72149-6

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, 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)

APPELLEE'S OPENING BRIEF

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I. INTRODUCTION

Stanley Xu and Nanling Chen (collectively "Xus") needed money for their real estate ventures. The Xus applied for a loan with the Appellant Sterling Savings Bank ("Sterling") and falsely represented that they had the authority to enter into the loan on behalf of Appellee Parkridge Property, L.L.C. ("Parkridge").

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

Sterling made an $18 million loan based entirely upon the Xus' 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 the Xus' personal bank account. As security for the loan, the Xus signed an $18 million deed of trust that Sterling recorded against Parkridge's property.

Parkridge eventually discovered the fraud and filed a quiet title action to quash Sterling's deed of trust. Sterling denied Parkridge's allegations and claimed that the Xus acted with Parkridge's actual or ap-

parent authority. Alternatively, Sterling asserted that it was a bona fide encumbrancer.

During the litigation, a third party offered to purchase Parkridge's property for approximately $18 million. Sterling consented to the sale. Rather than leaving the proceeds from the sale in escrow or depositing them into the court registry, the parties agreed that Sterling would hold the money pending resolution of the lawsuit. The parties further agreed that Sterling's possession of the money would be "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."

The trial court granted Parkridge's motion to add the Xus' attorney, Rebecca Wiess ("Wiess"), as a defendant. Acting at the Xus' request, Wiess had represented Parkridge in the loan transaction. Parkridge alleged that Wiess committed legal malpractice and breached her professional duty of care. Wiess' insurer paid $1 million to settle the claim before trial. Sterling did not participate in Parkridge's litigation against Wiess, nor did it reimburse Parkridge for the costs, attorney fees, and expert expenses it incurred in litigating the claim against Wiess.

Parkridge's quiet title action against Sterling proceeded to trial. The trial court found that Sterling acted unreasonably in failing to investigate the Xus' claim of authority. The trial court determined that Sterling would have discovered the Xus' fraud had it conducted a reasonable inquiry. The trial court held that, but for "Sterling's unreasonable blind reliance" on the Xus' representations, the fraudulent loan never would have occurred.

The trial court ruled in favor of Parkridge's quiet title claim and declared Sterling's deed of trust invalid and unenforceable. The trial court further held that Sterling was not a bona fide encumbrancer. The trial court ordered Sterling to return to Parkridge approximately $2.7 million of the proceeds from the Property's sale. The trial court also ordered Sterling to pay prejudgment interest on this amount and to reimburse Parkridge for its costs and attorney fees. Sterling does not assign error to any of these determinations by the trial court.

II. RESTATEMENT OF THE ISSUES

Sterling contends that the only issue on appeal is whether the trial court abused its discretion by "failing to offset a $1 million legal malpractice recovery received by Parkridge L.L.C. when it assessed

damages against Sterling?"[1] Parkridge disagrees and contends that this appeal presents the following three 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, does the doctrine of offset apply?

2. Sterling claims the right to an offset as the "other victim of Xus' fraud." Yet, Sterling facilitated that fraud by ignoring glaring inconsistencies in the Xus' representations, failing to investigate the accuracy of the information they provided, and failing to verify their authority to act on Parkridge's behalf. Given its complicity in the fraud, is Sterling entitled to the equitable remedy of offset?

3. Sterling claims the trial court abused its discretion by not offsetting Sterling's "damage obligation." However, Sterling did not introduce any evidence at trial concerning the details of the Wiess settlement or the costs, attorney fees, and expert expenses that Parkridge incurred in litigating its claim against Wiess. Did the trial court deny

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[1] Sterling's Opening Brief ("Sterling's Brief"), at 3.

Sterling's request for an offset on tenable grounds and for tenable reasons?

III. RESTATEMENT OF THE RELEVANT FACTS

The Xus needed money for their real estate ventures.[2] In January 2011, the Xus applied for a loan with Sterling.[3] The Xus falsely represented that they were Parkridge's managing members and had the authority to enter into the loan on Parkridge's behalf.[4] Parkridge owned an apartment complex located in Everett, Washington ("Property") that the Xus offered as security for the loan.[5]

Sterling was "looking for ways to make this loan" because it was eager to increase its portfolio of commercial multi-family housing loans.[6] When the Xus submitted their loan application, Sterling was in the process of changing its commercial real estate portfolio from 75% non-multifamily to 75% multifamily.[7] Sterling considered multifamily

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[2] See Sterling's Brief, at 8: "The Xus faced extreme financial pressure in 2010, when another property they owned faced foreclosure."

[3] RP 959-61, 970.

[4] Sterling's Brief, at 1.

[5] FOF #16; Sterling's Brief, at 8.

[6] RP 235-36, 914, 949-50.

[7] RP 235-36.

housing loans to be "much more desirable" and a "much less risky investment."[8]

The Xus provided Sterling with an appraisal valuing the Property at $24 million. Based upon this appraisal, Sterling agreed to loan the Xus $18 million.[9] This amount was six times larger than Sterling's typical loan on a multi-family property.[10]

When a company applies for a commercial real estate loan, Sterling's practice is to conduct an independent investigation to verify the information the borrower provides. As part of its investigation, Sterling verifies the borrower's authority to enter into the loan. For a limited liability company, this investigation includes confirming that the company's members properly consented to the loan and duly authorized a member or manager to execute the loan documents on the company's behalf.[11]

To confirm a limited liability company's authority to enter into a loan, Sterling will obtain a copy of the borrower's organizational documents. At a minimum, these documents include the company's certificate of formation and the limited liability company operating agree-

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[8] *Id.*

[9] RP 275.

[10] Sterling's average loan on a multi-family property is $3 million. RP 401-02.

[11] FOF # 56; RP 361.

ment. Sterling reviews the operating agreement to confirm the authority of the person or entity acting on the borrower's behalf. Additionally, Sterling obtains and reviews appropriate written consents, authorizations, certificates, and resolutions signed by the members required to approve the borrower's actions.[12]

Rather than simply relying upon the information the borrower provides, Sterling verifies through third parties as much of the information as possible:

> Q Isn't this also a situation like Ronald Reagan described, "Trust but verify." You trust that the borrower is going to give you valid information, but the bank's also going to verify the information the borrower provides, right?
>
> A Yes.
>
> Q And because, otherwise, people can just walk in and ask for an 18 million dollar loan. And if the bank just says, fine, I'll trust you, the bank has got a problem, right?
>
> A Yes.[13]

For a Washington limited liability company, Sterling checks the Washington Secretary of State's business search website to confirm the company's name and filing date, the company's status (active, inactive, dissolved), the company's term (perpetual or for a set period of

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[12] FOF # 57.

[13] RP 402-03:

years), and the identity of the company's members. Accessing the Washington Secretary of State's website is free and takes less than a minute.[14]

Before making the loan, Sterling wanted to be certain of the Xus' authority to sign the loan documents. Authority was important to Sterling because it needed the loan documents to be valid, binding, and enforceable.[15] Sterling knew that the loan documents—including the deed of trust—would be invalid and unenforceable if Parkridge did not authorize the Xus to enter into the loan.[16] Sterling's expert Gary Ehrig ("Ehrig") testified that the risk inherent in an $18 million loan was "a pretty good reason to do a fairly thorough verification of the borrower's authority."[17]

It typically takes Sterling 45 to 50 days to close a multi-family loan.[18] However, the Xus falsely represented to Sterling that they needed to close the loan within ten days. Sterling agreed to meet that deadline, even though it considered closing a loan in ten days to be

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[14] FOF # 58.

[15] FOF # 18.

[16] *Id.*

[17] RP 945-46.

[18] RP 399-400. The industry standard for closing a multi-family loan is 45 to 60 days. RP 536.

"fast."[19] Parkridge's expert Laura Pattie ("Pattie") testified that in the banking industry, closing an $18 million multi-family loan in ten days would be "[a]lmost unheard of. It would be crazy. I mean, $18 million in ten days?"[20]

Sterling disregarded its standard procedures in its rush to close the loan. In approving the loan, Sterling relied entirely upon the Xus' statements and the documents they provided.[21] Sterling did not check with any third party to verify the accuracy of the Xus' representations.[22]

Sterling's expert Ehrig testified that Sterling should have conducted an independent investigation to verify the Xus' claims. As part of its investigation, Sterling should have confirmed the Xus' authority to enter into the loan.[23] Ehrig further testified that because the Xus were a new customer, Sterling should not have relied upon the information

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[19] RP 400.

[20] RP 548-49. The trial court found that "Laura Pattie was an outstanding witness. She was—she was simply an outstanding witness, someone who had come up through the ranks and had done the work, not overseeing scores of departments full of people that do the work and oversee it—and we heard a lot of that from Mr. Williams and Mr. Ehrig—but Ms. Pattie was really clear to the court that she did the work, she knew what was appropriate to do and what was not." RP 1121. See FOF # 58.

[21] FOF # 27.

[22] RP 394-95.

[23] FOF # 62.

they provided; rather, Sterling should have verified through third parties as much of their information as possible.[24]

Sterling claimed at trial that it delegated to its attorneys, the law firm of Bryan Cave, the responsibility for confirming the Xus' authority to execute the loan documents and deed of trust. Ren Hayhurst ("Hayhurst") is an attorney with Bryan Cave and was responsible for the Xus' loan. Hayhurst testified that this was the first major loan transaction Bryan Cave handled for Sterling.[25]

Bryan Cave normally takes between 45 to 60 days to close a loan. Having to close the loan in ten days was, as Hayhurst described it, an "incredible rush." The loan transaction was moving very fast and Hayhurst was concerned about something falling through the cracks.[26]

Hayhurst testified that "this was a large loan and that it was important that we make sure that the transaction was authorized[.]"[27] To verify the Xus' authority, Bryan Cave reviewed the documents the Xus provided to Sterling.[28] During its review, Bryan Cave noticed that the loan application identified Longwell Parkridge, L.L.C. ("Longwell")—and

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[24] FOF # 64.

[25] FOF # 28.

[26] FOF # 29.

[27] RP 827.

[28] FOF # 31.

not the Xus—as Parkridge's managing member.[29] Bryan Cave informed Sterling of this discrepancy and requested that Sterling obtain from the Xus copies of all documents concerning the changes in Parkridge's membership and management.[30]

In response to Bryan Cave and Sterling's request for additional documentation, the Xus provided a document titled "First Amendment to Limited Liability Company Agreement of Parkridge Property, L.L.C." ("First Amendment").[31] The First Amendment stated that the Xus had just transferred to Longwell their claimed 100% membership interest in Parkridge. The First Amendment also stated that Longwell had taken over from the Xus as Parkridge's managing member.[32]

Typically, Bryan Cave will not accept at face value a prospective borrower's representation that it has the authority to do something.[33] More importantly, Hayhurst knew the statements contained in the First

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[29] See Sterling's Brief, at 10: "Hayhurst noticed that the loan application identified Longwell as Parkridge L.L.C.'s managing member, while the Operating Agreement indicated that the Xus and Chen were Parkridge L.L.C.'s managing members."

[30] FOF # 37. Bryan Cave never had direct contact with the Xus. RP 826-27.

[31] FOF # 38.

[32] *Id.*

[33] FOF # 31.

Amendment were false.[34] Normally, Bryan Cave will not allow a loan to close if it has questions about the borrower's authority:

> Q. Okay. Now, with an organizational discrepancy like that, your firm is going to follow up yourself before you are going to give approval to close the loan; correct?
>
> A. Correct.
>
> Q. And your firm would not have given the okay to close the loan if there was any gap in ownership and Bryan Cave was unsure who was authorized to sign the loan documents.
>
> A. That's right.
>
> Q. And if the borrower can't—borrower can't give a satisfactory explanation for any discrepancy, you're not going to approve the loan.
>
> A. Yes.[35]

Yet, Hayhurst did not require the Xus to explain the discrepancies between the First Amendment and the other organizational documents they provided.[36] Instead, Hayhurst suggested to Sterling that it obtain a legal opinion from the Xus' counsel, Rebecca Wiess, regarding the Xus' authority.[37] Bryan Cave has a form legal opinion letter that it

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[34] RP 879-81.

[35] RP 881-82.

[36] FOF # 39.

[37] Hayhurst testified that Bryan Cave "will ask for an opinion letter to make sure that the transaction has complied with all of the corporate formalities, has been properly authorized by the entity, and that the borrower understands the terms of the documents and has been assured that the terms are enforceable." RP 815-16.

typically provides to borrower's counsel. Hayhurst sent its form to Sterling and requested Sterling to forward the form to the Xus.[38]

Attorneys for borrowers usually make changes to Bryan Cave's form legal opinion letter or use their own form. Hayhurst testified that attorneys typically include exceptions or qualifications in their opinion letters; indeed, Hayhurst has seen some attorney opinion letters so qualified that they essentially did not contain an opinion.[39] Hayhurst admitted that without reading an opinion letter, he could not know what opinions, representations, qualifications, and exceptions the opinion letter contained.[40]

Rebecca Wiess drafted an opinion letter using Bryan Cave's form. The Xus e-mailed Wiess' opinion letter to Chicago Title, who was handling the escrow, the evening before the loan closed.[41] The next day, a representative from Chicago Title informed Hayhurst that Chicago Title had received the opinion letter, that it was on Wiess' letterhead, and that Wiess had signed the letter.[42] Hayhurst understood this

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[38] FOF # 40.

[39] FOF # 47.

[40] FOF # 41.

[41] FOF # 42.

[42] FOF # 45.

to mean that the *format* of Wiess' opinion letter was similar to the form he had provided to Sterling:

> Q. Did somebody from the title company get on the phone with you and read through that letter for you line by line?
>
> A. No.
>
> Q. They just said, "Yeah, we got the letter, looks like your form."
>
> A. Yes.[43]

Sterling states in its brief that Wiess' opinion letter "falsely represent[ed] that the loan was fully authorized under Parkridge L.L.C.'s articles of organization."[44] However, neither Bryan Cave nor Sterling possessed that knowledge when the loan closed; indeed, no employee from either entity read the opinion letter until after Parkridge filed its lawsuit:

> Q. Okay. Now, I wanted to be really clear about this. You didn't review, actually read or review the opinion letter itself before the loan closed.
>
> A. That is correct.
>
> Q. In fact you didn't actually even see the opinion letter until after this lawsuit started.
>
> A. That's right.[45]

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[43] RP 866-67. See FOF # 46.

[44] Sterling's Brief, at 2.

[45] RP 862-64. See FOF #'s 44, 46.

Hayhurst admitted that without reading the opinion letter, neither he nor Sterling could actually know what it said.[46] Additionally, Sterling admitted that it did not rely upon the opinion letter in making the loan.[47] Sterling's expert Ehrig testified that Bryan Cave's failure to read Wiess' opinion letter before the loan closed was "irregular:"

> Q. Does that surprise you, that outside counsel for the bank didn't even read the lawyer's opinion letter before the loan closed? Wouldn't you expect them to?
>
> A. In terms of verification?
>
> Q. Well, if you're supposed to rely upon the letter, wouldn't you expect them to read it?
>
> A. I believe, yes. And/or there could have been some other form of communication. I mean, I don't know that.
>
> Q. I understand that. But I mean, you expect, at the very least, that your outside counsel, who's saying you should get an opinion letter, gets the opinion letter and then doesn't bother to read it before the loan closes. That surprises you, right?
>
> A. It would seem irregular.[48]

Sterling and Bryan Cave possessed substantial information inconsistent with the Xus' claim that Parkridge had authorized them to

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[46] FOF #'s 46, 48.

[47] FOF # 43.

[48] RP 597-98.

enter into the loan.[49] Hayhurst admitted that Bryan Cave should not have allowed the loan to close until the Xus provided satisfactory evidence of their authority.[50] Additionally, both Parkridge's expert (Laura Pattie) and Sterling's expert (Gary Ehrig) testified that Sterling should not have closed the loan before resolving the discrepancies in the Xus' representations.[51]

Nonetheless—and ignoring its doubts about the Xus' authority—Bryan Cave recommended that Sterling close the loan. Because it was "looking for ways to make this loan," Sterling followed Bryan Cave's recommendation.[52] Sterling used approximately $15 million of the loan's proceeds to pay off the existing GE Capital loan and obtain a release of GE Capital's security interest in the Property. After deducting various fees and closing costs, Sterling paid the remaining loan proceeds of $2,757,880.99 directly into the Xus' personal bank account.[53] Sterling did not pay *any* of the loan proceeds to Parkridge.[54]

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[49] FOF # 61.

[50] FOF # 35.

[51] FOF #'s 59, 61 and 65.

[52] RP 914, 949-50.

[53] FOF # 51. Sterling's expert Ehrig testified that he did not understand why Sterling paid those funds directly to the Xus, since Parkridge was the borrower on the loan. FOF # 68; RP 959-61.

[54] RP 152-53.

As security for the loan, the Xus executed—supposedly on Parkridge's behalf—an $18 million deed of trust in Sterling's favor. Sterling recorded this deed of trust ("Sterling DOT") against Parkridge's property. Several months later, Parkridge discovered Sterling's DOT and filed its original complaint.

Parkridge alleged that it did not authorize the Xus 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 deed of trust invalidated and title to the Property quieted against Sterling's claims for any amount above $15 million (the amount Sterling paid to GE Capital).[55]

Sterling denied Parkridge's allegations. Sterling claimed that Parkridge had given the Xus 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.[56]

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[55] FOF #'s 69, 71, 89. Parkridge agreed in its complaint that Sterling had an equitable lien against the Property for the $15,014,646.77 it paid to obtain the release of the GE Capital deed of trust. CP 10.

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

During the litigation, a third party offered to purchase the Property for $17.85 million.[57] At the time of the offer, the Property's cash flow was inadequate to fund its maintenance and operation. Parkridge and Sterling agreed to sell the Property before it deteriorated and the value diminished.[58]

An issue then arose regarding what to do with the proceeds from the Property's sale. The parties discussed putting the money into escrow or the court registry. For a variety of reasons, the parties agreed that the best option was for Sterling to hold the money pending resolution of the case.[59]

Parkridge was concerned that allowing Sterling to hold the money would prejudice its quiet title action. [60] After discussion, Parkridge and Sterling agreed that

> With respect to the proceeds in excess of that amount [Sterling's payment to GE], the attorneys for Sterling, CFD Funding 1 and Parkridge L.L.C. 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.*[61]

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[57] FOF #78.

[58] RP 170.

[59] FOF #'s 78-79 (emphasis added). *See* RP 171-72.

[60] RP 170-72.

[61] Sterling's Brief, at 15. *See* FOF #'s 80, 84 and COL #'s 12, 19.

In April 2013, the Court granted Parkridge's motion to amend the complaint to add Rebecca Wiess as an additional defendant. Parkridge alleged that Wiess breached her professional duty of care by: (1) failing to review carefully the Sterling loan documents; (2) not discovering that the Xus were falsely representing themselves to be Parkridge's members; and (3) issuing an opinion letter incorrectly stating that Parkridge had authorized the Xus to enter into the loan.[62]

Parkridge and Wiess settled their dispute in March 2014, with Wiess' insurer paying $1 million to Parkridge.[63] Sterling did not participate in Parkridge's litigation against Wiess. Sterling also did not reimburse Parkridge for the costs, attorney fees, and expert expenses it incurred in litigating the claim against Wiess.[64]

Before trial, Sterling filed a motion for summary judgment against the Xus "for breach of guaranty and fraud." Sterling alleged that the Xus: (1) made numerous false and material representations to Sterling to induce it to make the loan; (2) submitted a false operating agreement for Parkridge; (3) falsely represented that Parkridge had authorized them to enter into the loan; and (4) did not have the author-

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[62] CP 468-71.

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

[64] FOF # 86.

ity to enter into the loan.[65] All of these assertions were contrary to Sterling's allegation, in response to Parkridge's complaint, that the Xus had the actual or apparent authority to execute the Sterling DOT.

The trial court granted Sterling's motion and entered summary judgment against the Xus for $676,217.42.[66] This amount was significantly less than the $2.7 million Sterling paid to the Xus in January 2011.[67]

After a bench trial in late April 2014, the trial court ruled in Parkridge's favor. The trial court found that, while there was "no dispute that Xu fooled Sterling into thinking he had authority to enter into the loan," Sterling's belief regarding the Xus' authority "was not objectively reasonable."[68] The trial court held that

> Sterling's due diligence in investigating Xu's authority was unreasonable for a commercial lender in a loan transaction such as this. Had Sterling conducted a reasonable inquiry, it would have discovered that CFD was also a member of Parkridge. Sterling's unreasonable blind reliance on Xu's representations means that its belief was not objectively reasonable.[69]

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[65] FOF # 90.

[66] CP 165-67.

[67] RP 388-90.

[68] COL # 36.

[69] *Id.*

The trial court concluded that the Sterling DOT was invalid and unenforceable because the Xus signed it without Parkridge's knowledge or consent.[70] The trial court further held that "[b]ecause a reasonable further inquiry would have revealed that Xu was not authorized to enter into the loan on Parkridge's behalf, Sterling is not a bona fide encumbrancer."[71]

The trial court next held that Sterling was "bound by its agreement that the sale of the Property 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 paid to GE Capital."[72] Having rejected Sterling's claims against the Property, the trial court concluded that "Parkridge is entitled to priority to $2,699,374.07 of the proceeds from the sale of the Property."[73] Because Sterling had been holding those proceeds pending trial, the trial court directed Sterling to pay them to Parkridge.[74]

The trial court awarded Parkridge prejudgment interest from the date of the Property's sale, finding that Sterling had use of the funds

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[70] COL # 20.

[71] COL # 47.

[72] COL #'s 19, 29. Sterling argued at trial that it did not have to honor the agreement. COL # 16. *See* RP 1045-53.

[73] COL # 48.

[74] *Id.*

and that they were a specific amount.[75] The trial court also awarded Parkridge its costs and attorney fees as provided in the Sterling DOT.[76]

Finally, the trial court denied Sterling's request to offset Parkridge's settlement with Wiess against Sterling's "damages." The trial court found that "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." [77] The trial court held that "Sterling did not meet its burden of proving a double recovery and a set off is inappropriate."[78]

IV. STANDARD OF REVIEW

This Court reviews the trial court's decision not to grant an off-set for abuse of discretion.[79] A trial court abuses its discretion if it does not base its decision on tenable grounds or tenable reasons.[80]

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[75] COL #'s 49-52.

[76] COL #'s 53-55.

[77] COL # 58.

[78] *Id.*

[79] *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 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 (2000)).

[80] *Kelsey v. Kelsey*, 179 Wn. App. 360, 367, 317 P.3d 1096 (2014) (quoting *Eagle Point*, 102 Wn. App. at 701).

V. ARGUMENT

A. The trial court's findings of fact and conclusions of law are "verities on appeal."

Sterling did not assign error to *any* of the trial court's findings of fact. Appellate courts treat unchallenged findings of fact as "verities on appeal."[81]

Typically, where an appellant does not assign error to the findings of fact, the appellate court's review is limited to whether the findings support the conclusions.[82] However, except for Conclusion of Law No. 58, Sterling did not assign error to the trial court's conclusions of law. Nor did Sterling argue in its opening brief that any of the trial court's conclusions (other than COL # 58) were incorrect. Since appellate courts will not consider an argument raised for the first time in a reply brief, Sterling effectively waived any argument that the trial court's conclusions of law were incorrect.[83]

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[81] *In re Disciplinary Proceeding Against Hall*, 180 Wn.2d 821, 828, 329 P.3d 870 (2014); *Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 886, 335 P.3d 998 (2014).

[82] *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 110, 267 P.3d 435 (2011); *Standing Rock Homeowner Ass'n. v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).

[83] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Scott's Excavating*, 176 Wn. App. at 348-49. *See Gibson v. Emp't Sec. Dep't*, __ Wn.App. __, 340 P.3d 882, 890 (2014) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.") (quoting *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996)).

B. 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. Sterling did not have a legal interest in the property and did not suffer "damages" when the trial court required it to return the money to Parkridge.

Sterling's sole argument on appeal is that "Parkridge was overcompensated and obtained a double recovery, at Sterling's expense, when the trial court refused to offset damages awarded against Sterling with the Wiess recovery."[84] In making this argument, Sterling implies that it suffered damages when the trial court ordered it to *return* $2,699,374.07 that *belonged to Parkridge*. As the trial court found, Sterling never had a legal interest in or right to this money. The equitable remedy of offset does not apply because Sterling did not sustain any damages.

Offset is an equitable remedy that ensures a plaintiff does not recover from two defendants for the same damage.[85] While Washington has an interest in avoiding double damages, "the party claiming an offset has the burden of proving this claim."[86] Further, when a party

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[84] Sterling's Brief, at 22.

[85] *Scott's Excavating*, 176 Wn. App. at 348-349 (citing *Eagle Point*, 102 Wn. App. at 702).

[86] *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); *see also Smith v. McLaren*, 58 Wash.2d 907, 910, 365 P.2d 331 (1961) (party claiming setoffs provided no competent evidence supporting claims); *Alway v. Carson Lumber Co.*, 57 Wash.2d 900, 901-02,

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."[87]

Sterling cannot make this showing because it does not have any damages to offset. While Sterling claims the trial court erred by not permitting "its damage obligation [to be] offset by $964,777.09 of the Wiess recovery," the fact is that Sterling does not have a "damage obligation."[88] The trial court ordered Sterling to *return* the money it is holding from the sale of *Parkridge's* property. As the trial court determined—and Sterling now concedes—Sterling never had a legal interest in Parkridge's property or a right to the excess proceeds from the Property's sale.

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.[89] It allows a party in possession of real property to compel

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355 P.2d 339 (1960) (record too vague to meet defendant's burden of proving set-off)).

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

[88] Sterling's Brief, at 29.

[89] *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).

others who assert a hostile right—such as a deed of trust upon the property—to submit that claim to judicial determination.[90] Without a quiet title action, Parkridge stood to lose $3 million in equity in the Property.[91]

Damages are not ordinarily allowed in a quiet title action, since it is a claim for equitable relief.[92] 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.[93] The trial court's determination of that issue would decide whether Parkridge or Sterling had priority to the proceeds from the Property's sale.[94]

The Property sold for a net (after commissions and expenses) of

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[90] *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.").

[91] FOF # 71.

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

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

[94] COL # 7. Parkridge could maintain a quiet title action to determine it right to personal property; *i.e.*, the proceeds from the sale of the Property. *See* RCW 7.28.310.

$17,714,020.84. Applying the doctrine of equitable subrogation, the parties agreed to reimburse Sterling for the $15,014,646.77 it paid to GE Capital.[95] The money remaining after this reimbursement—totaling $2,699,374.07—is what Sterling refers to in its brief as the "monetary damages:"

> The case against Sterling became a case for monetary damages when the underlying property was sold, with Parkridge L.L.C. 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).[96]

Parkridge owned the Property, which means it had the unrestricted right to possess, use, and enjoy the Property.[97] Parkridge's right of ownership also included the right to sell the Property and re-

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[95] "Equitable subrogation allows a party who satisfies another's obligation to recover from the party primarily liable for the extinguished obligation." *Hartford Fire Ins. Co. v. Columbia State Bank*, 183 Wn. App. 599, 609, 334 P.3d 87 (2014). The doctrine's purpose is to avoid a person's receiving an unearned windfall at another's expense. *Worden v. Smith*, 178 Wn. App. 309, 330, 314 P.3d 1125 (2013). In the context of mortgage refinancing, a lender is subrogated to the position of a priority interest holder when it pays off that priority interest holder's loan. *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 577, 581, 304 P.3d 372 (2013).

[96] Sterling's Brief, at 2.

[97] *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)).

ceive the proceeds of sale.[98] However, Sterling claimed priority to those funds under its deed of trust or as a bona fide encumbrancer. Parkridge's counsel observed in his closing argument that Parkridge would suffer $2.7 million in "damages" if the trial court upheld Sterling's claims:

> The property sold for $17.7 million. Sterling gets an equitable lien for $15 million. That leaves $2.7 million. That money would clearly have gone to Parkridge as the property's owner but for Sterling's claim that it has priority. So Parkridge [is] going to be damaged in the amount of $2.7 million if it doesn't get that money. That's what we're fighting over here, who has priority to the excess proceeds.[99]

Parkridge's counsel argued that the "excess proceeds" of $2,699,374.07 belonged to Parkridge because:

> It was Parkridge's property that got sold. Parkridge has a right to the money from the sale of its own property. GE—Sterling has not established any legal basis or claim to that money. It's not their property. It's not their money.[100]

The trial court agreed that the $2.7 million in remaining proceeds represented the "damages" at issue in the trial:

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[98] 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.[98] (citing *In re Seattle*, 81 Wn.2d 652, 656, 504 P.2d 292 (1972) and *Ackerman*, 55 Wn.2d at 409).

[99] RP 986-87.

[100] RP 1024-25.

> 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.[101]

The trial court determined that Sterling's DOT was invalid and unenforceable.[102] The trial court further concluded that Sterling was not a bona fide encumbrancer.[103] Finally, the trial court held that Sterling was only entitled to an equitable lien on the Property for the $15,014,646.77 it paid to GE Capital:

> 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 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.[104]

Based upon these determinations, the trial court held that Sterling did not have a legal claim to the remaining proceeds from the Property's sale. The trial court concluded that Parkridge had priority to the money and would receive it as "damages:"

> Parkridge is entitled to recover its damages in this quiet title action. Those damages are the $2,699,374.07 of proceeds in ex-

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[101] COL # 52.

[102] COL # 20.

[103] COL #'s 42, 47.

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

cess of the $15,015,646.77 that Sterling is entitled to recover under the doctrine of equitable subrogation.[105]

However, the trial court clarified in its oral ruling that it was not using the term "damages" in the traditional sense of the word:

> The timing of the sale of the property does not invalidate Parkridge's claim for quiet title. *I do find that the, I'll call them the $2.7 million roughly of proceeds over and above the $15 million necessary to pay off the loan, while those can be characterized as damages they are not damages along the lines of the -- I forget the name of it -- Kobza*[106] *I think was the name case.*
>
> And that case basically said, well, ordinarily damages are not part of a quiet title action, and it wasn't in that case. It was because it was a lost opportunity, a lost sale. *They were classic loss of sale damages, not the actual property that was the dispute. The property, just like the apartment building, this is a piece of the apartment building reflected in the proceeds after the underlying loan was paid off*, and I find that a quiet title action is appropriate and that just because it's now money does not convert it into a case that is not appropriate for quiet title action.[107]

During closing argument, Sterling's counsel emphasized that Parkridge's claim was not for damages: "There is (sic) no damages allowed in this case. They tried to convert this to a damage case. But

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[105] COL # 9. *See* COL # 48, where the trial court held that "Parkridge is entitled to priority to $2,699,374.07 of the proceeds from the sale of the Property. Sterling is directed to pay $2,699,374.07 to Parkridge."

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

[107] RP 1118-19 (emphasis added).

there is (sic) no damages allowed."[108] Nonetheless, Sterling may still argue in its reply brief that it suffered "damages" because the trial court required it to pay prejudgment interest and attorney fees. However, Sterling has had the use of Parkridge's money since the Property sold in June 2012.[109] The trial court's award of prejudgment interest compensated Sterling for the "use value" of these funds.[110] Additionally, the Sterling DOT provided that the prevailing party in any litigation would recover its reasonable costs and attorney fees.[111] Sterling's refusal to remove that deed of trust forced Parkridge to incur attorney fees and costs in this quiet title action.

Parkridge did not "obtain a double recovery at Sterling's expense." Sterling never paid *any* money to Parkridge: after satisfying the GE deed of trust, Sterling paid $2.75 million directly to the Xus' personal bank account. Further, the funds at issue in the lawsuit were the proceeds remaining from the sale of *Parkridge's* property. As the trial court found—and Sterling now concedes—Sterling never had a legal right to those proceeds; rather, Sterling is simply holding (and using)

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[108] RP 1039.

[109] Presumably, Sterling earns a return on these funds by using them in its business. Sterling did not introduce any evidence at trial to the contrary.

[110] COL #'s 49-52.

[111] COL #'s 53-55.

the money until resolution of the litigation. Being required to return Parkridge's money did not damage Sterling and the doctrine of offset does not apply.

C. Sterling claims to be the "other victim of Xus' fraud." Yet, Sterling facilitated that fraud by ignoring glaring inconsistencies in the Xus' representations, failing to investigate the accuracy of the information they provided, and failing to verify their authority to act on Parkridge's behalf. Given its complicity in the fraud, Sterling is not entitled to the equitable remedy of offset.

Sterling claims that "[t]he court erred by not permitted (sic) the other victim of Xus' fraud, Sterling, to have its damage obligation offset by $964,777.09 of the Wiess recovery in order to avoid a double recovery."[112] However, the reality is that Sterling, in its eagerness to make the loan, facilitated the Xus' fraud. Sterling's complicity in the fraud should disqualify it from receiving the equitable remedy of offset.

Sterling was not an innocent victim. It enabled the Xus' fraud through the following actions:

- Sterling was "looking for ways to make this loan" because it was eager to increase its portfolio of commercial multi-family housing loans.[113]

- This $18 million loan was six times larger than Sterling's typical commercial multi-family housing loan.[114]

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[112] Sterling's Brief, at 29.

[113] RP 235-36, 914, 949-50.

[114] RP 401-02.

- Sterling typically needs between 45 to 50 days to close a multi-family housing loan, but agreed to the Xus' request that it close this loan in only ten days. Sterling's outside counsel characterized this abbreviated closing as an "incredible rush." Parkridge's expert testified that closing an $18 million multi-family housing loan in ten days was "unheard of" and "crazy."[115]

- Even though the Xus were new customers and had no history with the bank, Sterling ignored its standard loan procedures and relied entirely upon the Xus' statements and the documents they provided. Sterling did not check with any third party to verify the accuracy of the Xus' representations.[116]

- Bryan Cave noticed discrepancies in the organizational documents the Xus submitted. The Xus provided a newly drafted document that supposedly resolved these discrepancies. Bryan Cave knew that the statements in the new document were false, but still recommended that Sterling close the loan.[117]

- Bryan Cave recommended that the Xus provide an opinion letter from their attorney. Bryan Cave admitted that without reading the opinion letter, it could not know what opinions, representations, qualifications and exceptions it actually contained. Yet, Bryan Cave did not read Wiess' opinion letter before the loan closed. Additionally, Sterling did not read the opinion letter or rely upon it in making the loan.[118]

- Sterling's expert Ehrig testified that, in "hindsight," he was "critical" of Bryan Cave because it incorrectly determined that

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[115] FOF # 29; RP 399-400, 548-49.

[116] FOF #'s 27, 62, 64; RP 394-95

[117] FOF #'s 37-39.

[118] FOF #'s 41, 43, 44, 46-48.

Parkridge had authorized the Xus to sign the loan documents. Ehrig also believes it was "irregular" that Bryan Cave did not review the opinion letter before the loan closed.[119]

- Before the loan closed, Sterling and Bryan Cave possessed—and disregarded—substantial information inconsistent with the Xus' representation that Parkridge had authorized them to enter into the loan.[120]

- Even though Parkridge was the borrower, Sterling paid the remaining loan proceeds of $2,757,880.99 directly to the Xus' personal bank account.[121] Sterling did not pay any funds from the loan to Parkridge.[122]

Based upon these unchallenged facts, the trial court found that "Sterling's due diligence in investigating Xu's authority was unreasonable for a commercial lender in a loan transaction such as this." The trial court determined that "[h]ad Sterling conducted a reasonable inquiry, it would have discovered" the Xus' fraud. The trial court held that, but for "Sterling's unreasonable blind reliance on Xu's representations," this fraudulent loan never would have occurred.[123]

The trial court also rejected Sterling's argument that Parkridge had "unclean hands:"

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[119] FOF # 67.

[120] FOF # 61.

[121] FOF # 68; RP 959-61, 970.

[122] FOF # 51; RP 152-53.

[123] COL # 36.

> I do think there is an issue here you could—quite frankly, Sterling doing a nine-day loan for the business, to get this new line of business and this new client, and dropping the ball in the ways that the court finds that they dropped the ball, doesn't have them with the cleanest hands either. It's different, but I don't see Parkridge here with unclean hands, and so I noted your argument but did not make a formal finding on it, other than I don't find it persuasive.[124]

Finally, Sterling's offset argument ignores that it has a judgment against the Xus from which to recover its "damages." In April 2014, the trial court entered an order granting Sterling's motion for summary judgment against the Xus. [125] Even though Sterling paid $2,757,880.99 directly to the Xus' personal bank account, it did not seek judgment for that amount; rather, Sterling claimed it only "suffered a loss of $676,217.42 due to its reliance on Mr. Xu and Ms. Chen's false representations." [126] The trial court granted summary judgment for that amount, "plus attorneys' fees if supported by lodestar."[127] The summary judgment order also reserved Sterling's "right to seek additional recovery against Mr. Xu and Ms. Chen for any addition-

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[124] RP 1126

[125] CP 165-67.

[126] CP 166.

[127] CP 167.

al losses incurred by Sterling in connection with Parkridge Property, L.L.C.'s claims against the Bank."[128]

Inexplicably, Sterling did not seek judgment at trial for the full amount of its $2.75 million payment to the Xus. Sterling also never filed a motion for costs and attorney fees related to its litigation against the Xus. Regardless, Sterling testified that it would attempt to recover the entire $2.75 million from the Xus if, as happened, the trial court ruled in Parkridge's favor:

> Q. All right. Let me ask you a question, then. If this court rules in Parkridge's favor and says that Parkridge has priority to loan proceeds in excess of the GE loan, will the Xus then have stolen from Sterling?
>
> MR. TRAPANI: Your Honor, that misstates what this case is about. This case is about the deed of trust and a quiet title action. It's not about priority to proceeds.
>
> MR. VON KALLENBACH: This is absolutely about priority to proceeds, your Honor. That is exactly what this case is about.
>
> THE COURT: With respect to the question that was posed to the witness, I don't find it to be an objectionable question. I'll allow the witness to answer.
>
> Q. (BY MR. VON KALLENBACH): So if the court rules in our favor and says, Sterling, you've got to give the money

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[128] CP 166.

back to Parkridge, at that point will Mr. Xu and Ms. Chen have stolen, from Sterling, $3 million?

A. They would—they would have committed a loan fraud that cost us more than the 15 million—the 15 million, which was the amount of the Chicago Title. So we would—we would proceed against Parkridge. We would proceed against anybody that committed a loan fraud in connection with the—in connection with the settlement.

Q. So is that a "yes," that they would have stolen the 3 million and Sterling would go against them and try to get it back?

A. I believe they would have committed loan fraud, and we would proceed to try to recover the—the (inaudible), yes.[129]

The Xus—and not Parkridge—defrauded Sterling "by falsely representing that they had the authority to refinance and encumber an apartment complex owned by Parkridge L.L.C."[130] Sterling's "unreasonable blind reliance" on these representations led it to pay $2.75 million to the Xus.[131] Sterling obtained a judgment against the Xus for $676,217.42, but could have obtained a judgment for the entire $2.75 million. Rather than demanding money from Parkridge—an inno-

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[129] RP 504-05.

[130] Sterling's Brief, at 1.

[131] See *Id.*: "The remaining proceeds were pocketed by Xu and Chen."

cent party—Sterling should recover its damages from the Xus. The equitable remedy of offset is inappropriate under these circumstances.

D. Sterling claims the trial court abused its discretion by not offsetting Sterling's "damage obligation." However, Sterling did not introduce any evidence at trial concerning the details of the Wiess settlement or the costs, attorney fees, and expert expenses that Parkridge incurred in litigating its claim against Wiess. The trial court denied Sterling's request for an offset on tenable grounds and for tenable reasons.

Sterling claims that the trial court abused its discretion "by failing to offset a $1 million legal malpractice recovery received by Parkridge L.L.C. when it assessed damages against Sterling."[132] A trial court abuses its discretion if it does not base its decision on tenable grounds or reasons.[133]

The appropriate amount of reduction, if any, is often difficult for a trial court to determine.[134] This is because settlements typically secure a release for more than just the claims at issue in the lawsuit. For example, settling parties generally receive a release from all known

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[132] *Id.*, at 3.

[133] *Kelsey,* 179 Wn. App. at 367; *Scott's Excavating,* 176 Wn. App. at 348-349).

[134] *See, e.g., Puget Sound Energy v. ALBA Gen. Ins. Co.*, 149 Wn.2d 135, 141, 68 P.3d 1061 (2003) (non-settling defendants could not show that plaintiff had been made whole by settlement; thus, no offset was granted); *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 675, 15 P.3d 115 (2000) (non-settling party failed to prove double recovery where plaintiff introduced unrebutted evidence that its costs alone greatly exceeded settlement funds it had received); *Pederson's v. Transamerica Ins.*, 83 Wn. App. 432, 451, 922 P.2d 126 (1996) (non-settling party failed to prove double recovery).

and unknown claims arising out of the lawsuit. The settling defendant also pays a premium not to have to endure the risks and expenses associated with trial and appeal. Therefore, amounts paid in settlement represent "an unquantifiable basket of risks and consideration," not simply payment for the plaintiff's direct damages.[135]

Parkridge brought a legal malpractice claim against Wiess. One of the required elements for a legal malpractice claim is that the attorney's negligence must damage the client.[136] 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."[137]

Parkridge's claim against Wiess was contingent upon the outcome of its lawsuit against Sterling. If Parkridge lost its claim against Sterling, it would sustain more than $3 million in losses as the direct result of Wiess' negligence. Conversely, if Parkridge prevailed on its claim against Sterling (as actually happened), it would not suffer any damages due to Wiess' negligence and would not be able to prove one of the required elements of its legal malpractice claim.

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[135] *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."). *See* COL # 57.

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

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

Parkridge and Wiess settled their dispute before trial, with Wiess' insurance carrier paying $1 million.[138] This settlement represented a compromise for both sides: the insurance company paid to eliminate its possible exposure to greater damages at trial, and Parkridge gave up the possibility of a larger award in exchange for a guaranteed payment. Viewing with the benefit of hindsight, Sterling argues that Parkridge received a $1 million "windfall."[139] However, when Parkridge agreed to the settlement, it faced the significant risk of losing at trial and suffering more than $2 million in uncompensated damages.

Sterling claims that the trial court erred in concluding that Sterling "did not show what part, if any, of Parkridge's settlement with Wiess was attributable to the claim it seeks to offset."[140] However, even though Sterling had the burden of proving its claim for an offset, it never examined Parkridge regarding the details of the settlement with Wiess.[141] Sterling made no attempt at trial to quantify the "basket

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[138] RP 179-80; 711-12.

[139] Even if Parkridge received a windfall, "as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall." *Cox v. Spangler*, 141 Wn.2d 431, 439-440, 5 P.3d 1265 (2000) (quoting *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993)).

[140] *See* COL #58.

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

of risks and considerations" associated with the settlement. Consequently, it is unsurprising that the trial court "did not find evidence to support an offset[.]"[142]

Sterling assumes in its brief that the only deduction from the settlement should be for the costs and attorney fees related to Parkridge's claim against Wiess. Even if that were true, Sterling did not introduce any evidence at trial concerning those costs and fees. The trial court correctly denied Sterling's request for an offset because of this failure of proof:

> There have been lots of costs incurred in tracing down all of the ripple effect that this fraud which the Xus caused. The court does not find that there is any clarity as to what costs will be defrayed, all of the costs incurred by that $1 million. And because there are costs outside of this, I don't see a basis, and it hasn't been established that there is a basis for the offset. Simply mentioning it in testimony isn't sufficient.[143]

Sterling does not deny the dearth of evidence in the record supporting its claim for offset, but asserts that it did not have "access to Parkridge L.L.C.'s full attorneys' fees and costs until after the trial had concluded."[144] However, Parkridge filed its motion for costs and attorney fees—including all supporting documentation–on June 17,

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[142] RP 1125.

[143] RP 1127.

[144] Sterling's Brief, at 26.

2014.[145] The trial court did not grant Parkridge's motion and enter the judgment until July 31, 2014.[146] Despite being in possession of the evidence concerning Parkridge's cost and attorney fees during this six week period, Sterling never asked the trial court to reconsider its decision denying the offset.

Sterling had the burden of proving its claim for an offset. Sterling did not examine Parkridge regarding the details of the Wiess settlement, nor did it introduce any evidence to support its offset claim. Given Sterling's complete failure to meet its burden of proof, the trial court did not abuse its discretion by denying the unsupported request for offset.

VI. PARKRIDGE'S REQUEST FOR COSTS AND ATTORNEY FEES

Parkridge is entitled to its costs and attorney fees on appeal. The Sterling DOT provides for an award of costs and attorney fees, including those incurred on appeal.[147] Although the trial court invalidated the Sterling DOT, "[a]ttorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee

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[145] CP 262-69.

[146] CP 389-96.

[147] COL #'s 53-55.

provision is invalidated."[148] Pursuant to RAP 18.1, Parkridge is entitled to its costs and attorney fees if it prevails on appeal.

VII. CONCLUSION

Parkridge did not obtain a double recovery "at Sterling's expense." The funds at issue in the litigation were the proceeds from the sale of Parkridge's property. Sterling was simply holding the funds pending trial and, as the trial court determined, had no legal right to keep the money. Sterling was not damaged by the trial court's order requiring it to relinquish the money and the doctrine of offset does not apply.

Far from being an innocent victim, Sterling facilitated the Xus' fraud. Sterling was so eager to make the loan that it ignored its normal procedures and relied entirely upon the Xus' unconfirmed claims. But for Sterling's "unreasonable blind reliance" upon the Xus' misrepresentations, the fraudulent loan would never have occurred. Given its complicity in the fraud, Sterling is not entitled to the benefit of the equitable doctrine of offset.

Finally, Sterling had the burden of proving its offset claim to the trial court. However, Sterling did not introduce any evidence at trial concerning the details of the Wiess settlement or the costs, attorney

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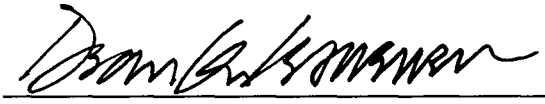
[148] *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

fees, and expert expenses that Parkridge incurred in litigating its claim against Wiess. Sterling also did not attempt to quantify the "basket of risks and considerations" associated with the settlement. Given this complete lack of evidence, Sterling cannot meet its burden of showing that the trial court rejected the offset claim on untenable grounds or for untenable reasons.

DATED: March 27, 2015.

YOUNG deNORMANDIE, P.C.



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Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington that on March 27, 2015, a true copy of the foregoing Appellee's Opening Brief was served upon counsel of records by email and legal messenger and the Court of Appeals by legal messenger only.

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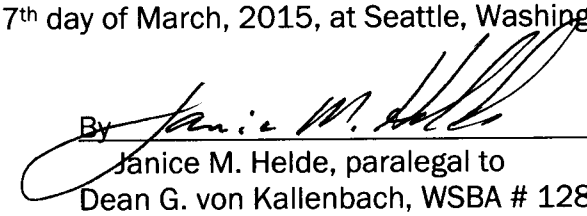
By 
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