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Court of Appeals No. 74602-2-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN PHILLIP HALL,

Appellant,

v.

JP MORGAN CHASE BANK, a national bank, QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates, Series 2005-PR4 Trust, WAMU MORTGAGE PASS_THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, a foreign trust,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Phillip Hall moves this Court for discretionary review of the Court of Appeals' (Div. 1) decision in Case No. 74602-2-I.

B. COURT OF APPEALS DECISION

Division One of the Court of Appeals affirmed the orders entered by the trial court in its decision of October 24, 2016. The Court of Appeals also denied the appellant's timely filed Motion for Reconsideration in its order of December 23, 2016.

Given the public interest in helping residents of Washington State to avoid foreclosure, as evidenced by the legislature's passage of the Foreclosure Fairness Act and its amendments, the appellant seeks review of the Court of Appeals decision and the order denying his motion for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in not broadly interpreting the legislative intent of the Foreclosure Fairness Act to "avoid foreclosure whenever possible" and to allow an ex-spouse to individually seek a loan modification with a lender on property received through divorce.
2. Whether the Court of Appeals erred on separate grounds in not allowing the appellant's claim under the Consumer Protection Act to proceed in light of evidence that the respondent Chase Bank misrepresented to appellant and his attorney that no loan assumption

relief was available to him when in fact guidelines of the loan guarantor Freddie Mac expressly allowed for assumption of loans by "non-borrower applicants" such as appellant.

3. Whether the Court of Appeals erred in not finding trustee conflicts of interest posed unacceptable flaws in nonjudicial foreclosure process.
4. Whether the Court of Appeals erred by affirming the trial court's order granting respondent's summary judgment motion and denying plaintiff's motion for leave to amend complaint regarding newly discovered evidence of fraud and/or negligent misrepresentation by defendant Chase Bank concerning mortgage relief to which plaintiff should have been entitled.
5. Whether the Court of Appeals erred by affirming the trial court's order dismissing plaintiff's case while plaintiff's outstanding discovery to defendants Chase Bank and Quality Loan Service remained unanswered.

D. STATEMENT OF THE CASE

1. FACTUAL HISTORY

Defendants Wells Fargo and WAMU Mortgage Trust, through servicer Chase Bank and trustee QLS, have been pursuing a trustee sale of appellant's Edmonds townhome residence. Appellant Hall received sole ownership of the condominium property pursuant to an agreed decree of dissolution entered January 2014. Appellant has reported income

adequate to cover the previous amount of the monthly mortgage payment of $1,009 per month.

Appellant hired an attorney in 2014 to facilitate his efforts to modify or refinance the loan and assist with a mediation under the Washington Foreclosure Fairness Act (FFA). A mediation, under the FFA and overseen by the Washington Department of Commerce, was held on April 14, 2014, at the Dispute Resolution Center of Snohomish, Island, and Skagit Counties. A loan modification package, with supporting financial documentation, was submitted prior to the mediation to Chase Bank and their local legal representative Robert McDonald, then of the firm McCarthy and Holthus and who now serves as trustee for Quality Loan Service Corp.

At the mediation, despite having been previously provided a copy of the decree awarding the property to appellant, the representative of Chase Bank stated that unless appellant's ex-wife was present, or that appellant had a power of attorney from his ex-wife authorizing him to negotiate, they would not proceed with the mediation. Additionally, despite requests from Chase for additional documentation prior to the mediation, the bank did not request any such power of attorney until the mediation itself. The merits of appellant's loan modification application and financial documentation were never considered at the mediation.

While the lender's representative indicated at the mediation that appellant could resubmit his application with a power of attorney from his

ex-wife at a later time for further review by the bank, at the conclusion of the mediation, the bank's representative refused to continue or reschedule the mediation, despite being made aware of the recently passed amendment to the FFA at RCW 61.24.165(6), which would require that a party in appellant's position be treated as a borrower at the mediation.

Respondent trustee QLS shares common ownership and/or management with the law firm of McCarthy & Holthus, the former employer of trustee and attorney Robert McDonald, who, prior to his current duty as trustee of the foreclosure proceeding against appellant's property, represented the beneficiary lender Wells Fargo at the April 2014 FFA mediation at which appellant's first loan modification application was denied without review.

In a declaration for the Court, Chase Bank employee Joseph Devine Jr. stated that the loan investor, Freddie Mac, does not participate in the Loan Assumption Modification Program or otherwise allow for loan assumption. As indicated in at least two Freddie Mac informational bulletins, however, Freddie Mac does participate in loan assumptions, even by non-borrowers, and requires its servicers to submit loan modification applications for review and final approval by Freddie Mac.

Loan servicer Chase Bank was cited and sanctioned by the US Office of the Comptroller of the Currency in 2015 for failing to respond to borrower loan modification requests and failing to make good faith efforts to prevent foreclosures.

2. PROCEDURAL HISTORY

Plaintiff Hall's complaint, asserting violations of the FFA and CPA by all defendants, as well as allegations involving breach of trust by the trustee, was filed June 3, 2015. Hall's first motion to restrain the trustee sale of his residence was filed June 4, 2015, which resulted in voluntary continuance of the sale initially only until the following month. The parties pursued informal negotiations and discussion regarding the case over the course of the summer. Defendants Chase Bank and QLS filed motions for summary judgment on November 12, 2015. Plaintiff's counsel propounded separate discovery requests to both defendants shortly thereafter, seeking information regarding ownership interests of QLS and McCarthy & Holthus, as well as information from Chase Bank regarding a second loan modification application believed to be under review.

Additionally, in the course of preparing a response to the defendants' motions, plaintiff's counsel discovered information regarding the availability of loan modifications and related procedures provided through principal loan investor Freddie Mac that was contradicted by representations made by Chase Bank employee Joseph Devine Jr. in his declaration to the Court. Given the discrepant testimony, plaintiff's counsel filed a motion for leave to amend the complaint to be heard December 15, 2015, with defendants' motions, which was denied. At that time, plaintiff had not had an opportunity to depose Mr. Devine, who provided no further declaration explaining the discrepancy between his

representations that no loan modifications or assumptions were available from Freddie Mac and Freddie Mac's clear guidelines indicating that such relief was routinely available. Plaintiff's discovery requests were also unanswered as noted in his response to the defendants' motions for summary judgment. As the trustee declined to continue or cancel the sale then scheduled for February 26, 2016, plaintiff's counsel filed a second motion to enjoin the sale, which was granted by the Court on February 24, 2016.

Appeal to Division One of the Court of Appeals was filed January 12, 2016. An amicus brief was also filed on behalf of appellant by the Northwest Consumer Law Center. Oral argument was heard September 30, 2016. The Court of Appeals opinion affirming the lower court orders was issued October 24, 2016. An order denying appellant's motion for reconsideration was issued December 23, 2016. This petition for review is filed January 22, 2017.

E. ARGUMENT

1. Broad Interpretation of FFA Best Achieves Legislative Intent; Respondent's Suggested Statutory Interpretation Would Result in Inconsistent Application of the Law.

This Court is being asked, in part, to determine what obligations a lender or its representative has to an individual in the appellant Hall's position, namely a spouse who has received a property pursuant to a decree of dissolution, as anticipated by amendments to the FFA at

RCW 61.24.165(6). Given that the FFA was specifically amended to address situations such as this and the stated intent of the statute to "avoid foreclosure whenever possible," this Court should find that individuals in appellant's position can individually engage with a lender without requiring the participation of an ex-spouse even in instances prior to the amendment expressly prohibiting the conduct engaged in by respondent Chase Bank. RCW 61.24.005.

In the interpretation of the statute respondent Chase has asked the Court to accept, application of the law would be extremely inconsistent, resulting in situations such as the present case where a disgruntled ex-spouse could effectively deny a homeowner the relief he or she may need by refusing to participate in mediation or provide a power of attorney. Given the statutory intent, a broad reading of this statute is necessary to best give the statute its intended effect of reducing the incidence of home foreclosure for the largest number of Washington residents.

Further, this case can be distinguished from the scenario upon which respondent Chase has placed inapposite emphasis, namely that this Court is being asked to require a lender to accept a loan assumption application from the ex-spouse of a borrower. Appellant Hall is not asking the Court to impose an affirmative obligation on a lender to accept a loan assumption sought by an ex-spouse, merely that someone in his position at least be given an opportunity to have his or

her own loan modification application reviewed on its own merits in good faith. By its own admission, respondent Chase asked for and received a financial application from the appellant, but then sought to stand behind a claimed procedural obstacle without actually reviewing the merits of his application. This conduct makes a mockery of the legislative intent underpinning the FFA, particularly in light of the then pending statutory amendment at RCW 61.24.165(6), requiring that someone who received a property in a dissolution be treated as a "borrower" and allows a lender to sidestep the statute and legislative intent at the whim of an ex-spouse.

Additionally, the FFA guidelines are of general application for the myriad circumstances a named borrower may not be able to attend mediation. This Court should not allow a convenient interpretation of these general guidelines, permitting a proxy through a power of attorney, to supersede the plain intent of the statute to reduce the incidence of foreclosure in Washington.

Additionally, in view of the statute at RCW 61.24.163(14)(c), which provides a defense to foreclosure if a lender/beneficiary is not willing to reasonably negotiate a modification, such conduct by a lender, precluding meaningful review of a loan application, should not be condoned.

Along these same lines, given the legislative intent as set forth in the notes to RCW 61.24.005 to "create a framework for homeowners

and beneficiaries to communicate with each other to reach a resolution and ***avoid foreclosure whenever possible***," as well as the recently passed amendment of the statute at RCW 61.24.165(6), expressly addressing the factual scenario of an ex-spouse, as is at issue in this case, a violation of the FFA should be treated as a per se violation of the CPA. RCW 19.86.093 further provides a claimant a private right of action to establish that an unfair or deceptive act or practice is injurious to the public interest if it "violates a statute that contains a specific legislative declaration of public interest impact."

2. **Hall's CPA Claim Should Also Be Allowed to Proceed as Freddie Mac Guidelines Regarding Loan Assumptions Do Not Require Ex-Spouse's Participation or Consent.**

The Court of Appeal's opinion indicates that Hall's CPA claim failed the first and fifth elements necessary for a CPA claim, although its emphasis appears to be primarily on the fifth element of causation. *Hall v. Chase et al.*, 74602-2-1, pp. 8-9. Regarding the first element briefly, a misrepresentation of fact concerning the availability of loan relief from an attorney at a well-established law firm coupled with a similar declaration filed in court from a representative of a major national bank could be reasonably viewed as having "the capacity to deceive a substantial portion of the public." Whether such an act would be deceptive is also a question of fact. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 318, 308P.3d716 (2013) (quoting

Holiday Resort Cmtv. Ass'n v. Echo Lake Assocs., LLC. 134 Wn.App. 210, 226, 135 P.3d 499 (2006)). In fact, as evidence in the record indicates, Chase Bank was sanctioned for similar conduct by the federal Office of the Comptroller of the Currency as adversely impacting a large swath of the public.

With regard to the fifth prong of a CPA claim, causation, the Court's opinion appears focused only on relief that may have arisen from the April 2014 mediation, which required the consent or involvement of the original borrower. As the Freddie Mac Guidelines clearly state, however, Hall's application as a "non-Borrower applicant" should have been forwarded to Freddie Mac for review, completely independently of the participation or consent of his ex-wife. Hall's application was not forwarded to Freddie Mac for review on its own merits as required under the guidelines, and the misrepresentations of Chase Bank and its counsel were an attempt to hide that fact. If this fact is not sufficiently demonstrative on its face of the bank's actions materially and meaningfully impacting Hall's ability to assume the loan, it should be treated as a question of fact and remanded to the trial court.

Further, in its response to plaintiff's motion to enjoin the trustee sale at the trial level, defendant Chase Bank offered no declaration or evidence denying or rebutting the fact that its employee Joseph

Devine, Jr. provided a declaration to this Court stating that "Freddie Mac does not participate in the Loan Assumption Modification Program or otherwise allow for loan assumption." Chase also offered no declaration or evidence contradicting the two Freddie Mac bulletins submitted in support of the motion that clearly indicate that Freddie Mac does in fact offer loan assumptions, even to individuals in Mr. Hall's position, "non-borrowers" who have received title to a property through a divorce. The egregious misconduct and deceptive business practices of Chase Bank towards Mr. Hall exemplify the same type of corporate malfeasance that resulted in the bank being sanctioned by the Office of the Comptroller of the Currency in 2015.

Additionally, the "non-borrower" argument made by Chase Bank has previously been rejected by other Courts. Specifically, in the *McGarvey* decision, also involving Chase Bank as servicer for a WaMu loan, the Court found that the injured "non-borrower" in that case could pursue claims against Chase under California's analog of the Consumer Protection Act. *McGarvey v. JP Morgan Chase Bank, N.A.*, 2013 WL 5597148 (E.D. Cal. Oct. 10, 2013)

3. Trustee Conflicts Pose Additional Unacceptable Flaws in This Attempted Nonjudicial Foreclosure.

In a nonjudicial foreclosure, "the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to

ensure that the rights of both the beneficiary and the debtor are protected." *Klem v. Washington Mutual,* 176 Wn.2d 771 at 20; 295 P.3d 1179 (2013), *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683, (1985). The trustee's actions in this matter evince a disregard for the absolutely necessary impartiality that must be required in foreclosures proceeding under the streamlined procedures afforded under the Deed of Trust Act. It is clear that in wearing two different hats, first as counsel previously advocating unlawfully on behalf of the defendant bank and now as trustee who has refused to continue or cancel the sale at plaintiff's reasonable request, both actions seemingly adverse to plaintiff's interests, the trustee is in an untenable conflict of interest and this Court should suspend any further trustee sale, remove the trustee, and allow a fair and equitable mediation to occur.

4. Given Plaintiff's Outstanding Discovery, Pursuant to CR 56(f), and His Motion for Leave to Amend Complaint, Summary Judgment Was Premature and Prejudicial.

Lastly, summary judgment should not have been granted in this matter given plaintiff's outstanding and unanswered discovery requests, which issue plaintiff raised in his response to the motion. CR 56(f) provides:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In his initial discovery requests to defendants Chase Bank and QLS, plaintiff sought additional information regarding the cross-ownership and/or management between trustee QLS and the law firm that previously employed QLS employee Robert McDonald, which raise serious concerns regarding his potential and actual conflicts of interest, especially in light of his actions adverse to plaintiff's interests in his capacities as beneficiary's counsel previously and new position as trustee overseeing sale of plaintiff's home. Plaintiff also believes that it would be important to depose Chase Bank employee Joseph Devine, Jr. regarding his declaration to the lower Court and other evidence contradicting his declaration.

Therefore, until appellant has been afforded an opportunity to complete his discovery and additional relevant factual information can be evaluated, the trial court's order of summary judgment was wholly premature and should be reversed.

Further, given that factual issues concerning respondent Chase Bank's misrepresentations to appellant were never resolved at the trial level, plaintiff-appellant's motion for leave to amend his complaint was also prematurely and inappropriately denied. Whether defendant Chase Bank's statements to plaintiff, his counsel, and the Court, that no loan relief is available to him are misrepresentations, intentional or negligent, is a material issue of fact precluding summary judgment.

CR 56(c); *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

Given the outrageous conduct of defendant Chase Bank in misleading plaintiff, his counsel, and the Court to believe that no loan modification relief was available to the plaintiff, a claim patently at odds with guidelines of the loan investor Freddie Mac, it is not unreasonable that plaintiff may have been delayed in discovering that information and should therefore have been permitted to amend his complaint to reflect the newly discovered evidence.

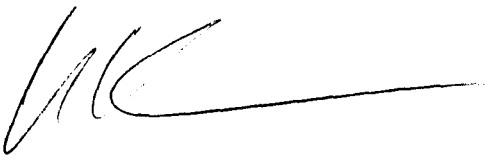
CR 15(a) provides in pertinent part: "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Absent prejudice to the opposing party, the Court has held such amendments shall be granted. *Olson v. Roberts & Schaeffer Co.*, 25 Wn.App 225, 607 P.2d 319 (Div. 2 1980). The fundamental legal and equitable issues raised in this case and the harm to plaintiff should outweigh any potential claims of prejudice that defendants may raise.

F. CONCLUSION

On the basis of the evidence in the record and foregoing argument, the appellant requests that this Court remand the case to the trial court to allow for fact-finding and adjudication of his fraud, negligent misrepresentation, and CPA claims with a ruling that plaintiff is a

borrower within the meaning of RCW 61.24.165(6), entitled, as an individual, to a mediation with the lender.

Respectfully submitted this 22nd day of January, 2017.



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DECLARATION OF SERVICE

I, Christopher Kerl, hereby declare that on the 22nd day of January, 2017, I caused a true and correct copy of the following:

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOHN PHILLIP HALL, an individual, Appellant, v. JP MORGAN CHASE BANK, a national bank; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Series 2005-PR4 Trust, WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, a foreign trust, Respondents.	)	No. 74602-2-I UNPUBLISHED OPINION FILED: October 24, 2016

VERELLEN, C.J. — John Hall appeals the summary judgment orders dismissing his claims against JP Morgan Chase Bank, Quality Loan Service Corporation of Washington, and Wells Fargo Bank, N.A. for violations of unspecified portions of the Foreclosure Fairness Act (FFA)[1] and Consumer Protection Act (CPA).[2] Hall's primary argument is that the defendants acted in bad faith by refusing to participate in a foreclosure mediation without the consent or involvement of the original borrower

[1] Ch. 61.24 RCW.

[2] Ch. 19.86 RCW.

under the loan, Hall's ex-wife, from whom he acquired the property in a dissolution proceeding. But the statutory amendment that Hall relies on, RCW 61.24.165(6), was not in effect at the time the mediation occurred. And Hall provides no authority, or argument, for the retroactive application of that amendment. As to his CPA claim, Hall presented no evidence that any alleged unlawful act by the defendants caused his injuries. Summary judgment was proper.

We also conclude the trial court did not abuse its discretion in denying Hall's motions for leave to amend and for a CR 56(f) continuance. Therefore, we affirm.

FACTS

In 2005, Diane Hough borrowed $272,000 from Washington Mutual Bank. She signed a promissory note and executed a deed of trust encumbering her Edmonds condominium. The deed of trust named Washington Mutual as the lender and beneficiary and First American Title as trustee. Washington Mutual later sold the loan to a securitized trust with Wells Fargo Bank, N.A., acting as trustee. Washington Mutual remained the servicer.

Hough defaulted on her loan in June 2008.

In September 2008, Washington Mutual failed, and the Federal Deposit Insurance Corporation placed the bank in receivership. Under a purchase and assumption agreement, JP Morgan Chase Bank (Chase) acquired the servicing rights to Hough's loan.

In 2013, Chase, as attorney-in-fact for Wells Fargo, appointed Quality Loan Service Corporation of Washington as successor trustee of the deed of trust.

Quality Loan issued a notice of default in January 2014.

That same month, John Hall acquired the condominium in a dissolution proceeding with Hough. Per the dissolution decree, Hall was required to refinance the loan by July 2014 to remove Hough as a borrower, or to sell the property.

In March 2014, Hall submitted a "request for mortgage assistance" application.[3] On April 14, 2014, Hall and Wells Fargo participated in a foreclosure mediation under the FFA, but no agreement was reached. Wells Fargo explained they had no authority to consider Hall for a loan modification because (1) he was not the original borrower and (2) the original borrower, Hough, did not sign the loan modification application, was not present at the mediation, and did not execute a power of attorney authorizing Hall to negotiate a loan modification on her behalf.[4] On May 1, 2014, the FFA mediator certified that the parties mediated in good faith.

In February 2015, Quality Loan recorded a notice of trustee's sale, setting a nonjudicial foreclosure sale for June 2015. Quality Loan continued the sale twice, ultimately setting the sale for February 26, 2016.

On June 3, 2015, Hall moved to enjoin the trustee's sale.

That same day, Hall sued Chase, Quality Loan, and Wells Fargo, alleging they violated unspecified portions of the FFA and CPA.[5] Hall filed an amended complaint later that month. The defendants moved for summary judgment in November 2015.

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[3] Clerk's Papers (CP) at 269-74.

[4] See CP at 266 ("Beneficiary said that because Ms. Hough is liable for the debt and has settlement authority, she would need to be present to discuss options. There has not been any communication from Ms. Hough.").

[5] Hall also claimed Quality Loan was liable for breach of trust. CP at 510.

On December 9, 2015, Hall moved for leave to file a second amended complaint "based on newly discovered information that defendant Chase has provided false and/or incorrect information to plaintiff."[6] Hall alleged Chase had "previously advised plaintiff that the loan investor, Freddie Mac, does not participate in the Loan Assumption Modification Program or 'otherwise allow for loan assumption.' Plaintiff's counsel has just discovered, however, that this information is flatly contradicted by several recent informational bulletins issued by Freddie Mac."[7]

On December 15, 2015, after considering the pleadings and records filed therein, including Hall's motion for leave to amend his complaint, the trial court granted the defendants' motions for summary judgment. That same day, the court denied Hall's motion for leave to amend his complaint.

In February 2016, the trial court granted Hall's motion for injunction and temporary restraining order, cancelling the February 26, 2016 trustee's sale.

Hall appeals the summary judgment orders.

ANALYSIS

Foreclosure Mediation

We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[8] We view the facts and all reasonable inferences in the light most favorable to the nonmoving party.[9] Summary judgment is proper if there are no

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[6] CP at 54.

[7] CP at 55 (citations omitted).

[8] Beaupre v. Pierce County, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

[9] Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

genuine issues of material fact.[10] "A material fact is one that affects the outcome of the litigation."[11]

A defendant moving for summary judgment "has the initial burden to show the absence of an issue of material fact, or that the plaintiff lacks competent evidence to support an essential element of [his] case."[12] If the defendant meets this initial showing, then the inquiry shifts to the plaintiff to set forth evidence to support his case.[13] The evidence set forth must be specific and detailed.[14] The responding plaintiff may not rely on conclusory statements, mere allegations, or argumentative assertions.[15] If the plaintiff fails to establish the existence of an essential element that he bears the burden of proving at trial, then summary judgment is warranted.[16]

Hall claims the defendants violated the FFA "when they refused, at mediation, to allow plaintiff, who had received property through a divorce, to individually seek a loan modification."[17] Specifically, he relies on "RCW 61.24.165(6), which provides

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[10] CR 56(c); Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013) (quoting Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003)).

[11] Janaszak v. State, Dep't of Soc. & Health Servs., 173 Wn. App. 703, 711, 297 P.3d 723 (2013).

[12] Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

[13] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[14] Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004).

[15] CR 56(e); Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

[16] Young, 112 Wn.2d at 225.

[17] Appellant's Br. at 1.

that such a person much be treated as a borrower."[18] He claims that "by not fairly engaging in a mediation, it remains an unresolved factual issue" whether the defendants "acted in good faith at the mediation."[19]

But the statutory amendment to RCW 61.24.165 that Hall relies on was not in effect at the time of the foreclosure mediation in this case. RCW 61.24.165(6) states:

> For purposes of referral and mediation under RCW 61.24.163, 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."

The amendment did not become effective until June 12, 2014, nearly two months *after* the April 14, 2014 mediation occurred. And Hall provides no authority, or argument, for the retroactive application of that amendment.[20] Therefore, we conclude Hall's bad faith and related CPA arguments regarding the lender's request that Hall's ex-wife consent to or participate in the loan modification mediation do not create a question of fact precluding summary judgment.[21]

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[18] Id.

[19] Id. at 10-11.

[20] To the extent Hall refers to the refusal of the lender to continue the mediation when they were aware the amendment was adopted but not yet effective, he provides no authority or argument that the lender had such an obligation. See Appellant's Br. at 5.

[21] The Northwest Consumer Law Center filed an amicus brief in support of Hall's position. The Consumer Law Center argues that it defeats the entire purpose of the statutory amendment if homeowners are excluded from participating in foreclosure mediation absent the participation of the ex-spouse from whom they gained title. The statutory amendment serves the purpose of not allowing a lender to exclude an ex-spouse such as Hall from mediation. It does not, however, compel the lender to proceed with the mediation absent the original borrower's consent or involvement.

CPA Claim

Hall next claims Chase "misrepresented material facts to him and his attorney, claiming that no loan modification relief was available to him when this claim was contradicted by Freddie Mac guidelines."[22] He asserts "a reasonable inference could be made that if no mortgage relief was available, as asserted by respondent in its July 2015 letter of counsel and the declaration of Joseph Devine, then the March 2014 mediation was a sham and could not have been conducted in good faith."[23]

On November 12, 2015, the same day Chase filed its motion for summary judgment, Chase employee Joseph Devine filed a declaration asserting that "Freddie Mac[ ] does not participate in the Loan Assumption Modification Program or otherwise allow for loan assumption."[24] In a July 14, 2015 letter to Hall's counsel regarding his lawsuit, Chase's counsel reiterated that Chase had "previously communicated to Mr. Hall, Ms. [Hough]'s loan is owned by Freddie Mac, and Freddie Mac does not currently participate in any loan assumption programs."[25] Hall's position is that this alleged misrepresentation, coupled with Chase's violation of "the FFA by failing to treat him as a borrower and not reviewing his loan modification application in good faith," created a question of material fact precluding summary judgment.[26] We disagree.

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[22] Reply Br. at 4.

[23] Id.

[24] CP at 195.

[25] CP at 77.

[26] Reply Br. at 4.

A CPA claim has five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation."[27]

An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public or if the legislature declares it to be unfair or deceptive.[28] A practice is deceptive if it "'misleads or misrepresents something of material importance.'"[29] "Whether an act is unfair or deceptive is a question of law."[30] But whether an unfair act "has the capacity to deceive a substantial portion of the public is a question of fact."[31]

Hall asserts that "a violation of the FFA should be treated as a per se violation of the CPA."[32] But a per se CPA violation requires an express statutory provision identifying a per se violation.[33] Hall cites no statute declaring a per se CPA violation. Moreover, as addressed above, Hall's argument relies on a statutory amendment to the FFA that was not in effect at the time Hall's foreclosure mediation occurred. Therefore, Hall's argument fails.

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[27] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[28] Id. at 785.

[29] Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 318, 308 P.3d 716 (2013) (quoting Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006)).

[30] Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 835, 355 P.3d 1100 (2015).

[31] Walker, 176 Wn. App. at 318.

[32] Appellant's Br. at 13.

[33] Hangman Ridge, 105 Wn.2d at 786 ("A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.").

Even assuming Hall could establish an unfair or deceptive act or practice, proximate cause is critical here. Hall must show a causal link "between the unfair or deceptive acts and the injury suffered."[34] That link must establish that the alleged injury would not have occurred "but for" the defendant's unlawful acts.[35]

Hall alleges that while a sale of the property has not yet occurred, he "has suffered injury by the fact that he has been unable to effectively explore other financing options *given the default foreclosure status on the property.*"[36]

But by the time Hall acquired the property in the dissolution, the mortgage was already in default and the foreclosure process had already commenced. More importantly, Hall cannot demonstrate that Chase's alleged misrepresentation had any impact on his mortgage relief effort because any meaningful relief arising out of the April 2014 foreclosure mediation required the consent or involvement of the original borrower.[37]

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[34] Id. at 793.

[35] Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 278, 259 P.3d 129 (2011) (quoting Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 82, 170 P.3d 10 (2007)).

[36] Reply Br. at 8 (emphasis added). Hall also alleges "he has a community property interest in the home from the marriage and Chase's argument that he is a 'stranger' to the note effectively deprives him of that property right and value." Id. Hall alleges he has resided in the condominium since September 2005. The record on appeal, however, does not reveal when Hall married Hough. The record also does not explain the significance of the deed placing the property in trust.

[37] It is not apparent that Hall even sought to assume Hough's loan despite Chase's alleged misrepresentation about the availability for a loan assumption. On its face, Hall's "request for mortgage assistance" application does not reflect an independent application for loan assumption. Indeed, in his complaint, Hall only asserted that he "submitted a *loan modification application*" to Chase," that he "seeks to remove his ex-wife's name from the note on the property *through a loan modification or refinancing of the note*, and that he "hired an attorney last year . . . to

All in all, no evidence indicates that, but for unlawful acts by Chase, Hall would have obtained a loan modification. Hall thus failed to present evidence sufficient to create a genuine issue of material fact as to the first and fifth elements of his CPA claim. We affirm the trial court's dismissal of Hall's CPA claim against Chase.

Trustee's Duty of Good Faith

Hall claims Quality Loan violated its duty of good faith towards him by failing to act impartially. Attorney Robert McDonald represented Wells Fargo at mediation and later represented Quality Loan in advancing the foreclosure. Quality Loan shares ownership and office space with McDonald's former firm, McCarthy & Holthus, which represented Wells Fargo. Quality Loan notes that McDonald never worked for McCarthy & Holthus and Quality Loan at the same time. It further points out that Hall does not describe any impact on him from McDonald representing both companies, whether successively or simultaneously.

"RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the borrower, beneficiary, and grantor."[38] The "trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith."[39] The trustee may not as a practice "defer[ ] to the lender on whether to

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facilitate his efforts to *modify or refinance the loan* and assist with a mediation" under the FFA. CP at 508 ¶¶ 3.2, 3.5 & 3.6 (emphasis added).

[38] Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 787, 336 P.3d 1142 (2014).

[39] Id.

postpone a foreclosure sale and thereby fail[ ] to exercise its independent discretion as an impartial third party."[40]

But here, Hall makes no showing that the trustee improperly deferred to the lender and thus breached its duty of good faith. Although a lawyer's dual representation of a lender and trustee might raise questions about the trustee's good faith in some circumstances, Hall offered no evidence of bad faith here. He has not shown any reason the trustee should not have foreclosed.

Leave to Amend

Hall contends the trial court erred in denying his motion to file a second amended complaint. We disagree.

The decision to grant leave to amend the pleadings is within the trial court's discretion.[41] Absent an abuse of discretion, the trial court's decision will not be disturbed on appeal.[42] In determining whether prejudice would result, we may consider potential delay, unfair surprise, and the probable merit or futility of the amendments requested.[43]

Here, Hall waited less than a week before the December 15, 2015 hearing on the defendants' motions for summary judgment to move for leave to file a second

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[40] Klem v. Washington Mut. Bank, 176 Wn.2d 771, 792, 295 P.3d 1179 (2013). The Supreme Court has expressed skepticism that an attorney for a party who also acts as the trustee can fulfill its duty of good faith. Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 101 n.3, 297 P.3d 677 (2013).

[41] Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

[42] Id.

[43] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997); Karlberg v. Otten, 167 Wn. App. 522, 529, 280 P.3d 1123 (2012).

amended complaint based on the "newly discovered information" about the availability of loan assumptions.[44] The respondents allege Hall was "aware of the factual basis for the proposed amendments since before the filing of his lawsuit."[45] The "newly discovered" documents that Hall relies on are "Freddie Mac Bulletin[s]" addressed to "Freddie Mac Servicers" dated February 15, 2013, July 15, 2014, and April 2015.[46] It is unclear from the record, however, when Hall discovered these bulletins. And Hall provides no explanation for his delayed motion for leave to amend.

The respondents argue the trial court denied Hall's motion in part because it failed to comply with CR 15(a) and Snohomish County Local Court Rule 15(e).[47] But the trial court did not articulate why it denied Hall's motion. Without regard to Hall's noncompliance with these rules, we conclude the trial court did not abuse its discretion. Hall's proposed amendments would have been futile. As explained above, because any meaningful relief arising out of the April 2014 mediation required the consent or involvement of the original borrower, Hall cannot show that Chase's alleged misrepresentation impacted him.

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[44] CP at 54-56.

[45] Respondent's Br. (Chase) at 17.

[46] CP at 74-75, 80-85, 87-93, 95-96.

[47] If a party moves to amend a pleading under CR 15(a), "a copy of the proposed amended pleading, denominated 'proposed' and unsigned," must be attached to the motion. SCLCR 15(e) requires "[i]nterlineations, corrections, and deletions on pleadings and all other papers to be filed with the clerk" to "be initialed by the party or counsel filing them."

CR 56(f) Continuance

Finally, Hall argues that "[p]ursuant to CR 56(f)," "summary judgment should not have been granted in this matter given plaintiff's outstanding and unanswered discovery requests."[48]

When a party moves for summary judgment, the opposing party may request a continuance if it needs additional time to obtain affidavits that will justify its opposition to summary judgment.[49] But the court "may deny a motion for a continuance when (1) the moving party does not offer a good reason for the delay in obtaining the evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of fact."[50]

We review a trial court's decision to deny a continuance for an abuse of discretion.[51]

Hall did not file a separate motion for a continuance but requested one in the conclusion of his response to the defendants' motions for summary judgment:

> Plaintiff has propounded discovery on defendant Chase Bank and defendant [Quality Loan]. This discovery seeks to determine, *inter alia*, any cross-ownership interests between the trustee QLS and the law firm of McCarthy & Holthus, the trustee's legal counsel and Mr. McDonald's former employer, along with the current status of Mr. Hall's loan modification application with Chase Bank.

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[48] Appellant's Br. at 17.

[49] CR 56(f).

[50] Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

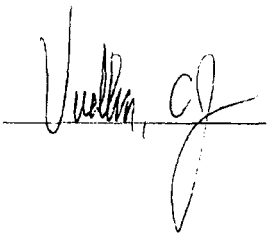
[51] Id. at 504.

Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

Done this 23rd day of December, 2016.

FOR THE PANEL:



> Until such time as discovery can be completed and additional relevant factual information can be evaluated, any motion for summary judgment is premature and should be denied.[52]

Hall offered no justification for the delay in obtaining this evidence. And he failed to demonstrate how this evidence would raise an issue of material fact precluding summary judgment. Therefore, we conclude the trial court did not abuse its discretion in denying Hall's motion for a continuance.

We affirm.

WE CONCUR:

Trickey, J

Leach, J.

[52] CP at 174.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOHN PHILLIP HALL, an individual, Appellant, v. JP MORGAN CHASE BANK, a national bank; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; WELLS FARGO BANK, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Series 2005-PR4 Trust, WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR4 TRUST, a foreign trust, Respondents.	)	No. 74602-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant John Hall has filed a motion for reconsideration of the court's October 24, 2016 opinion. The court requested and received answers from Quality Loan Service and JP Morgan Bank.

Following consideration of the motion and answers, the panel has determined the motion for reconsideration should be denied.