trial court.

Sterling argues that "the record was devoid of any evidence that the malpractice payment had anything to do with disputes outside the fraud." However, the record lacks evidence because Sterling never examined Parkridge regarding the details of its settlement with Wiess; indeed, Sterling did not even introduce into evidence a copy of the release be-

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[48] *See Puget Sound Energy v. ALBA Gen. Ins. Co.*, 149 Wn.2d 135, 141, 68 P.3d 1061 (2003); *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 675, 15 P.3d 115 (2000).

[49] Petition, at 18.

tween Parkridge and Wiess.[50] Sterling made no attempt to quantify the "basket of risks and considerations" associated with the settlement.[51] Consequently, it is unsurprising that the trial court "did not find evidence to support an offset:"[52]

Sterling "failed to provide the trial court with an evidentiary basis to exercise its discretion to decide the appropriateness of the requested offset."[53] Because "substantial evidence supports the conclusion that Sterling Bank did not meet its burden of showing it was entitled to an offset," the Court of Appeals correctly denied Sterling's appeal. The Petition does not articulate a legitimate reason for this Court to accept review.

VI. PARKRIDGE REQUESTS ATTORNEY FEES AND COSTS

Pursuant to RAP 18.1, Parkridge requests an award of attorney

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[50] *See* RP 179-80, 711-14, and 717-18 for the evidence in the trial record concerning Parkridge's settlement with Wiess.

[51] *See Puget Sound Energy,* 149 Wn.2d at 141 ("[T]he settling insurers did more than just settle a claim with PSE. They obtained a release, a release from any number of risks and expenses associated with, among other things, the trial and appeal process.").

[52] RP 1125. *See* Decision, at 10.

[53] *Harmony at Madrona,* 160 Wn. App. at 737 (*citing Smith v. McLaren,* 58 Wn.2d 907, 910, 365 P.2d 331 (1961) *(*party claiming setoffs provided no competent evidence supporting claims)*; Alway v. Carson Lumber Co.*, 57 Wn.2d 900, 901-02, 355 P.2d 339 (1960) (record too vague to meet defendant's burden of proving setoff)).

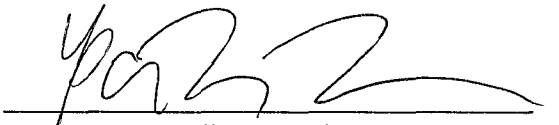
fees and costs incurred in responding to Sterling's Petition for Review. Sterling bases this request on RCW 4.84.330 and the Deed of Trust, both of which were the bases for the trial court's and Court of Appeals' awards of attorney fees and litigation expenses.

VII. CONCLUSION

For the reasons set forth above, Parkridge respectfully requests the Court deny Sterling's Petition for Review.

Dated this 25th day of November, 2015.

WILLIAMS KASTNER & GIBBS, PLLC



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 25, 2015, a true copy of the foregoing Parkridge Properties LLC's Answer to Petition for Review was served upon the counsel of record listed below by email and ABC Legal Messenger:

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DATED this 25th day of November, 2015 at Seattle, Washington.

Jan Helde