

COURT OF APPEALS
STATE OF WASHINGTON
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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 OPENING BRIEF

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I. INTRODUCTION

Stanley Xu and Nanling Chen defrauded Appellant Sterling Savings Bank and Respondent Parkridge Property, LLC (“Parkridge LLC”) by falsely representing that they had the authority to refinance and encumber an apartment complex owned by Parkridge LLC. Xu and Chen falsified documents, and made multiple misrepresentations, in order to induce Sterling to issue an \$18 million loan on the complex.

Of the \$18 million advanced by Sterling, approximately \$15 million was used to pay off a prior, legitimate loan. The remaining proceeds were pocketed by Xu and Chen.

Xu and Chen, however, had no authority to refinance or encumber the apartment complex. Under Parkridge LLC’s actual operating agreement - an agreement never provided to Sterling - that authority could only come from CFD Funding 1, LLC, the 75% owner of Parkridge LLC. Xu and Chen, in essence, cut out CFD Funding 1 and withdrew approximately \$3 million in equity for themselves.

The fraud was facilitated by the involvement of the attorney for Parkridge LLC, Rebecca Wiess. Ms. Wiess, who also served as the attorney for Xu and Chen, signed an opinion letter as part of the closing of the Sterling loan falsely representing that the loan was fully authorized under Parkridge LLC's articles of organization. Ms. Wiess, who had personally participated in the drafting of those governing documents, knew or should have known that CFD Funding 1's authorization was required to enter into a loan, and that Xu and Chen had no such independent authority.

Upon discovery of the fraud, Parkridge LLC sued Sterling and, upon discovery of her opinion letter, Ms. Wiess. The case against Sterling became a case for monetary damages when the underlying property was sold, with Parkridge LLC seeking \$2,699,374.07 in damages, computed as the difference between the sale price of the property (\$17,714,020.84) and the amount paid to retire the legitimate prior loan (\$15,014,646.77). Parkridge LLC sought a similar recovery from Ms. Wiess.

Prior to trial, Parkridge LLC settled with Ms. Wiess, obtaining a policy-limits settlement of \$1,000,000. Parkridge LLC proceeded to

trial against Sterling, seeking all of its alleged \$2.7 million in damages. The trial court awarded those damages to Parkridge LLC, but failed to offset those damages by the \$1,000,000 recovery that Parkridge LLC had already received from Wiess. As a result, Parkridge obtained a double recovery, at Sterling's expense, of nearly \$1 million. This appeal follows the rejection of Sterling's claim for an offset.

II. ASSIGNMENTS OF ERROR

Sterling assigns error to Conclusion of Law No. 58, which reads as follows:

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). *See also* RP 1126-27 (trial court orally rejecting Sterling's claim for offset).

III. ISSUE PRESENTED

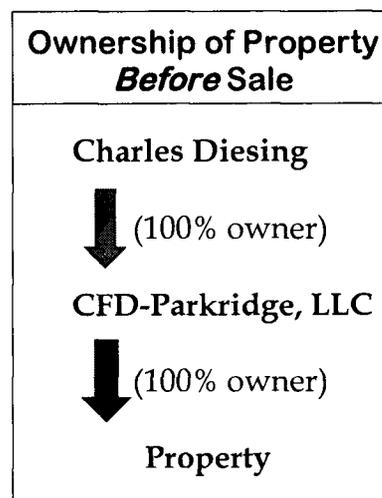
1. Did the trial court abuse its discretion in failing to offset a \$1 million legal malpractice recovery received by Parkridge LLC when it assessed damages against Sterling?

Answer: Yes. Sterling established that the \$1 million malpractice recovery obtained by Parkridge LLC was directly related to the fraud perpetrated by Xu and Chen against Parkridge LLC and Sterling. Parkridge LLC obtained a double recovery, receiving a windfall of \$964,777.09 at the expense of Sterling, the other party wronged by fraud.

IV. STATEMENT OF THE CASE

A. Xu's Purchase of the Parkridge Apartments

CFD-Parkridge, LLC was the owner of a 249-unit apartment complex located in Everett, Washington (the "Property"). CP 412 (Fact No. 1). Charles Diesing ("Diesing") was CFD-Parkridge's only owner. CP 412 (Fact No. 1). Graphically displayed, the ownership structure was as follows:

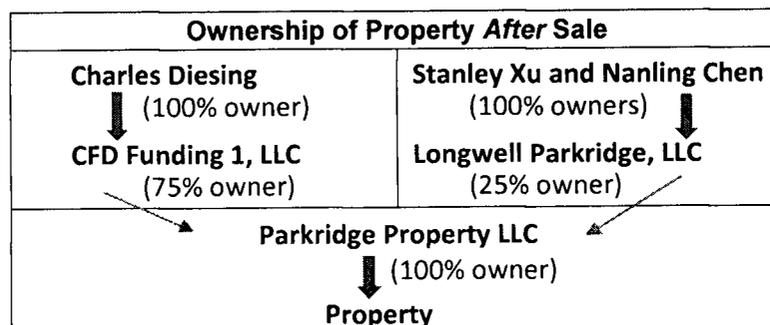


Diesing was approached by Stanley Xu and Nanling Chen (collectively, "the Xus") about purchasing the Property. The Xus and Diesing agreed upon a purchase price, and the Xus proceeded to arrange for financing. CP 412-413 (Fact Nos. 2, 3). General Electric Capital Corporation ("GE Capital") agreed to loan the Xus \$14.95 million. CP 413 (Fact No. 3). Because this sum was not enough for the Xus to both purchase the Property and perform certain planned renovations, the Xus approached Diesing about providing supplemental financing as part of the purchase. Diesing eventually agreed to provide \$6 million. CP 413 (Fact No. 3).

This additional financing, however, caused a problem because GE Capital would not approve a loan if anyone filed any security interests, even in second position, against the Property. CP 413 (Fact No. 4); RP 6, lns. 4-11; RP 85, lns. 17-25. In an effort to circumvent GE Capital's objection, the Xus and Diesing agreed to jointly form Parkridge LLC, a Washington limited liability corporation. CP 413 (Fact No. 4); RP 86-87. In exchange for \$6 million, Diesing would receive a 75% interest in Parkridge LLC. EX 62. He would also receive a 7.5% preferred return on his

\$6 million capital contribution, payable from available net cash flow. CP 413 (Fact No. 4), 415 (Fact No. 11); EX 62. At the end of three years, Parkridge LLC would redeem Diesing’s membership interest for \$6 million plus any accrued and unpaid preferred returns. CP 413 (Fact No. 4), 415 (Fact No. 11). The Xus personally guaranteed Parkridge LLC’s obligations. CP 415 (Fact No. 11). In essence, the deal was structured to give Diesing an interest in the Property in exchange for a “loan” of \$6 million, with interest, without the filed security interest objected to by GE Capital. RP 7, Ins. 14-17; RP 89-90, Ins. 23-11.

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



The sale was completed. GE Capital loaned Parkridge LLC \$14.95 million, and Parkridge LLC executed a deed of trust on the Property for the benefit of GE Capital. CP 414 (Fact No. 7).

B. Parkridge LLC's LLC Agreement

The Limited Liability Company Agreement governing Parkridge LLC was negotiated between attorneys Robert deNormandie on behalf of Diesing/CFD Funding 1 and Rebecca Wiess on behalf of Xu/Longwell. CP 414 (Fact No. 8). After multiple drafts, it was executed on August 27, 2008. CP 414 (Fact No. 8).

The LLC Agreement designated Longwell as Parkridge LLC'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 LLC'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 the GE Capital loan, or allowing a lien or other encumbrance to be filed against the Property. CP 414 (Fact No. 9).

C. The Xus Defraud Sterling Savings Bank.

The Xus faced extreme financial pressures in 2010, when another property they owned entered foreclosure. RP 10-11, lns. 18-3. The Xus came up with a scheme to pull equity out of the Property in order to meet their other obligations, and approached Sterling in January 2011 about obtaining an \$18 million loan for Parkridge LLC, secured by the Property. (416 (Fact No. 16). Of that sum, \$15 million would be used to refinance the GE Capital loan. CP 416 (Fact No. 16). The remaining \$3 million would be paid directly to the Xus. CP 416 (Fact No. 16)..

As part of Sterling's loan application process, Stanley Xu signed documents in which he falsely represented that he and Chen were Parkridge LLC's managing members and sole owners. 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."). As the trial court further 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 LLC. CP 417 (Fact No. 18).

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). The Xus never disclosed that they had no authority under Parkridge LLC’s actual operating agreement to refinance or encumber the property without CFD Funding 1’s consent. The Xus also failed to provide Sterling with complete tax returns for 2008 and 2009, omitting the true Schedule K-1 forms that would have identified Parkridge LLC’s other member. CP 419 (Fact Nos. 24, 25). Instead, the Xus provided false forms. CP 419 (Fact Nos. 25, 26). It was, as Parkridge LLC’s attorney admitted during opening, “a complete fraud upon Sterling.” RP 13, ln. 7.

D. Sterling Obtains an Opinion Letter from the Xus' Attorney, Ms. Wiess, Representing that the Xus Have the Authority to Enter into the Sterling Loan.

Sterling hired Ren Hayhurst, an attorney at the firm Bryan Cave, to confirm that the Xus had the authority to refinance the Property on behalf of Parkridge LLC. CP 419-20 (Fact No. 28). In part of his review, Hayhurst noticed that the loan application identified Longwell as Parkridge LLC's managing member, while the Operating Agreement indicated that the Xus and Chen were Parkridge LLC's managing members. CP 422 (Fact No. 37). Bryan Cave informed Sterling of the discrepancy, and requested that Sterling obtain copies of all documents concerning changes in Parkridge LLC's membership. CP 422 (Fact No. 30).

In response to Sterling's request, 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 document that the Xus had transferred to Longwell their phony 100% interest in Parkridge LLC, and stated that Longwell had taken over as Parkridge LLC's managing member. CP 422 (Fact No. 38).

Seeking confirmation of the Xus' authority, Hayhurst recommended that Sterling obtain an opinion letter from Parkridge LLC's counsel (and the Xus' counsel), Wiess. CP 423 (Fact No. 40). Wiess drafted an opinion letter on Parkridge LLC'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 LLC] of the Loan Documents have been duly authorized by all necessary action of [Parkridge LLC] 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 LLC, knew or should have known that the Xus had no ability to encumber the Property without CFD Funding 1's consent. CP 414 (Fact No. 9).

The Xus e-mailed Wiess's opinion letter to Chicago Title on the evening of Sunday, January 30, 2011. CP 423 (Fact No. 42). On Monday, January 31, a representative from Chicago Title informed Hayhurst that it had received the opinion letter, that it was on Wiess' letterhead, and that it was signed by Wiess. CP 424 (Fact No. 45). The loan proceeded to close later that day. CP 423 (Fact No. 45).

As the trial court found, "Sterling approved the Loan based upon the false information that Xu provided." CP 425 (Fact No. 50). *See also* 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."). The trial court also found that the Xus and Longwell entered into the loan without the legal authority to do so:

Xu and Longwell executed the Loan Documents and Deed of Trust. Xu and Longwell did not obtain CFD's consent before they executed the Loan Documents and Deed of Trust. Xu and Longwell concealed their actions from CFD and did not disclose the Loan or Deed of Trust. Xu and Longwell executed the Loan Documents and the Deed of Trust without Parkridge's knowledge or authority.

CP 425 (Fact No. 52).

E. The Xus Appropriate Parkridge LLC's Loan Proceeds and Encumber the Property.

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, Files Suit, and Obtains a Receiver.

In July 2011, CFD Funding 1, through Diesing, discovered the Xus' fraud. CP 430 (Fact No. 69). CFD Funding 1 sued the Xus, Chen and Longwell. CP 430 (Fact No. 69). In addition, CFD Funding 1, derivatively on behalf of Parkridge LLC, sued the Xus, Chen, Longwell and Sterling. CP 430-31 (Fact Nos. 70, 71). CFD Funding 1 quickly obtained an order appointing a receiver to liquidate Parkridge LLC's assets, including the Property. CP 431 (Fact No. 72).

G. The Xus Settle the Parkridge Dispute with CFD Funding 1 for \$6 Million plus Interest.

In December of 2011, CFD Funding 1 obtained summary judgment against the Xus and Longwell. CP 431 (Fact No. 74). After judgment had been entered, CFD Funding 1 entered into a settlement with the Xus and Longwell under which CFD Funding 1 was paid an amount equal to the forced redemption payments for Parkridge Property, plus interest and attorneys' fees. CP 432 (Fact No. 76); EX 68, p. 2, § 1; RP 3.

H. By Agreement of the Parties, the Property Is Sold by the Receiver for \$17.85 Million.

In June 2012, the court-appointed receiver obtained a buyer for the Property. CP 432 (Fact No. 78). The proposed sale price was \$17.85 million. CP 432. Sterling, CFD Funding 1, and Parkridge LLC all agreed that a sale at that price was in the best interests of all parties. CP 432 (Fact No. 78).

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 68.¹

With respect to the proceeds in excess of that amount, the attorneys for Sterling, CFD Funding 1 and Parkridge LLC agreed that the receiver would pay those sums to Sterling as well, 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. CP 432-33 (Fact No. 80). As the trial court found:

In June of 2012, the Court approved the Receiver's sale of the Property. Per the Agreement, the net proceeds from the sale of the Property, totaling \$17,714,020.84, were distributed to Sterling. The Agreement further provided that, under the doctrine of equitable subrogation, Sterling was entitled to reimbursement for the \$15,014,646.77 it paid to GE Capital. Finally, the Agreement provided that the parties can "assert claims and defenses as to which party has priority" to \$2,699,374.07, which are the "proceeds in excess" of the amount Sterling claimed under the doctrine of equitable subrogation.

CP 434 (Fact No. 84).

¹ Because Sterling had paid approximately \$15 million to GE Capital to refinance its interest in the Property, Sterling "stood in the shoes" of GE Capital and had priority over those funds. *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007).

I. Wiess Becomes a Defendant, and Settles for \$1,000,000.

In April of 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 LLC \$1,000,000 in March of 2014 to resolve the claims Parkridge LLC made against her. CP 434 (Fact No. 85).

J. CFD Funding 1 Is Dismissed, and the Case Proceeds with Parkridge LLC as the Sole Plaintiff.

Parkridge LLC filed a Second Amended Complaint for damages against Sterling in December of 2013. CP 435 (Fact No. 88). The Second Amended Complaint dropped CFD Funding 1's claims, and the only plaintiff from that point forward was Parkridge LLC. CP 435 (Fact No. 88) ("Since CFD had settled its claims with the Xus and Longwell, the Court dismissed CFD as a plaintiff. The Court also dismissed CFD's derivative action and allowed Parkridge to bring this action in its own name.").

Having settled with Wiess, Parkridge LLC'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 LLC had the ability to seek monetary damages under RCW 7.28.190 because the underlying property had 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). *See also* RP 995-996, lns. 25-6.

K. The Trial Court Awarded Damages, Plus Prejudgment Interest on Those Damages, to Parkridge Property.

At trial, Parkridge LLC 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,

Ins. 2-5 (“So look at these here is about \$2.7 million of call them excess proceeds, for lack of calling them something else, that we’re fighting over in this lawsuit.”); RP 996, Ins. 17-18 (“... Parkridge is entitled to an award of damages.”); RP 791, Ins. 2-3 (Parkridge LLC claim is for “[t]he difference between the amount of the Sterling loan and the amount of the GE Capital loan”). The trial court agreed. Because it was awarding damages, the trial court also awarded prejudgment interest on this sum:

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 Parkridges’s damages. This damage amount is liquidated, since it is determinable without reliance on 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).

L. The Trial Court Awarded Parkridge Property its Attorneys’ Fees and Costs.

In addition to awarding damages in the sum of \$2,699,374.07 and prejudgment interest on those damages in the sum of \$591,510.62, Parkridge LLC was also awarded its attorneys’ fees and costs against Sterling. CP 55 (Conclusion of Law 55); CP 392, ¶ 12.

In a post-trial motion, Parkridge LLC moved for, and received, an award of \$434,585.50 in fees and \$16,874.53 in costs. The trial court, in awarding those fees, concluded that they were “related to the quiet title action, or so intertwined with it that they are impossible to segregate.” CP 392, ¶ 12.

M. The Trial Court Refused to Offset Wiess’ \$1,000,000 Payment from the Damages Award.

Given that Parkridge LLC 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 \$1,000,000 payment made by Wiess to Parkridge LLC. RP 1124-25. In addition to raising the issue in testimony and briefing, Sterling’s counsel specifically raised the issue of an offset in a colloquy with the trial court:

We talked about the amount of money paid to the bank and the deed of trust, but what 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

* * *

You 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 discussion before the court?

RP 1124-25, lns. 25-4.

The trial court, in responding to this objection, explained that it believed that Parkridge LLC "had financing agreement that required monthly payments, required this seven and a half percent ... premium payments that weren't necessarily monthly, but as cash came in; the settlement of that issue was not in this court, that was a lawsuit portion of it that was outside this court's ambit." RP 1127, lns. 9-15. It therefore concluded that it had no basis upon which to find any offset:

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 those costs incurred by that \$1 million.

RP 1127, lns. 15-20.

In its written Findings and Conclusions, the trial court indicated that it was not awarding an offset because there was no evidence on the record that indicated how much Parkridge LLC had incurred in legal fees and costs in pursuing Wiess:

Sterling did not participate in the litigation against Wiess. Sterling not did it [sic] reimburse Parkridge for

the costs, attorneys' fees and expert expenses Parkridge incurred in litigating its claim against Wiess.

CP 434 (Fact No. 86). It therefore concluded that a failure to attribute the \$1,000,000 settlement to Parkridge LLC's damages resulting from the Xus' fraud, and the lack of proof related to Parkridge LLC's attorneys' fees and costs, rendered an offset inappropriate:

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).

V. ARGUMENT

A. The Trial Court Erred in Not Permitting a Full or Partial Offset of the Wiess Recovery.

1. A Court Should Apply an Offset to Prevent 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 (2000). This principle is inherently equitable, and is designed to prevent a plaintiff from obtaining a double recovery. *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.”).

Here, the trial court erred in not offsetting the damages award against Sterling by \$964,777.09 of the Wiess recovery. Specifically, Sterling shows below that:

- All of the Wiess recovery was “attributable to” the fraud perpetrated by the Xus;
- The evidence in the record permits a precise calculation of the amount necessary to make Parkridge LLC whole; and
- Parkridge LLC was overcompensated and obtained a double recovery, at Sterling’s expense, when the trial court refused to offset the damages awarded against Sterling with the Wiess recovery.

2. The *Entire* Wiess Settlement Was Related to the Fraud.

The trial court, in its oral colloquy with Sterling’s counsel, found that an offset was not appropriate because there was no “clarity as to what costs will be defrayed.” RP 1127, lns. 18-19. The trial court specifically referenced the “financing agreement that required monthly payments, required this seven and a half percent” and rejected Sterling’s request for an offset because “the settlement of that

issue was not in this court, that was a lawsuit portion of it that was outside this court's ambit." RP 1127, Ins. 13-15. The trial court, in essence, concluded that there was no evidence that CFD Funding 1 and/or Diesing had been made whole by the settlement with the Xus.

Of course, neither CFD Funding 1 nor Diesing was a plaintiff at trial. CP 435 (Fact No. 88). The relevant question is not whether non-parties such as CFD Funding 1 and Diesing had obtained a double recovery; rather, the relevant question is whether Parkridge LLC, the only remaining plaintiff, had obtained a double recovery. Sterling was under no obligation to prove that non-party entities had received a double recovery.² It only had to establish that Parkridge LLC did.

² Evidence was submitted which established that CFD Funding/Diesing had been compensated for the \$6 million in supplemental financing, plus interest and attorneys' fees and costs. Trial Exhibit 68, admitted into evidence at RP 3, was the Settlement Agreement between, among other parties, Xu/Longwell and CFD Funding 1 under which Xu/Longwell agreed to pay the \$6,000,000 redemption amount, plus interest at 7.5%, plus all the attorneys' fees and costs incurred by CFD Funding 1 in the underlying case. EX 68, § 1; RP 158, Ins. 5-11. Payment was fully collateralized. EX 68, § 4. *See also* RP 16, Ins. 4-11. Finding of Fact No. 76 concludes that CFD Funding 1 settled for its redemption payment, interest, fees and costs:

In the Settlement, Xu and the Longwell defendants agreed to pay CFD approximately \$11.1 million. *The settlement amount reflects the forced redemption payments due under the Parkridge and Brittany L.L.C. Agreements, plus interest and attorneys' fees.*

CP 432 (Fact No. 76) (emphasis added).

While the alleged lack of proof of full compensation for non-parties formed the basis of the trial court's oral reasoning, *see* RP 1127, it does not show up in its written Findings and Conclusions. In those Findings and Conclusions, the trial court rejected an offset because (1) "Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset"; and (2) "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." CP 451 (Conclusion No. 58). Both of these conclusions are in error.

a. Parkridge LLC's Settlement with Wiess Was Entirely Related to the Xus' Fraudulent Conduct in Obtaining the Loan from Sterling.

The trial court's rejection of an offset because "Sterling did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset" was in error. CP 451 (Conclusion No. 58). 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 LLC'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 LLC 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). All of the evidence established that the entire Wiess claim was directly related to her facilitation of the Xus' fraud by writing the opinion letter, and there was absolutely no evidence which suggested that the

settlement of the Wiess claims was anything but payment in exchange for a resolution of these claims against her. The trial court erred in concluding that Sterling had not shown “what part, if any, of Parkridge’s settlement with Wiess was attributable to the claim it seeks to offset.” CP 451 (Conclusion No. 58). The whole thing was.

b. The Evidence Established the Amount of Attorneys’ Fees and Costs Parkridge LLC Incurred in Obtaining the Wiess Recovery.

The trial court also erred in concluding 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.” CP 451 (Conclusion No. 58). Aside from the fact that it would be unreasonable to assume that Parkridge LLC could have possibly expended \$1,000,000 in a straightforward malpractice case which resolved quickly, the evidence on the record details exactly how much Parkridge LLC spent pursuing Wiess.

Sterling, of course, had no access to Parkridge LLC’s full attorneys’ fees and costs detail until after trial had concluded. At that point, Parkridge LLC moved for its fees and costs. When it did so, its attorneys segregated that time spent on the quiet title matter

against Sterling from the time spent litigating against the Xus and Wiess. As Parkridge LLC's attorneys explained:

This lawsuit involved three related claims: (1) CFD's claims against Stanley Xu, Nanling Chen and Longwell Parkridge, Inc.; (2) Parkridge's claim against Rebecca Wiess; and (3) Parkridge's claim against Sterling.

CP 271, ¶4.

The total amount of fees expended on all three matters was \$657,043.91. CP 275, ¶16. Of this sum, \$428,955.50 was spent on work the attorneys attributed to (3), "Parkridge's claim against Sterling." CP 275, ¶16.³ A total of \$228,088.41 in fees was spent on pursuing Xu/Chen/Longwell and Wiess. CP 275, ¶16. And, with respect to costs, a total of \$3,732.91 was spent on costs pursuing Xu/Chen/Longwell and Wiess. CP 276, ¶18.

As a result, we know that *less* than \$231,821.32 in fees and costs was spent pursuing Wiess. Without an offset, and even before segregating the time spent on the Wiess matter from the

³ Judgment against Sterling and in favor of Parkridge LLC included an award of all of these attorneys' fees. CP 392.

Xu/Chen/Longwell matter, it is apparent that Parkridge LLC obtained a double recovery of at least **\$768,178.68**.

An analysis of the timesheets in the record actually indicates that the double recovery was much higher. Of the \$231,821.32 in fees unrelated to the quiet title action, the vast majority was spent by CFD Funding 1's pursuit of Xu/Chen/Longwell. *Appendix A*, attached hereto, contains a summary of the time entries related to Parkridge LLC's pursuit of Wiess excerpted from CP 278-349. Those attorneys' fees total just \$31,490. *See Appendix A*. If all of the costs are included,⁴ then Parkridge LLC spent, at most, \$35,222.91 in fees and costs to obtain the Wiess recovery.

3. With No Offset, Parkridge LLC Obtained a Double Recovery of \$964,777.09 at Sterling's Expense.

The Xus' fraud caused Parkridge LLC to sustain the following losses:

- The difference between the net proceeds from the sale of the Property (\$17,714,020.84) and the payoff to GE Capital (\$15,014,646.77), totaling **\$2,699,374.07** (CP 449) (Conclusion of Law 49);

⁴ Parkridge LLC's attorneys spent \$3,732.91 in costs pursuing Xu/Chen/Longwell and Wiess. CP 276, ¶18. As these costs are difficult to segregate, Sterling will assume that all of those costs are related to Wiess.

- Attorneys' fees and costs associated with its claims against Wiess and Sterling, totaling **\$486,682.95** (\$451,460.03 incurred in the Sterling action, CP 392, and \$35,222.92 in the Wiess action, *App. A*).

Parkridge LLC's total loss, including fees and costs, therefore totals **\$3,186,057.02**, plus interest. However, under the trial court's approach, Parkridge LLC actually recovered **\$4,150,834.10**, plus interest, in this litigation:

- \$2,699,374.07, plus interest, against Sterling;
- All of its \$451,460.03 attorneys' fees and costs against Sterling (CP 392); and
- \$1,000,000 from Wiess.

In short, Parkridge LLC was grossly overcompensated to the tune of **\$964,777.09**. The trial court erred by not permitted the other victim of Xu's fraud, Sterling, to have its damage obligation offset by \$964,777.09 of the Wiess recovery in order to avoid a double recovery.

B. Sterling Is Entitled to Fees and Costs on Appeal.

Sterling is entitled to fees and costs on appeal for the same reasons that Parkridge LLC was awarded fees in the underlying action. CP 449-50 (Conclusion Nos. 53, 54, 55). The underlying contract provides for an award of fees, including fees on appeal.

CP 379, § 10.12. Although this contract was invalidated, “[a]ttorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated.” *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Pursuant to RAP 18.1, Sterling is entitled to its attorneys’ fees and costs if it prevails on appeal.

VI. CONCLUSION

The trial court’s denial of an offset for the Wiess payment should be reversed, and the judgment against Sterling reduced by the sum of \$964,777.09. In the alternative, Sterling seeks a remand of this matter back to the trial court with directions to compute the amount of offset due Sterling as a result of the Wiess payment.

DATED: January 30, 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 January 30, 2015, a true copy of the foregoing **APPELLANT'S OPENING BRIEF** was served upon counsel of record as indicated below:

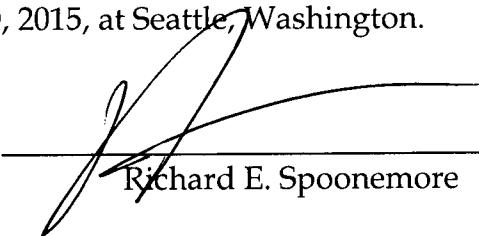
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DATED: January 30, 2015, at Seattle, Washington.


Richard E. Spoonemore

APPENDIX A
Attorneys' Fees Related to Wiess Litigation

Date	Task	Amount	CP Cite
03/20/2013	Draft motion to amend complaint to include Wiess, Declaration of Dean G. von Kallenbach and proposed order	140.00	298
03/20/2013	Conference with Dean G. von Kallenbach regarding legal malpractice claim; telecon with Dave Meissner	385.00	298
03/22/2013	Draft amended complaint to include Wiess	315.00	298
04/02/2013	Draft motion to amend complaint to add Rebecca Wiess	140.00	299
04/02/2013	Review transcripts of Rebecca Wiess Deposition; legal research regarding malpractice claim	1,012.50	299
04/03/2013	Draft motion for leave to file amended complaint	665.00	299
04/04/2013	Research requirements for professional negligence cause of action	367.50	299
04/04/2013	Legal research regarding legal malpractice claim against Rebecca Wiess; telecon with Bank's attorney; amend complaint	1,200.00	299

Date	Task	Amount	CP Cite
04/05/2013	Amend complaint to add malpractice claim against Rebecca Wiess	975.00	299
04/08/2013	Draft amended complaint; revise motion to amend; draft Dean G. von Kallenbach Declaration	825.00	299
04/09/2013	Draft declaration of mailing, file with court and to all counsel	70.00	299
04/09/2013	Finalize motion to amend; finalize amended complaint; draft Dean G. von Kallenbach Declaration	600.00	299
04/25/2013	Draft summons for Rebecca Wiess and submit for service	52.50	300
04/29/2013	Docket service of Wiess	35.00	300
05/08/2013	Review notice of appearance for Rebecca Wiess	112.50	300
05/15/2013	Review email from Wiess counsel	112.50	300
06/06/2013	Correspondence with Wiess' attorney regarding Wiess answer	112.50	300
06/10/2013	Correspondence with Rebecca Wiess counsel regarding answer to complaint; review defense's motion against Wiess	150.00	301
06/11/2013	Review Wiess answer to complaint; correspondence with Wiess counsel regarding continuance	225.00	301

Date	Task	Amount	CP Cite
06/12/2013	Correspondence with Wiess attorney regarding continuance; correspondence with Xu counsel	150.00	301
06/14/2013	Correspondence with Wiess counsel regarding insurance limits; conference with Pete deNormandie regarding strategy; review legal research regarding execution on interest in LLC	450.00	301
06/21/2013	Correspondence with Wiess attorney; review Wiess insurance policy	150.00	301
08/14/2013	Review deposition of Rebecca Wiess and pleadings on file; begin drafting motion for summary judgment	350.00	302
08/15/2013	Draft motion for summary judgment	612.50	302
08/19/2013	Legal research; review deposition transcript of Rebecca Wiess; draft motion for summary judgment	875.00	302
08/19/2013	Telecon Dave with Meissner and Bob Neugebauer regarding action against Rebecca Wiess; conference with Dean G. von Kallenbach regarding summary judgment motion and expert witness	330.00	302

Date	Task	Amount	CP Cite
08/23/2013	Draft motion for summary judgment against Rebecca Wiess	175.00	302
08/26/2013	Draft motion for summary judgment	1,050.00	302
08/27/2013	Draft motion for summary judgment; draft declaration of DGVK	437.50	302
09/17/2013	Conference with Patrick E. Byrnes regarding declaration of Scott Osborne	110.00	303
09/17/2013	Draft note for motion and proposed order for summary judgment against Wiess	87.50	303
09/17/2013	Draft motion for summary judgment against Rebecca Wiess; Draft declaration of Charles Diesing; conference with Pete deNormandie and Dean G. von Kallenbach	1,137.50	303
09/18/2013	Finish drafting motion for summary judgment	140.00	303
09/19/2013	Draft declaration of Scott Osborne	87.50	303
09/20/2013	Finish drafting Osborne declaration	87.50	303
10/01/2013	Correspondence with Keith Kemper; conference with Dean G. von Kallenbach regarding amended complaint against Sterling Savings and Rebecca Weiss; telecon with Dave Meissner	100.00	303

Date	Task	Amount	CP Cite
10/07/2013	Conference with Dean G. von Kallenbach regarding strategy	165.00	303
12/05/2013	Organize documents for Scott Osborne (expert) review; conference with Dean G. von Kallenbach	175.00	304
12/06/2013	Draft summary judgment motion against Wiess	1,575.00	304
12/10/2013	Review engagement letter	110.00	304
12/11/2013	Correspondence with Scott Osborne; finalize and deliver documents for his review	210.00	304
12/12/2013	Telecon Scott Osborne	122.50	304
12/16/2013	Conference with Jael Mejia regarding documents for Scott Osborne review; correspondence with Scott Osborne	105.00	305
12/16/2013	Review Osborne declaration; conference with Dean G. von Kallenbach; assemble additional loan documents	175.00	305
12/16/2013	Review Scott Osborne declaration; telecon with Osborne; correspondence to Osborne regarding changes to declaration; draft motion for summary judgment against Wiess	1,050.00	305
12/17/2013	Legal research; draft motion for summary judgment against Wiess	1,687.50	305

Date	Task	Amount	CP Cite
12/18/2013	Legal research; draft motion for summary judgment; telecon with Scott Osborne; review Osborne declaration	1,650.00	305
12/19/2013	Legal research; draft summary judgment motion against Wiess; correspondence with Scott Osborne	2,287.50	305
12/20/2013	Legal research; draft five summary judgment motions against Wiess	1,537.50	305
01/29/2014	Review policy limit demand for claim against Rebecca Wales; correspondence with Dave and Charlie	330.00	305
01/31/2014	Correspondence with Wiess Attorney	112.50	306
02/08/2014	Conference with Dean G. von Kallenbach; telecon with Dave Meissner regarding deposition schedule and policy limits demand against Rebecca Wales	330.00	306
02/12/2014	Telecon with Mark Rozenkrantz and Dave Meissner regarding Avante Apartments; conference with Dean G. von Kallenbach regarding policy limits demand and summary judgment against Sterling	550.00	306

Date	Task	Amount	CP Cite
02/13/2014	Meeting with Dave Meissner and Charlie Diesing; conference with Dean G. von Kallenbach regarding settlement agreement with Rebecca Wiess	1,650.00	306
02/13/2014	Correspondence with Sterling's attorney regarding discovery; correspondence with Wiess' attorney; review and revise release; review settlement agreement; meeting with Charles Diesing	1,162.50	306
02/18/2014	Conference with Dean G. von Kallenbach regarding Weiss Settlement; telecon with Mark Rozenkrantz regarding agreement between Stanley and Avante Mortgage Lender	605.00	307
02/20/2014	Telecon and correspondence with Pam DeVet regarding settlement with Rebecca Weiss; conference with Dean G. von Kallenbach regarding settlement and payment	495.00	307
02/20/2014	Correspondence with Wiess attorney regarding settlement	150.00	307

Date	Task	Amount	CP Cite
02/21/2014	Telecon and correspondence with Mark Rozenkrantz; conference with David Meissner regarding Avante Apartments and settlement with Rebecca Weiss; conference with Mark Rozenkrantz	495.00	307
02/25/2014	Conference with Dean G. von Kallenbach; telecon with Pam DeVet regarding final settlement with Rebecca Weiss	220.00	307
02/27/2014	Conference with Dean G. von Kallenbach regarding collection action against Sterling Bank and settlement with Rebecca	220.00	307
02/28/2014	Review lender term sheet; telecon with Dave Meissner regarding Avante Apartments; conference with Dean G. von Kallenbach regarding settlement with Rebecca and Avante	495.00	307
	TOTAL	\$31,490.00	