74602-2

No. 74602-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOHN PHILLIP HALL,

Appellant,

v.

JPMORGAN CHASE BANK, et al.,

Respondents.

ANSWERING BRIEF OF RESPONDENTS JPMORGAN CHASE BANK, AND WELLS FARGO BANK, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST

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I. INTRODUCTION

Despite being a complete stranger to a loan belonging to his ex-wife, Appellant John Phillip Hall brought this lawsuit to avoid foreclosure. He alleges that his ex-wife's lenders refused to consider him for a loan modification or treat him as a "borrower" at the foreclosure mediation. But Appellant is not a borrower and has no loan to modify.

Respondents JPMorgan Chase Bank, N.A. ("Chase"), and Wells Fargo Bank, N.A. ("Wells Fargo"), as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005-PR4 Trust (the "Trust") (together, the "Respondents") moved for summary judgment on Appellant's claims (arising under the Foreclosure Fairness Act (FFA) and Consumer Protection Act (CPA) because Respondents had no duty (and were not permitted) to modify the loan without the express authorization of Appellant's ex-wife—the actual borrower on the loan.

The trial court granted summary judgment in favor of Respondents on Appellant's FFA claim because (i) Appellant is not a party to his ex-wife's loan; (ii) Appellant does not have a power of attorney from his ex-wife authorizing him to negotiate on her behalf; and (iii) Respondents have no duty (and are not permitted) to modify his ex-wife's loan without his ex-wife's permission. Moreover, the trial court disposed of Appellant's CPA claim because Appellant failed to provide any evidence showing any unfair or deceptive act, a public-interest impact, injury, or causation.

Appellant now asks this Court to reverse the trial court's order granting summary judgment and to command Respondents to participate in foreclosure mediation. Appellant's claims hinge on his unsupported theory that RCW 61.24.165(6) somehow requires Respondents to ignore the contractual obligations between Respondents and Appellant's ex-wife and to treat Appellant as the borrower at the foreclosure mediation. But nothing in the statute authorizes a lender to modify a borrower's loan or participate in mediation unless ***all*** borrowers identified in the subject loan attend the foreclosure mediation. As a result, this Court should affirm the trial court's decision granting summary judgment and denying leave to amend Appellant's complaint.

II. STATEMENT OF THE CASE

A. Factual Background.

Ms. Hough's Loan. On August 1, 2005, non-party Diane E. Hough n/k/a Diane Van Natter ("Ms. Hough") borrowed $272,000 from Washington Mutual Bank ("WaMu") secured by real property at 623 Main St. #3, Edmonds, Washington 98020 (the "Property"). Ms. Hough promised to repay the loan in a promissory note (the "Note"). Clerk's Papers ("CP") 198-203. Simultaneously, and to secure her obligations under the Note, Ms. Hough executed a deed of trust (the "Deed of Trust") encumbering the Property. CP 279-305. The Deed of Trust explains that WaMu was the "Lender." CP 280 ¶ (C). The Deed of Trust further explains that any subsequent holder of the Note could sell Ms. Hough's Note without notice to them: "The Note or a partial interest in the Note

(together with this Security Instrument) can be sold one or more times without prior notice to Borrower." CP 292-93 ¶ 20.

Appellant is not a party to the Note or Deed of Trust. He did not sign either agreement. He incurred no obligations in connection with those agreements. Appellant has no right to enforce Ms. Hough's rights under the agreements.

On or about December 20, 2005, WaMu transferred the Note to Wells Fargo, as trustee for the Trust, but WaMu remained the servicer, responsible for sending statements to Ms. Hough and collecting payments from her. CP 194 ¶ 4.

On September 25, 2008, the FDIC imposed a receivership with respect to WaMu's assets and obligations. *Id.* ¶ 5. On the same day, Chase acquired the servicing rights to Ms. Hough's loan through a Purchase and Assumption Agreement with the FDIC. CP 205-248. Chase is the current servicer for, and attorney-in-fact on behalf of, Wells Fargo. CP 194 ¶ 6. (Freddie Mac, a corporation chartered by Congress and operating under the direction of the Federal Home Finance Agency, is also the guarantor of the loans within the Trust.)

Wells Fargo Appoints a New Trustee and Initiates Foreclosure. On December 18, 2013, Wells Fargo's attorney-in-fact (Chase) executed an Appointment of Successor Trustee appointing Quality Loan Service Corporation of Washington ("QLS") as the successor trustee under the Deed of Trust. CP 307-309. Thereafter, on January 22, 2014, QLS issued

a Notice of Default, which stated that Ms. Hough defaulted on her loan by failing to make the June 1, 2008 payment and all subsequent payments. CP 194 ¶ 7, CP 250-263.

Appellant Sought a Loan Modification After Ms. Hough Transfers Title of the Property to Appellant. On January 3, 2014, the Snohomish County Superior Court entered a decree of dissolution terminating the marriage of Ms. Hough and Appellant. CP 311-321. Pursuant to the decree of dissolution, title to the Property was transferred to Appellant, provided that he refinanced the loan by July 2014 to remove Ms. Hough as a borrower under the loan. If he failed to meet that condition, Ms. Hough and Appellant agreed that the Property would be listed for sale. CP 316 ¶ 2(d).

Despite not being a borrower on Ms. Hough's loan, on or about March 17, 2014, Appellant submitted an application for a loan modification, ostensibly seeking to assume and/or modify Ms. Hough's loan. CP 194 ¶ 8, CP 269-274. (Notably, even if he had obtained a modified loan, it would have not qualified as a "refinancing" because it would not have been a new loan used to pay off the old loan.)

On April 14, 2014, Appellant and representatives of Respondents participated in a foreclosure-mediation. CP 194 ¶¶ 9-10, CP 265-267. Ms. Hough was not present at the mediation. CP 266. Respondents told Appellant that they had no authority to consider him for a loan modification because: (i) he was not the borrower, and (ii) the borrower,

Ms. Hough, did not sign the loan-modification application, was not present at the foreclosure mediation, and did not execute a power-of-attorney authorizing Appellant to negotiate a loan modification on her behalf. *See id.*; CP 447 ¶ 3.11. At the conclusion of the mediation, the mediator certified that Respondents have mediated in good faith. CP 265-266. Respondents separately denied Appellant's request to assume Ms. Hough's loan because the guarantor of the loan (Freddie Mac) would not allow Appellant to assume the loan. CP 195 ¶ 11.

QLS Schedules a Trustee's Sale. Because Ms. Hough did not cure her default, QLS recorded (and subsequently posted) a Notice of Trustee's Sale scheduling a trustee's sale for June 12, 2015. CP 323-326. Respondents cancelled the June 12th trustee's sale and no sale is currently pending. CP 195 ¶ 12.

B. Procedural Background.

Appellant's Complaint. On June 3, 2015, Appellant filed a Complaint in Snohomish County Superior Court alleging Respondents violated unspecified portions of the FFA and CPA. CP 507-511. On June 25, 2015, Appellant filed a First Amended Complaint. CP 445-449.

Respondents' Motion for Summary Judgment. On November 12, 2015, Respondents filed their motion for summary judgment. CP 362-374. The motion was supported by the declaration of Joseph G. Devine Jr., a Chase employee who based his testimony on his personal review of Chase's business records. CP 193-195. Mr. Devine authenticated loan documents from Chase's business records showing the transfer of the loan

to Wells Fargo, the indorsed Note, the Notice of Default, Appellant's Loan Modification Application, and the Foreclosure Mediation Report. CP 197-274. On November 26, 2016, Respondent QLS filed its motion for summary judgment. CP 184-187.

On December 4, 2015, Appellant filed an opposition to Respondents' motions. CP 167-175. Appellant did not provide any evidence in support of his CPA claim nor did his briefing address any of the elements of a CPA claim. *Id.*

In reply, Respondents point out that Appellant did not dispute (and could not deny) that Appellant is a complete stranger to Ms. Hough's loan, and that Appellant's name does not appear anywhere in any of Ms. Hough's loan documents. Further, Respondents' reply points outs that (i) Appellant has no evidence Respondents committed a deceptive act or practice; (ii) Appellant has no evidence showing Respondents' actions affect the public interest; and (iii) Appellant has no evidence Respondents caused Appellant injury. CP 33-39. On December 15, 2015, the trial court granted Respondents' summary judgment motions. CP 11-12, 15-18.

Appellant's Motion for Leave to Amend Complaint. On December 9, 2015, Appellant filed a motion for leave to file a Second Amended Complaint. CP 54-64. On December 11, 2015, Respondents filed an opposition to Appellant's motion for leave to file an amended complaint arguing that Appellant's motion, if granted, would be unfair and prejudicial to Respondents. In addition, Respondents' opposition argued

that Appellant's motion failed to comply with CR 15(a) and Local Civil Rule 15(e), which require that "a copy of the proposed amended pleading [be] denominated 'proposed' and unsigned" and all interlineations included in proposed amended pleading be "initialed by the party or counsel filing them." CP 29. On December 15, 2015, the same day that the trial court granted Respondents' summary judgment motions, the trial court denied Appellant's motion for leave to amend his complaint. CP 11-12, 15-18. On January 13, 2016, Appellant filed a Notice of Appeal. CP 2-10.

III. ARGUMENT

A. Standards of Review.

Summary Judgment. This Court reviews *de novo* an order granting summary judgment, engaging in the same inquiry as the trial court. *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63–64 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000) (citing *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147 (1997)). In determining whether a genuine issue of material fact exists, the trial court construes the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 963 (1997). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm.,*

Inc., 112 Wn.2d 216, 225 (1989). If the moving party meets this initial showing and is a defendant, the burden shifts to the plaintiff. *Id.*

It should be noted that Appellant inaccurately asserts that a trial court "must also consider any hypothetical facts which could support plaintiff's complaint." Appellant's Br. at 9 (citing *Brave v. Dolsen Companies*, 125 Wn.2d 745 (1995). While motions brought under CR 12(b)(6) permit trial courts to consider hypothetical facts, motions for summary judgment under CR 56 do not. *See Brave,* 125 Wn.2d at 750.

Leave to Amend a Pleading. This Court applies a manifest-abuse-of-discretion test in reviewing the trial court's decision to deny leave to amend a pleading. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351 (1983). The trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26 (1971).

B. The Trial Court Properly Granted Summary Judgment on Appellant's FFA Claim.

Although Appellant is frustrated that he cannot assume Ms. Hough's loan and is precluded from obtaining a loan modification without express authorization from Ms. Hough, Appellant's Foreclosure Fairness Act (FFA) claim fails as a matter of law because he has not alleged facts giving rise to a finding that Respondents violated their duty to mediate in good faith as required under RCW 61.24.163(10).

The FFA imposes upon the borrower and the beneficiary a duty to mediate in good faith. It also requires that, following the mediation, the mediator certify in writing "[w]hether the parties participated in the mediation in good faith." RCW 61.24.163(12)(d). A borrower can assert a beneficiary's violation of its good-faith duty as a basis to enjoin the beneficiary's non-judicial foreclosure sale of the borrower's home. RCW 61.24.163(14)(a). In this case, the mediator properly certified that Respondents participated in "good faith" in the mediation. CP 265-266.

RCW 61.24.165(6) states, in part: [A] person may be referred to mediation if the person has been awarded title to the property in a proceeding for dissolution or legal separation... For the purposes of mediation under RCW 61.24.163, the person must be treated as ***a*** "borrower." ***This subsection does not impose an affirmative duty on the beneficiary to accept an assumption of the loan***. RCW 61.24.165(6) (emphasis added).

Without offering any authority in support of his FFA claim, Appellant posits that RCW 61.24.165(6) required Respondents to ignore the contractual obligations between Chase and Ms. Hough and to treat Appellant as the ***sole*** borrower at the foreclosure mediation. Appellant's Br. at 10-11. Under Appellant's theory, anyone who acquires title to property through a divorce automatically obtains "borrower" status and is permitted to assume and modify that loan without the consent of the actual borrower party to the loan agreements. But nothing in the statute

authorizes a lender to modify a borrower's loan or participate in mediation ***unless all borrowers identified in the subject loan attend the foreclosure mediation***. *See* RCW 61.24.165(6). Indeed, the Foreclosure Fairness Program Guidelines ("FFA Guidelines") promulgated by the Department of Commerce expressly provide: "The borrower(s) identified on the loan must attend the mediation **in person**. When a borrower cannot or does not want to attend the mediation in person, they can authorize a personal representative to act on their behalf at the mediation. However, the borrower should produce a **power of attorney** that clearly authorizes that representative to undertake binding negotiations on the borrower's behalf." CP 344 (emphasis in original).

In this case, Appellant was treated as ***a*** borrower at the foreclosure mediation, but not as the sole borrower. At the conclusion of the foreclosure mediation, the foreclosure mediator issued a foreclosure mediation report confirming that the parties "mediated in good faith" but that no agreement could be reached because Ms. Hough, the actual borrower on all the loan documents, was not present at the mediation, and Appellant did not have authority from Ms. Hough to negotiate on her behalf. *See* CP 265-266. The trial court, therefore, properly granted Respondents summary judgment on Appellant's FFA claim because not all borrowers were present at the foreclosure mediation, as the statute and state-issued guidelines require.

In a case on point, the Eastern District of Washington agreed with a lender that it had no obligation to allow a stranger to the loan to pay off the loan. *See Ramirez-Melgoze v. Countrywide Home Loan Servicing LP*, 2010 WL 4641948, *6 (E.D. Wash. 2010). The lender there argued that "there is a compelling need to protect lenders from 'strangers' to a loan based on privacy considerations, principles of freedom of contract, and fairness and stability in the marketplace" because lenders "should not be forced into contractual relationships with parties with whom they have no desire to transact business." *Id.*, *4. So too, here. Respondents had no obligation to involve Appellant, as a stranger to the loan, with a third party's loan transaction. *See also Robertson v. GMAC Mortgage LLC*, 982 F. Supp. 2d 1202, 1206 (W.D. Wash. 2013) ("Because [plaintiff] is a stranger to the [] Deed of Trust, [this] precludes his challenge to any procedural irregularities with the foreclosure process under the Deed of Trust Act").

C. The Trial Court Properly Granted Summary Judgment on Appellant's CPA Claim.

The elements of a CPA claim are: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes injury to the plaintiff's business or property; and (5) that injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The trial court found that Appellant failed to produce evidence on

each element required to prove a CPA claim. As a result, the trial court properly granted Respondents summary judgment.

1. Appellant Failed to Identify An Unfair or Deceptive Act or Practice.

"[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Indoor Billboard Wash., Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 74 (2007). Appellant can meet the first CPA element by establishing either that an act or practice (i) has a capacity to deceive a substantial portion of the public, or (ii) that the alleged act constitutes an unfair trade practice. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986)). Appellant must therefore allege facts showing that Respondents' acts have the capacity to deceive a substantial portion of the public or show an unfair trade practice.

Respondents did not commit any *per se* unfair trade practice. Only the Washington Legislature has the authority to declare a trade practice as being *per se* "unfair." *Hangman Ridge*, 105 Wn.2d at 787. Appellant cites no statutory violation that is a legislatively declared *per se* CPA violation, and thus there is no basis for a CPA claim tied to a *per se* "unfair" act or practice. Appellant cannot show that Respondents committed a *per se* CPA violation, and thus he cannot establish a *per se* unfair act as a basis for a CPA claim.

Further, to show Respondents acted "unfairly" under the CPA—outside the context of a *per se* unfair trade practice—Appellant must show Respondents took some action violating the public interest, which typically requires a showing that Respondents' practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves or outweighed by countervailing benefits." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013) (citing FTC standard). Appellant failed to allege Respondents acted unfairly at all, let alone in a manner "likely to cause substantial injury to consumers."

Likewise there is no evidence in the record establishing any deceptive practice by Respondents. To be "deceptive," the act or practice must be one that "misleads or misrepresents something of material importance." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007). While Appellant now claims that he was misled by Respondents' summary-judgment motion and evidence submitted in support, Appellant's Complaint does not allege that Chase misled him regarding Freddie Mac's purported loan-assumption programs. *See* Appellant's Brief at 5-6. Notwithstanding that none of Appellant's claims has anything to do with Freddie Mac's purported loan assumption programs, there is nothing misleading about the Devine Declaration, which stated that: "on or about July 2, 2014, [Appellant's] request to assume Ms. Hough's loan was denied because the guarantor of the loan, Freddie Mac, does not participate in the Loan Assumption Modification Program."

CP 195. Indeed, that was and remains true. The purported informational bulletins cited by Appellant are not a basis for affirmative claims and would not, in any event, give Appellant (a non-borrower on the loan) any right to a loan assumption. *See Abreu v. Countrywide Bank, FSB*, 2009 WL 2913509, *2 (D. Md. 2009) ("The law is clear that Freddie Mac guidelines ... are not intended to, and do not, grant borrowers any rights and are not part of the contract between lender and the borrower."); *Deerman v. Federal Home Loan Mortgage Corp.*, 955 F. Supp. 1393, 1398 (N.D. Ala. 1997) (the Freddie Mac Servicing Guide "does not define any rights and obligations between the [defendant] and the [plaintiffs] or any other borrower"), *aff'd*, 140 F.3d 1043 (11th Cir. 1998); *Hinton v. Federal Nat'l Mortgage Assoc.*, 945 F. Supp. 1052, 1056 (S.D. Tex. 1996) ("the guide is not law"), *aff'd*, 137 F.3d 1350 (5th Cir. 1998); *Huntington Mortgage Co. v. DeBrota*, 703 N.E.2d 160, 166 (Ind. App. 1998) (the guide "is not a contract between borrower and lender"). Moreover, the assumption programs Appellant cites to all deal with a situation where the original borrower is deceased. CP 80-81. Mr. Hough, the borrower of the subject loan, is not dead, and she has not given her ex-husband authority to modify ***her*** loan.

2. There is No Public Interest Impact.

A plaintiff asserting a CPA claim must offer evidence showing the act complained of impacts the public interest. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). As to

public interest, "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Id.* at 790. Notably, the Legislature amended the CPA in 2009 to create a new test for establishing the public interest element of the CPA, for actions occurring after that date. *See* RCW 19.86.093. Under the revised CPA, Appellant must have offered evidence showing Respondents' act or practice (a) injured other persons, (b) had the capacity to injure other persons, or (c) have the capacity to injure other persons." *Id.* Whether an act or practice impacted the public interest is a question of fact. *Hangman Ridge*, 105 Wn.2dat 789–90 (1986). Because Appellant failed to offer any ***evidence*** establishing that Respondents' actions caused injury to third parties or has (or had) the capacity to injure third parties, the trial court property granted Respondents summary judgment on Appellant's CPA claim.

3. Appellant Did Not Allege Compensable Injury or Any Causal Link Between Respondents' Acts and Injury.

Appellant's CPA claim also failed because he failed to show the essential CPA element of causation—that Respondents caused injury to his business or property. *See Hangman Ridge*, 105 Wn.2d at 792; *Mickelson v. Chase Home Fin. LLC*, 901 F. Supp. 2d 1286, 1288 (W.D. Wash. 2012) ("Even if the deception element of the CPA is met, the Plaintiffs cannot make a claim under the CPA because they cannot show injury."), *aff'd*, 579 Fed. App'x 598 (9th Cir. 2014). To plead a valid CPA claim, a

plaintiff must allege facts demonstrating that any injuries were caused by the deceptive practice; to prove causation, the "plaintiff must establish that, ***but for*** the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84 (2007) (emphasis added). A plaintiff must show a "causal link between the misrepresentation and the plaintiff's injury." *Id.* at 83. Here, the trial court properly granted Respondents summary judgment because Appellant offered no evidence Respondents caused him any injury under the CPA. Appellant did not present evidence or argument showing injury caused by Respondents and thus this Court should affirm summary judgment.

D. The Trial Court Did Not Abuse its Discretion when it Denied Appellant's Motion for Leave to Amend at the Summary Judgment Hearing.

Less than a week prior to the hearing on Respondents' motions for summary judgment, Appellant filed a motion requesting leave to file a second amended complaint to add two causes of action against Chase: fraud and negligent misrepresentation.

Under CR 15(a), Appellant's right to amend as a matter of course had expired, and Appellant could amend his complaint "only by leave of court or by written consent of the adverse party." CR 15(a). The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 763 (1985); *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577 (1978).

Therefore, when reviewing the trail court's decision to grant or deny leave to amend, this Court must apply a manifest abuse of discretion test. *Caruso v. Local Union No. 690,* 100 Wn.2d 343, 351 (1983). The trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26 (1971).

The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. *Caruso,* 100 Wn.2d at 350. The factors a court may consider in determining prejudice include undue delay and unfair surprise. *Id.* at 349–51.

In this case, despite being aware of the factual basis for the proposed amendments since before the filing of his lawsuit, Appellant waited until after Respondents' summary judgment motions had been fully briefed to file his motion for leave. Appellant's delay in seeking to amend his complaint is unfair and prejudices Respondents because they could have addressed these claims in their summary judgment motions, but were denied that opportunity by Appellant's delay. *See Herron v. Tribune Publ'g Co.,* 108 Wn.2d 162, 165-66 (1987) (unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice).

In addition, the trial court denied Appellant's motion for leave because it failed to comply with CR 15(a) and Local Civil Rule 15(e),

which require that "a copy of the proposed amended pleading [be] denominated 'proposed' and unsigned" and all interlineations included in proposed amended pleading be "initialed by the party or counsel filing them." *See* CR 15(a) and SCLCR 15(e). Appellant did not initial or otherwise identify his proposed amendments, let alone identify how the amended pleadings would change the form of the original complaint.

Notwithstanding that the trial court granted Respondents' motions for summary judgment, Appellant's proposed fraud and negligent misrepresentation claims were fundamentally infirm and inadequately pled. For each of these reasons, the trial court did not abuse its discretion in denying Appellant's motion for leave to amend his complaint.

E. The Trial Court Properly Denied Plaintiff's Request for Additional Discovery.

Six months after filing his Complaint, and three weeks after being served with Respondents' summary judgment motions, Appellant used one paragraph in his opposition to Respondents' motions to ask the trial court to continue Respondents' motion pending discovery on the issue of "the current status of [Appellant's] loan modification application with Chase." CP 174. The trial court should deny a CR 56(f) request when: (1) the moving party fails to state what evidence it would establish through additional discovery; (2) the evidence sought would not raise a genuine issue of fact rendering delay and further discovery futile; or (3) the moving party fails to offer good reason for their delay in obtaining the evidence desired. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400

(1997). Failure to meet one of these requirements is fatal and the timing of a motion for summary judgment is irrelevant to whether a continuance should be denied. *See e.g.*, *Manteufel v. SAFECO Ins. Co.*, 117 Wn. App. 168, 175 (2003) (denying request to continue motion for summary judgment one month after filing of the complaint). The trial court properly denied Appellant's request for the following reasons:

First, delay for discovery "is not justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Molsness*, 84 Wn. App. at 400-401. "Vague or wishful thinking is not enough." *Id.* (holding trial court did not abuse discretion by denying continuance). Appellant must identify, by affidavit, specific evidence she will obtain that is necessary to oppose summary judgment. *See* CR 56(f); *Molsness*, 84 Wn. App. at 401. Appellant failed to present any such affidavit to the trial court. This failure by itself bars his claims here. Regardless, Appellant also failed to identify any specific evidence that he might uncover by delaying the motion for additional discovery. While Appellant claimed to require additional discovery regarding "the current status of [Appellant's] loan modification application with Chase" (CP 174), Appellant had ample time and opportunity to obtain discovery regarding this alleged issue.

Second, the trial court properly denied Appellant's request for delay because Appellant did not and could not demonstrate that additional discovery could raise a genuine issue of fact. *Stranberg v. Lasz*, 115 Wn.

App. 396, 406-407 (2003). The mere possibility that discoverable evidence exists that may be relevant is not sufficient. *Molsness*, 84 Wn. App. at 401. Appellant did not and could not submit any facts surrounding the status of his loan-modification application would bear on what is a question of law—whether Respondents had no duty and were not permitted to consider him for a loan modification without the express authorization of his ex-wife.

Third, the trial court properly denied Appellant's request for delay because he failed to offer good reason for his delay in obtaining the evidence desired. CR 56(f) is not intended to endorse inaction and delay. *Bridges v. ITT Research Inst.*, 894 F. Supp. 335, 337 (N.D. Ill. 1995) ("Rule [56(f)] is not to be used as a delay tactic or scheduling aid for busy lawyers"). "The failure to conduct discovery diligently is grounds for denial of a Rule 56(f) motion." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1005 (9th Cir. 2005).[1] Appellant did nothing in this case for six months. Indeed, Appellant waited until the deadline for responding to Respondents' summary judgment motions before serving discovery and asking the trial court for a continuance. As a result, the trial court properly denied Appellant's request for delay to conduct discovery.

IV. CONCLUSION

Respondents respectfully ask this Court to affirm the trial court's granting of summary judgment in its entirety.

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[1] Washington state courts interpret CR 56(f) consistently with its federal counterpart. *Turner v. Kohler*, 54 Wn. App. 688, 693 (1989) (looking to Fed. R. Civ. P. 56(f))

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record:

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Dated at Seattle, Washington this 27th day of April, 2016.

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