

FILED
Court of Appeals
Division III
State of Washington
9/10/2018 2:47 PM

Court of Appeals No. 355314
Grant Co. Superior Court Cause No. 16-2-01074-8

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

MARY E. NIELSON,

Appellant,

vs.

HOUSEHOLD FINANCE CORPORATION III, CALIBER HOME
LOANS d/b/a CALIBER LOANS, INC., U.S. BANK TRUST
NATIONAL ASSOCIATION; AND LSF⁹ MASTER PARTICIPATION
TRUST,

Respondents.

APPELLANT'S REPLY BRIEF

George Ahrend, WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

REPLY STATEMENT OF THE CASE 1

 A. Contrary to HFC, its wrongful conduct is not limited to misrepresenting the extent of its security interest in 2006, but also includes assignment of its improper security interest in 2015. 1

 B. HFC misstates the record regarding Nielson’s bankruptcy filings and ignores the standard of review in claiming that knowledge of the extent of HFC’s claimed security interest is imputed from her bankruptcy lawyer..... 2

 C. HFC does not dispute the facts material to accrual of Nielson’s claims under the applicable statutes of limitations..... 5

REPLY ARGUMENT 7

 A. HFC does not address Nielson’s claim based on the 2015 assignment of its claimed security interest, which is well within the applicable limitations period. 7

 B. Regarding HFC’s misrepresentation regarding the extent of its claimed security interest in 2006, there appears to be no disagreement regarding the governing principles of accrual, only their application to this case; and the case law supports Nielson’s position. 11

 C. HFC’s reliance on the unpublished federal district court decision in *Pruss* is misplaced because it involves a different standard of review, a misinterpretation of Washington law, and distinguishable facts. 16

 D. Contrary to HFC, finding Nielson’s claims to be timely filed will not undermine the recording system. 19

CERTIFICATE OF SERVICE 21

APPENDIX

TABLE OF AUTHORITIES

Cases

<i>Aberdeen Fed. Sav. & Loan Ass'n v. Hanson</i> , 58 Wn. App. 773, 794 P.2d 1322 (1990)	13, 16, 19
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	16-17
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	17
<i>Buxton v. Perry</i> , 32 Wn. App. 211, 646 P.2d 779, <i>rev. denied</i> , 97 Wn. 2d 1040 (1982)	14
<i>Kendrick v. Davis</i> , 75 Wn. 2d 456, 452 P.2d 222 (1969)	12
<i>Manning v. Mortgage Elec. Registration Sys., Inc.</i> , <i>noted at</i> 196 Wn. App. 1043, 2016 WL 6534890 (Div. I, Oct. 31, 2016)	14-15
<i>McCurry v. Chevy Chase Bank, FSB</i> , 169 Wn. 2d 96, 233 P.3d 861 (2010)	17
<i>Pruss v. Bank of Am. NA</i> , 2013 WL 5913431 (W.D. Wash. Nov. 1, 2013).....	16-19
<i>Shepard v. Holmes</i> , 185 Wn. App. 730, 345 P.3d 786 (2014).....	11, 16
<i>State v. LA Investors, LLC</i> , 2 Wn. App. 2d 524, 410 P.3d 1183 (2018), <i>rev. denied</i> , 190 Wn. 2d 1023, 418 P.3d 796 (2018)	8
<i>State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.</i> , 87 Wn. 2d 298, 553 P.2d 423 (1976)	8-10
<i>Strong v. Clark</i> , 56 Wn. 2d 230, 352 P.2d 183 (1960)	15

<i>Tabingo v. Am. Triumph LLC</i> , 188 Wn. 2d 41, 391 P.3d 434 (2017), <i>cert. denied</i> , 138 S. Ct. 648 (2018)	5
---	---

Statutes and Rules

Ch. 19.86 RCW	1
Ch. 31.04 RCW	1
CR 12(b)(6)	5, 16
Fed. R. Civ. P. 12(b)(6).....	16
Laws of 2018, ch. 62, § 11.....	8
RCW 19.86.020	8-9
RCW 19.86.120.....	10
RCW 19.86.140.....	10
RCW 31.04.027(1)(b) & (c)	8

Other Authorities

Black's Law Dictionary (10th ed. 2014)	10
--	----

Plaintiff-Appellant Mary E. Nielson (“Nielson”) submits this reply to Respondent Household Finance Corporation III’s (“HFC”) Answering Brief:

I. REPLY STATEMENT OF THE CASE

A. **Contrary to HFC, its wrongful conduct is not limited to misrepresenting the extent of its security interest in 2006, but also includes assignment of its improper security interest in 2015.**

HFC attempts to confine its wrongful conduct to the misrepresentation by its representative of the extent its claimed security interest when Nielson refinanced her property in 2006.¹ However, HFC’s wrongful conduct also includes assignment of the improper security interest in 2015. Nielson alleged that HFC assigned the improper security interest to third parties on July 20, 2015, in her amended complaint. CP 405 (¶ 4.6). She alleged that the assignment of the security interest constituted a violation of the Consumer Loan Act (“CLA”), Ch. 31.04 RCW, which is a per se violation of the Consumer Protection Act (“CPA”), Ch. 19.86 RCW.

¹ See, e.g., HFC Br., at 1 (stating “Nielson’s fundamental claim is that **in 2006** she was promised that a loan from Household would be secured only by her mobile home and not the underlying land”; emphasis added); *id.* at 3 (stating “Household’s Allegedly Wrongful Acts Occurred **in 2006**”; emphasis added); *id.* at 7 (stating “it is clear that each of the claims is based on Nielson’s contention that Household improperly encumbered the trailer and the Property **at the time of Loan origination**”; emphasis added); *id.* at 8 (stating “[a]ll of Household’s alleged wrongful acts occurred **in January 2006, at the time of Loan origination**”; brackets & emphasis added).

CP 409 (¶ 5.5(d)). She also alleged a non-per se violation of the CPA based on the same conduct. CP 410. With respect to these claims, Nielson has emphasized that the assignment is a separate wrongful act, both in the superior court and on appeal. RP 23:1-25:12; Nielson Br., at 26-27.

Inexplicably, HFC never mentions the assignment in its brief. The Court should not permit HFC to artificially limit the scope of this appeal to wrongful conduct that occurred in 2006, but should also consider the significance of HFC's wrongful conduct in 2015.

B. HFC misstates the record regarding Nielson's bankruptcy filings and ignores the standard of review in claiming that knowledge of the extent of HFC's claimed security interest is imputed from her bankruptcy lawyer.

HFC states that Nielson listed her debt to HFC as a "secured claim," when she filed Chapter 13 bankruptcy proceedings with her ex-husband in April 2012, implying that she acknowledged the extent of its claimed security interest. HFC Br., at 4. However, HFC's statement and the implication from the statement convey an incomplete and misleading half-truth. As pointed out in the superior court and in Nielson's opening brief, Nielson has always acknowledged that her debt to HFC was secured in the sense that it was supposed to be secured by her mobile home, but she has

consistently maintained that it was not supposed to be secured by the separately acquired underlying property. Nielson Br., at 8-9. Nielson's position is clearly reflected in her bankruptcy schedules, which were available to, but never objected to by HFC.

Schedule A, regarding real property, lists the mobile home and underlying real property separately and shows that the mobile home is encumbered by HFC's security interest, while the underlying property is **not** encumbered:

Description and Location of Property	Nature of Debtor's Interest in Property	Husband, Wife, Joint, or Community	Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption	Amount of Secured Claim
Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848	legal title or fee simple	J	100,000.00	51,428.00
Other: Land that our home sits on. Location: 2572 Beverly Burke Road S. Quincy, WA 98848		W	10,000.00	0.00

CP 248 (reproduced in full in the Appendix).

Schedule C, regarding property claimed as exempt, also lists the mobile home and the underlying real property separately and shows that the mobile home is only partially exempt (after deducting the value of HFC's interest), while the underlying property is **completely** exempt:

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deducting Exemption
Real Property Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code §§ 6.13.010, 6.13.020, 6.13.030	54,072.00	100,000.00
Other: Land that our home sits on. Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code §§ 6.13.010, 6.13.020, 6.13.030	10,000.00	10,000.00

CP 249 (reproduced in full in the Appendix).

Schedule D, regarding secured creditors, lists HFC as having a secured interest **only** in the mobile home (note the value of the secured claim, which corresponds to the value of the mobile home listed in Schedules A and C):

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND ACCOUNT NUMBER (See instructions above.)	C O D E D E B I T O R H W J C	1 Husband, Wife, Joint, or Community		C O N T I N G E N T	D I S P U T E D	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
		DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN					
Account No. 9291000964090 HFC PO BOX 60101 City of Indus, CA 91716-0101			01/02/2006 Home Mortgage 1st Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848			45,928.00	0.00
			Value \$ 100,000.00				

CP 251 (reproduced in full in the Appendix). HFC received notice of Nielson’s bankruptcy filings, but did not object or seek to have them corrected. CP 169 & 253-55).

On the basis of its misstatement of the record, HFC presumes that Nielson’s bankruptcy lawyer must have known the extent of its claimed security interest and contends that his presumed knowledge should be imputed to Nielson.² HFC’s presumption is factually

² See, e.g., HFC Br., at 2 (stating “Nielson was represented by an attorney in bankruptcy proceedings in 2012, which also imputes constructive knowledge to her of the deed of trust”); *id.* at 15 (stating “[i]t is simply inconceivable that a practicing bankruptcy lawyer would not, in the course of his due diligence, determine the nature of the secured interests held by his client’s creditors”); *id.* at 15-16 (stating “[t]he fact that Nielson was represented by counsel in her

unwarranted and contrary to the standard of review of a motion to dismiss under CR 12(b)(6). The fact that the bankruptcy lawyer did **not** appreciate the extent of HFC's security interest is confirmed by the bankruptcy schedules excerpted above, which he submitted on behalf of Nielson.

Moreover, on review of a 12(b)(6) motion, Nielson is entitled to the benefit of all conceivable facts **consistent** with the complaint. *See Tabingo v. Am. Triumph LLC*, 188 Wn. 2d 41, 45, 391 P.3d 434, 437 (2017), *cert. denied*, 138 S. Ct. 648 (2018). HFC is not entitled to the benefit of conceivable facts **inconsistent** with the complaint. Accordingly, HFC cannot establish constructive knowledge of the extent of its claimed security interest based on Nielson's bankruptcy filings.

C. HFC does not dispute the facts material to accrual of Nielson's claims under the applicable statutes of limitations.

Specifically, HFC does not address, let alone dispute, the following dispositive facts:

- HFC originally made a loan to Nielson and her ex-husband that was secured only by their mobile home. Nielson Br., at 3 (citing CP 167 & 280-81).

bankruptcy and in that bankruptcy she acknowledged the existence of the debt to Household is an independent self-sufficient basis to affirm”).

- At the time of the original loan, Nielson did not own the underlying land. *See id.* (citing CP 167). Although she later acquired the underlying land by inheritance from her father, the mobile home was not attached to the land and title was not merged with the land. *See id.* at 4 (citing CP 167-68 & 281).
- When HFC refinanced the original loan, HFC’s representative assured Nielson that only the mobile home would be encumbered, stating that the refinance documents were the same as the original loan documents. Nielson had no reason to disbelieve or second-guess HFC’s representative. *See id.* (citing 168 & 281).
- Nielson did not have an opportunity to read the refinance documents. *See id.* at 5 (citing 168 & 281).
- Even if she had been given the opportunity to read the refinance documents, Nielson did not know how to read them to determine whether they encumbered the mobile home, the underlying land, or both. *See id.* at 8 (citing CP 168).
- According to real estate professionals—including a mortgage broker, a limited practice officer, and a lawyer and title officer—a reasonable consumer would not be expected to be able to read loan documents to determine the extent of the security interest conveyed. *See id.* at 13 (citing CP 1036-47).
- HFC’s “Loan Repayment and Security Agreement” purported to encumber only Nielson’s land, not her mobile home. *See id.* at 5 (citing CP 168, 174-85, 281 & 291-302).
- HFC’s “Deed of Trust” purported to encumber both Nielson’s land and mobile home, even though title to the mobile home had not been merged with the land. *See id.* at 6-7 (citing CP 294 & 302).
- HFC attempted to perfect a security interest in Nielson’s land by filing the Deed of Trust with the county auditor, but it did not attempt to perfect a security interest in the separately titled mobile home. *See id.* at 7 (citing CP 294-302).
- Nielson confirmed her understanding of the extent of HFC’s security interest in her 2012 bankruptcy filings. HFC received

notice of these filings, but did not object to Nielson's understanding of the extent of its security interest. *See id.* at 8-9 (citing CP 168-69, 248-49, 251 & 253-55).

- After HFC assigned its security interest to a third party on July 20, 2015, Nielson learned for the first time that the refinance documents purported to encumber her land. *See id.* at 9 (citing CP 169-70, 303-04 & 282).

- Nielson filed suit against HFC on September 12, 2016. *See id.* at 10 (citing CP 170 & 282-85).

These undisputed facts should serve as the basis for analyzing HFC's statute of limitations defense.

II. REPLY ARGUMENT

A. **HFC does not acknowledge Nielson's claim based on the 2015 assignment of its claimed security interest, which is well within the applicable limitations period.**

As noted above, HFC does not mention the 2015 assignment of its claimed security interest in its brief. By this omission, HFC appears to assume, although it does not explain why, Nielson's claims based on the assignment must have accrued when its representative misrepresented the extent of its security interest in 2006. HFC's assumption is unwarranted, at least with respect to Nielson's CLA and CPA claims, based on the nature of these claims and the applicable statute of limitations.

Nielson alleged a per se violation of the CPA based on provisions of the CLA that prohibit "[d]irectly or indirectly

engag[ing] in any unfair or deceptive practice toward any person,” and “[d]irectly or indirectly obtain[ing] property by fraud or misrepresentation.” RCW 31.04.027(1)(b) & (c) (brackets added).³ She also alleged a non-per se violation of the CPA based on the provision of the Act that prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. HFC’s assignment of its claimed security interest to a third party in 2015 violated these provisions because it purported to convey an interest in Nielson’s property that it was not entitled to convey, and thereby embroiled Nielson in litigation with the third party. *See* RP 22:21-25:12.⁴

Each unfair or deceptive act or practice is deemed to be a separate violation of the CPA. *See State v. LA Investors, LLC*, 2 Wn. App. 2d 524, 545-46, 410 P.3d 1183, 1196 (2018), *rev. denied*, 190 Wn. 2d 1023, 418 P.3d 796 (2018) (citing *State v. Ralph Williams’ Nw. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 317, 553 P.2d 423 (1976)). The number of violations is not based on the number of consumers, but rather on the number of “causes of action” requiring

³ The CLA was amended on March 15, 2018, the day after Nielson submitted her opening brief. *See* Laws of 2018, ch. 62, § 11. However, as it pertains to this case, the amendment merely renumbers the subsections of the relevant statute and does not change the substance.

⁴ HFC has not disputed the *merits* of Nielson’s CLA and CPA claims in the superior court or this Court, only the *timeliness* of those claims.

proof of “divergent facts.” See *Ralph Williams*, 87 Wn. 2d at 316-17.

For example, in *Ralph Williams* the Court explained how a single advertisement could give rise to multiple violations:

A single advertisement may include a number of misrepresentations. For example, some of appellants' advertisements included price misrepresentations and false statements concerning easy credit terms. Respondent established price misrepresentations by presenting evidence which proved that appellants' prices were higher than their advertised prices and higher than their competitors' prices. Respondent established the credit misrepresentations by presenting evidence that appellants required higher down payments and higher monthly payments than their advertised credit terms. Each of these acts is a separate violation of RCW 19.86.020.

Id. at 317 n.12.

In an analogous way, the misrepresentation by HFC's representative in 2006 is separate from the assignment in 2015. In 2006, HFC obtained something from Nielson that it was not entitled to obtain by misrepresenting the extent of its security interest in the loan refinance documents. In 2015, HFC purported to convey what belonged to Nielson to a third party and thereby embroiled her in litigation with that party. These facts are actually somewhat more “divergent” than the example provided in *Ralph Williams* because they involve separate transactions and separate parties over an extended period of time.

While *Ralph Williams* required the Court to determine the number of violations for purposes of imposing civil penalties under RCW 19.86.140, there is no reason to determine the number of violations differently for purposes of the statute of limitations, which is phrased in terms of a separate limitations period for each “cause of action.” Specifically, the CPA statute of limitations provides in pertinent part: “[a]ny action to enforce a claim for damages ... shall be forever barred unless commenced within four years after the cause of action accrues[.]” RCW 19.86.120 (ellipses & brackets added). The decision in *Ralph Williams* equated different “causes of action” with “divergent facts.” This is in accord with the ordinary meaning of the phrase “cause of action.” See Black's Law Dictionary, s.v. “cause of action” (10th ed. 2014) (“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”).

While Nielson conceivably could have brought suit against HFC for the misrepresentation regarding the extent of its security interest any time after it occurred in 2006—if she had discovered it—she could not have brought suit for the improper assignment until 2015 because that is when the operative facts occurred. In this way,

the misrepresentation in 2006 and the assignment in 2015 give rise to separate causes of action under the applicable statute of limitations, each subject to accrual at different times and each subject to its own limitations period. Since Nielson brought suit against HFC just over a year after the assignment in 2015, claims arising from the assignment are unquestionably timely.

B. Regarding HFC's misrepresentation regarding the extent of its claimed security interest in 2006, there appears to be no disagreement regarding the governing principles of accrual, only their application to this case; and the case law supports Nielson's position.

HFC does not dispute that Nielson's claims are subject to accrual based on discovery. *See* HFC Br., at 1, 8 & 11.⁵ HFC does not dispute that discovery is deemed to occur when the plaintiff has actual or constructive knowledge of the factual basis for the essential elements of a claim. *See* HFC Br., at 2, 8, 14 & 18-20. HFC also does not dispute that constructive knowledge is based on what a reasonable person should know. *See* HFC Br., at 12 (quoting *Shepard v. Holmes*, 185 Wn. App. 730, 739-40, 345 P.3d 786 (2014)).

However, the parties disagree whether a recorded document constitutes constructive notice of a legal description contained

⁵ As noted in Nielson's opening brief, the discovery rule is incorporated into statutory accrual language. *See* Nielson Br., at 17-19 & n.11.

therein under the circumstances present in this case. HFC contends that a recorded document ***always*** constitutes constructive notice of the information contained therein ***for all purposes***. Nielson contends that a recorded document only constitutes constructive notice of its contents if a reasonable person would have referred to it and would have been able to apprehend the information contained therein.

HFC's position is impossible to reconcile with the standard of reasonableness on which constructive knowledge is based. In her opening brief, Nielson cited *Kendrick v. Davis*, 75 Wn. 2d 456, 464, 452 P.2d 222 (1969), for the proposition that "[r]ecording generally constitutes constructive notice only as to subsequent purchasers, because only they have a reason to refer to the record." Nielson Br., at 23. Specifically, *Kendrick* stated that "[t]he recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument" and "[t]he recording of an instrument does not constitute notice to antecedents in the chain of title." 75 Wn. 2d at 464. In response, HFC attempts to distinguish *Kendrick* on grounds that "it dealt with whether the vendor on a real estate contract had constructive knowledge of a subsequently recorded mortgage and thus focused on

the effect of recording on an antecedent lien holder.” HFC Br., at 16-17. However, this attempted distinction concedes the very point that Nielson made: ***Recording does not constitute constructive notice unless the person charged with constructive notice has a reason to refer back to the recorded document.***

Nielson also quoted *Aberdeen Fed. Sav. & Loan Ass’n v. Hanson*, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990), for the proposition that “[o]ne is charged with constructive notice only if the fraud could have been discovered by examining the record” in question. Nielson Br., at 23. In response, HFC attempts to distinguish *Aberdeen* on grounds that it involved a miscellaneous recorded document that did not contain the legal description of the subject property. HFC Br., at 16. Again, this attempted distinction concedes the point that Nielson made: ***Recording does not establish constructive notice unless the person can reasonably discern the fraud from the recorded document.***

HFC distinguishes the remaining cases on which Nielson relies on grounds that the courts in those cases found constructive knowledge. *See* HFC Br., at 17. However, the fact that the result was different does not undermine the rule applied in those cases, which

Nielson asks the Court to apply in this case: Recording does **not** always establish constructive notice for all purposes, especially where there is no reason to refer to the recorded document or where the relevant information cannot be reasonably be discerned from the recorded document. *See* Nielson Br., at 22-23.

The cases on which HFC relies are do not support a different rule or result. HFC cites *Buxton v. Perry*, 32 Wn. App. 211, 646 P.2d 779, *rev. denied*, 97 Wn. 2d 1040 (1982), as an “instructive case.” HFC Br., at 13. However, *Buxton* does not indicate whether the document in question was recorded, and the plaintiff admittedly had **actual knowledge** of the factual basis for his claim within the applicable limitation period. The plaintiff “argue[d] that the statute runs from the time he discovers the witness to support or prove his case” rather than the time when he discovers the factual basis for his claims. 32 Wn. App. at 212. *Buxton* is therefore inapplicable to this case.

Next, HFC cites the unpublished decision in *Manning v. Mortgage Elec. Registration Sys., Inc.*, noted at 196 Wn. App. 1043, 2016 WL 6534890 (Div. I, Oct. 31, 2016), for the proposition that constructive notice arises from the filing of a deed: “[T]he defendants are correct that the Mannings had constructive notice of the allegedly

improper deed of trust when it was recorded.” *See* HFC Br., at 13 (brackets in original). However, HFC takes this statement out of context. The Court stated:

The test the defendants propose would start the statute of limitations for CPA claims alleging illegal loan documents whenever those documents are recorded. ***This rule is too broad.***

Manning, 2016 WL 6534890, at *6 (emphasis added). Thus, while the Court held that the defendants had constructive knowledge of an allegedly improper deed of trust when it was recorded, that did not mean that they had constructive knowledge of the factual basis for all of the essential elements of their claim, which accrued afterward.

Lastly, HFC cites *Strong v. Clark*, 56 Wn. 2d 230, 232, 352 P.2d 183 (1960), for the proposition that: “When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.” HFC Br., at 13. In *Strong* the court found that the bankruptcy trustee for sellers of property had constructive notice of the sale based on this general rule. In light of the facts, “*Strong* stands for the proposition that the recording of an instrument affecting real property is constructive notice to all those ***who subsequently acquire an interest in the property***

and have reason to refer to the record in which the document is recorded.” *Aberdeen*, 58 Wn. App. at 777 (emphasis in original). This is entirely consistent with Nielson’s position. “The cases holding that placing a document on record is constructive notice to all the world of that document generally are cases in which the party either had actual notice or was a subsequent party.” *Id.* Since Nielson was not a subsequent purchaser, she should not be deemed to have constructive notice.⁶

C. HFC’s reliance on the unpublished federal district court decision in *Pruss* is misplaced because it involves a different standard of review, a misinterpretation of Washington law, and distinguishable facts.

HFC principally relies on the unpublished federal district court decision in *Pruss v. Bank of Am. NA*, 2013 WL 5913431 (W.D. Wash. Nov. 1, 2013), to establish constructive notice as a matter of law. *See* HFC Br., at 8-10. Initially, *Pruss* is distinguishable because the federal court applied the standard for motions to dismiss under Fed. R. Civ. P. 12(b)(6), which has been specifically rejected under CR 12(b)(6). *Compare* 2013 WL 5913431, at *2 (applying “plausibility” standard adopted in *Ashcroft v. Iqbal*, 556 U.S. 662,

⁶ HFC also cites *Shepard v. Holmes*, 185 Wn. App. 730, 345 P.3d 786 (2014). *See* HFC Br., at 11-13. Because the superior court relied on *Shepard*, Nielson addressed the case at length in her opening brief. *See* Nielson Br., at 24-26. HFC does not engage with any of the points made in Nielson’s opening brief.

678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), with *McCurry v. Chevy Chase Bank, FSB*, 169 Wn. 2d 96, 101-03 & 117 n.5, 233 P.3d 861 (2010) (majority and dissenting opinions unanimously rejecting *Iqbal-Twombly* standard). HFC does not account for the different standard involved in *Pruss*.

Pruss misreads Washington law to the extent it characterizes the discovery rule as applying only to certain classes of cases rather than being incorporated into the statutory concept of accrual. See *Nielson Br.*, at 17-19 & n.11. The federal court seemed to believe that “[i]n Washington, the discovery rule applies where there are **truly latent facts**, such as a medical malpractice claim where a sponge was left in a body only to be discovered years later through a body scan.” 2013 WL 5913431, at *3 (brackets & emphasis added). This Court is not bound by *Pruss* and the Court should disapprove of the case because this limitation on the discovery rule is contrary to Washington law.

Applying *Pruss* is problematic because the court did not explain how to classify cases involving “truly latent facts” or to distinguish them from cases not involving such facts. For example, under the circumstances present in this case, the extent of HFC’s claimed security interest could be considered a latent fact because

HFC's representative misrepresented it, Nielson herself was incapable of reading and understanding the significance of a legal description in the refinance documents, and a reasonable consumer would not be expected to be able to read and understand the significance of such a legal description, according to real estate professionals who testified without contradiction. *See* CP 1036-47.

Lastly, *Pruss* is factually distinguishable because the plaintiff in that case "makes no statement about when he did become aware of the facts that give rise to his claims," and "provides the Court no information to help it determine when the facts were actually discovered." 2013 WL 5913431, at *3.⁷ In this case, by contrast, Nielson was not aware of HFC's incorrect security interest in the loan documents when they were signed because HFC's representative misrepresented it, Nielson was incapable of verifying when HFC's representative told her, and she had no reason to second-guess what HFC's representative told her. She did not learn that the misrepresentation by HFC's representative was false until HFC later

⁷This is where the standard of review may have made a difference in *Pruss*, because the federal standard required the plaintiff to come forward with evidence, whereas Nielson is entitled to rely on any conceivable facts consistent with the complaint, although she has also submitted evidence.

assigned the loan to a third party who attempted to foreclose. Given these distinctions, *Pruss* does not support HFC's motion to dismiss.

D. Contrary to HFC, finding Nielson's claims to be timely filed will not undermine the recording system.

HFC claims that, if Nielson's claims are deemed to be timely, it would "undermine Washington's legislatively enacted real property recording statutes, the essence of which is that recording of a document in the county records provides notice of its contents to the world." HFC Br., at 2. If HFC is correct, then the damage has already been done because the courts have recognized that recording of a document does not always establish constructive knowledge for all purposes. *See Aberdeen, supra* (rejecting rule identical to that proposed by HFC as being "too broad"). In actuality, there is no risk of harm because, as pointed out in Nielson's opening brief, the purpose of the recording system is to put parties who obtain an interest in property on notice of prior interests. *See Nielson Br.*, at 22-23. The recording system is not intended to govern accrual of claims between lenders and consumers, and the courts are fully capable of distinguishing these different circumstances.

Respectfully submitted this 10th day of September, 2018.

s/George M. Ahrend

George M. Ahrend, WSBA #25160

Ahrend Law Firm PLLC

100 E. Broadway Ave.

Moses Lake, WA 98837

(509) 764-9000 • (509) 464-6290 Fax

gahrend@ahrendlaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and U.S. Postal delivery, postage prepaid, as follows:

Abraham Lorber & Daniel Kittle
Lane Powell PC
1420 Fifth Ave., Ste. 4100
Seattle, WA 98101-2338
lorbera@lanepowell.com
kittled@lanepowell.com

Pilar C. French
Lane Powell PC
601 SW Second Ave., Ste. 2100
Portland, OR 97204
frenchp@lanepowell.com

Tina Thomas & Kristine Kruger
Perkins Coie LLP
1201 Third Ave., Ste. 4900
Seattle, WA 98101-3099
kkruger@perkinscoie.com
tthomas@perkinscoie.com

Signed at Moses Lake, Washington on September 10, 2018.



Shari M. Canet, Paralegal

APPENDIX

Bankruptcy Schedule A – Real Property (CP 248)	A-1
Bankruptcy Schedule C – Property claimed As Exempt (CP 249)	A-2
Bankruptcy Schedule D – Creditors Holding Secured Claims (CP 251)..	A-3

In re **Donald Oliver Nielson,
Mary Elizabeth Nielson**

Case No. _____

Debtors

SCHEDULE A - REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a cotenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim." If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C - Property Claimed as Exempt.

Description and Location of Property	Nature of Debtor's Interest in Property	Husband, Wife, Joint, or Community	Current Value of Debtor's Interest in Property, without Deducting any Secured Claim or Exemption	Amount of Secured Claim
Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848	legal title or fee simple	J	100,000.00	51,428.00
Other: Land that our home sits on. Location: 2572 Beverly Burke Road S. Quincy, WA 98848		W	10,000.00	0.00
Timeshare: Worldmark by Wyndym Location: Leavenworth, WA	Fee simple	J	4,000.00	12,000.00

Sub-Total > **114,000.00** (Total of this page)

Total > **114,000.00**

0 continuation sheets attached to the Schedule of Real Property

(Report also on Summary of Schedules)

In re **Donald Oliver Nielson,
Mary Elizabeth Nielson**

Case No. _____

Debtors

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor claims the exemptions to which debtor is entitled under:
(Check one box)

- 11 U.S.C. §522(b)(2)
 11 U.S.C. §522(b)(3)

Check if debtor claims a homestead exemption that exceeds \$146,450. (Amount subject to adjustment on 1/1/13, and every three years thereafter with respect to taxes commenced on or after the date of adjustment.)

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Value of Property Without Deducting Exemption
Real Property			
Residence: 1993 Mariette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code §§ 6.13.010, 6.13.020, 6.13.030	54,072.00	100,000.00
Other: Land that our home sits on. Location: 2572 Beverly Burke Road S, Quincy, WA 98848	Wash. Rev. Code §§ 6.13.010, 6.13.020, 6.13.030	10,000.00	10,000.00
Timeshare; Worldmark by Wyndym Location: Leavenworth, WA	Wash. Rev. Code § 6.15.010(1)(c)(ii)	100.00	4,000.00
Checking, Savings, or Other Financial Accounts, Certificates of Deposit			
Checking Account: only use debit card, not checks Location: Wheatland Bank	Wash. Rev. Code § 6.15.010(1)(c)(ii)	0.00	0.00
Checking Account: Location: Washington Trust Bank	Wash. Rev. Code § 6.15.010(1)(c)(ii)	0.00	0.00
Savings Account: Location: Washington Trust Bank	Wash. Rev. Code § 6.15.010(1)(c)(ii)	23.00	23.00
Household Goods and Furnishings			
Furniture: 3 bedroom sets Dining room Set 3 sofas 2 televisions 1 piano 3 bookshelves Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code § 6.15.010(1)(c)(i)	3,000.00	3,000.00
Appliances: Microwave refrigerator, stove, oven toaster, griddle, crock pot. Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code § 6.15.010(1)(c)(i)	1,000.00	1,000.00
Household: China, Kitchen ware. Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code § 6.15.010(1)(c)(i)	500.00	500.00
Audio-Video: Computer 2 stereo 3 game stations 1 dvd player 2 dvr Location: 2572 Beverly Burke Road S. Quincy, WA 98848	Wash. Rev. Code § 6.15.010(1)(c)(i)	1,000.00	1,000.00

1 continuation sheets attached to Schedule of Property Claimed as Exempt

In re **Donald Oliver Nielson,
Mary Elizabeth Nielson**

Case No. _____

Debtors

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests.

List creditors in alphabetical order to the extent practicable. If a minor child is a creditor, the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See: 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor". Include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community".

If the claim is contingent, place an "X" in the column labeled "Contingent". If the claim is unliquidated, place an "X" in the column labeled "Unliquidated". If the claim is disputed, place an "X" in the column labeled "Disputed". (You may need to place an "X" in more than one of these three columns.)

Total the columns labeled "Amount of Claim Without Deducting Value of Collateral" and "Unsecured Portion, if Any" in the boxes labeled "Total(s)" on the last sheet of the completed schedule. Report the total from the column labeled "Amount of Claim" also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report the total from the column labeled "Unsecured Portion" on the Statistical Summary of Certain Liabilities and Related Data.

Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	H W J C	Husband, Wife, Joint, or Community		C O N T I N G E N T	U N L I Q U I D A T E D	D I S P U T E D	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
		DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	Value \$					
Account No. _____ Grant County Treasurer 35 C Street NW Ephrata, WA 98923	C	property tax Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848					5,500.00	0.00
Account No. 92910000964090 HFC PO BOX 60101 City of Indus, CA 91716-0101	J	01/02/2006 Home Mortgage 1st Residence: 1993 Marlette Triple Wide Location: 2572 Beverly Burke Road S. Quincy, WA 98848					45,928.00	0.00
Account No. 026-033981 Reliant/ Gold Acceptence PO Box 3730 Fullerton, CA 92834	W	08/21/2010 Car Loan Auto: 2006 Toyota Camry, 209000, Fair Condition Location: 2572 Beverly Burke Road S. Quincy, WA 98848					9,500.00	3,500.00
Account No. 07004010 Worldmark 9805 Willows Road Redmond, WA 98052	J	09/06/2000 Other Timeshare; Worldmark by Wyndym Location: Leavenworth, WA					12,000.00	8,000.00
Subtotal (Total of this page)							72,928.00	11,500.00
Total (Report on Summary of Schedules)							72,928.00	11,500.00

0 continuation sheets attached

AHREND LAW FIRM PLLC

September 10, 2018 - 2:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35531-4
Appellate Court Case Title: Mary E. Nielson v. Household Finance Corporation III, et al
Superior Court Case Number: 16-2-01074-8

The following documents have been uploaded:

- 355314_Briefs_20180910144639D3347362_9533.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2018-09-10 Reply Brief.pdf

A copy of the uploaded files will be sent to:

- KKruger@perkinscoie.com
- frenchp@lanepowell.com
- kittled@lanepowell.com
- lorbera@lanepowell.com
- tthomas@perkinscoie.com

Comments:

Sender Name: George Ahrend - Email: gahrend@ahrendlaw.com
Address:
100 E BROADWAY AVE
MOSES LAKE, WA, 98837-1740
Phone: 509-764-9000

Note: The Filing Id is 20180910144639D3347362