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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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LINDA AMES,  
*Plaintiff and Appellant,*

*vs.*

HSBC BANK USA, NATIONAL ASSOCIATION  
as Trustee for Wells Fargo Asset Securities Corporation, Mortgage  
Pass-Through Certificates Series 2006-AR16,  
*Defendant and Respondent.*

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**RESPONDENT'S BRIEF OF  
HSBC BANK USA, NATIONAL ASSOCIATION**

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Mortgage Pass-Through Certificates Series 2006-AR16

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	v
I. INTRODUCTION .....	1
II. RESTATEMENT OF ISSUES ON APPEAL .....	2
A. Under Washington law, a trial court’s denial of a motion for default is not an appealable order since it neither adjudicates nor discontinues a plaintiff’s claims. HSBC answered Ames’s complaint with leave from the trial court which also repeatedly denied her multiple motions for default. Is Ames’s attempted appeal here of these nonappealable, interlocutory orders correctly rejected? .....	2
B. The power of a trial court to adjudicate discovery disputes and enter reasonable discovery protective orders is well within the bounds of its discretion. The trial court denied Ames’s motions to compel discovery because she could not identify any discovery she had not already received, and it entered a reasonable discovery protective order. Are the trial court’s discovery orders correctly affirmed? .....	2
C. On a party’s motion for summary judgment, the trial court may consider material and competent testimony submitted by sworn declaration of an affiant witness. In adjudicating HSBC’s motion for summary judgment, the trial court considered material evidence in declarations submitted by three	

competent bank representatives. Were Ames’s blanket objections to these declarations correctly rejected?.....	2
D. More than two years after filing her complaint, and even after HSBC’s summary judgment motion had been adjudicated, Ames then proposed to amend her pleading. Was her dilatory request to amend her complaint correctly stricken by the trial court?.....	3
III. RESTATEMENT OF THE CASE .....	3
A. <i>Factual Background</i> .....	3
B. <i>Procedural History</i> .....	6
IV. STANDARD OF REVIEW .....	12
V. SUMMARY OF ARGUMENT .....	14
VI. LEGAL ANALYSIS AND ARGUMENT .....	14
A. Denial of a motion for default is not an appealable order, and the trial court did not abuse its discretion when it granted HSBC leave to respond to the Complaint and denied Ames’s motions for default.....	14
B. The trial court did not abuse its discretion when it entered a confidentiality protective order covering materials produced during discovery .....	17
C. The trial court did not abuse its discretion when it denied Ames’s “fifth” and “sixth” motions to compel. She failed to identify any information she did not receive in discovery that might have addressed the issues raised in HSBC’s motion for summary judgment.....	19

D.	The trial court did not err when it considered the declarations of competent representatives in support of HSBC’s motion for summary judgment .....	23
E.	The trial court correctly granted HSBC’s motion for summary judgment and dismissed Ames’s claims .....	27
1.	Ames’s claims to set aside the trustee’s sale were barred by res judicata and collateral estoppel .....	28
2.	Ames’s claims are likewise barred by waiver .....	31
3.	Her remaining claims for failure of the trustee to materially comply with the DTA, for fraud and misrepresentation were equally time-barred .....	35
4.	Ames failed to establish fraud in connection with the notice of trustee’s sale and the assignment of the deed of trust .....	35
5.	Ames never disputed the material provisions of the note and it was manifestly enforceable .....	38
6.	Ames’s quiet title claim fails because HSBC was the beneficiary of the deed of trust as MERS’s assignee .....	39
7.	The foreclosure was not barred by the statute of limitations .....	41
8.	QLS’s appointment as successor trustee was indisputably valid .....	41

9.	No registration was required for HSBC to enforce Ames's debt in Washington .....	42
10.	After extensive discovery, Ames was not entitled to a continuance of summary judgment motion for further unspecified discovery.....	44
V. CONCLUSION .....		48
CERTIFICATE OF SERVICE .....		49

## TABLE OF AUTHORITIES

Page(s)

### FEDERAL CASES

<i>Federated Dep't Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981).....	29
<i>Wilson v. Bank of Am., N.A.</i> , No. C12-1532JLR, 2013 U.S. Dist. LEXIS 9814 (W.D. Wash. Jan. 23, 2013).....	37

### WASHINGTON CASES

<i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wash.2d 83, 285 P.3d 34 (2012).....	39, 42
<i>Bavand v. OneWest Bank, FSB</i> , 196 Wash. App. 813, 385 P.3d 233 (2016).....	<i>passim</i>
<i>Bucci v. Nw. Tr. Servs., Inc.</i> , 197 Wash. App. 318, 387 P.3d 1139 (2016).....	38
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	13
<i>Castro v. Stanwood School Dist. No. 401</i> , 151 Wn.2d 221 (2004).....	12
<i>City of Lakewood v. Koenig</i> , 160 Wn. App. 883, 250 P.3d 113 (2011).....	13
<i>City of Seattle v. Heath</i> , 10 Wn. App. 949, 520 P.2d 1392 (1974).....	25
<i>Civil Serv. Comm'n v. City of Kelso</i> , 137 Wn.2d 166, 969 P.2d 474 (1999).....	29
<i>Conrad v. Alderwood Manor</i> , 119 Wn. App. 275, 78 P.3d 177 (2003).....	12, 15

<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	12, 15, 17
<i>Deutsche Bank Nat'l Tr. Co. v. Shields</i> , No. 75044-5-I, 2017 Wash. App. LEXIS 2288 (Ct. App. Oct. 2, 2017) (unpub'd).....	43
<i>Edmundson v. Bank of Am., NA</i> , 194 Wn. App. 920, 378 P.3d 272 (2016).....	41
<i>Frizzell v. Murray</i> , 179 Wn.2d 301, 313 P.3d 1171 (2013).....	32, 33
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	16
<i>Gutz v. Johnson</i> , 128 Wn. App. 901, 117 P.3d 390 (2005).....	13, 16
<i>Holder v. City of Vancouver</i> , 136 Wash. App. 104, 147 P.3d 641 (2006).....	27
<i>International Association of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	31
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	13, 18
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	13, 16, 17
<i>Norton v. Brown</i> , 99 Wn. App. 118, 992 P.2d 1019, 3 P.3d 207 (1999).....	16
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	32
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007).....	44
<i>Rhinehart v. Seattle Times Co.</i> , 98 Wn.2d 226, 654 P.2d 673 (1982).....	13, 18, 21

<i>Rye v. Seattle Times Co.</i> , 37 Wash. App. 45, 678 P.2d 1282 (1984).....	15
<i>Schibel v. Eymann</i> , 189 Wash. 2d 93, 399 P.3d 1129 (2017).....	30
<i>Seattle First-Nat'l Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 588 P.2d 1308 (1978).....	27
<i>Seattle-First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978).....	29
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	31
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997).....	23
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	23
<i>State v. Iverson</i> , 126 Wn. App.....	24
<i>State v. Iverson</i> , 126 Wn. App. 329, 108 P.3d 799 (2005).....	24
<i>State v. Rafay</i> , 167 Wn.2d 644, 222 P.3d 86 (2009).....	17
<i>State v. Wood</i> , 89 Wn.2d 97, 569 P.2d 1148 (1977).....	28
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	23
<i>Stiley v. Block</i> , 130 Wash. 2d 486, 925 P.2d 194 (1996).....	36
<i>Talps v. Arreola</i> , 83 Wn.2d 655, 521 P.2d 206 (1974).....	28

<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	18
<i>Trust Fund Servs. v. Glasscar, Inc.</i> , 19 Wash. App. 736, 577 P.2d 980 (1978).....	48
<i>Walker v. Quality Loan Serv. Corp. of Wash.</i> , 176 Wash. App. 294, 308 P.3d 716 (2013).....	40
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	13, 37, 48
<i>Wilson v. Katzer</i> , 37 Wn.2d 944, 226 P.2d 910 (1951).....	15
<i>Yakima County v. Yakima County Law Enforcement Officers Guild</i> , 157 Wn. App. 304, 237 P.3d 316 (2010).....	29

## WASHINGTON STATUTES

### REVISED CODE OF WASHINGTON

4.16.040.....	41
5.45.020.....	25, 27
19.86.....	5
23.95.520(1).....	43
23.95.520(1) (h).....	43
23B.15.010(2) (a) and (h).....	43
61.24.040(1) (f) (IX).....	31, 32
61.24.127.....	28, 33, 46
61.24.127(2) (a).....	7, 35
61.24.130.....	32

62A.3-301 .....	38
62A.3-308(a).....	38

WASHINGTON RULES

RULES OF APPELLATE PROCEDURE (RAP)

2.2(a) (3) .....	15
2.4(b).....	11, 47

CIVIL RULES (CR)

26(i).....	10
55(a) (2) .....	7, 16
56(f).....	44

RULES OF EVIDENCE (ER)

803(a) (2) .....	23
803(a) (4) .....	23

GENERAL RULES (GR)

14.1.....	43
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OTHER AUTHORITIES

<i>HSBC Bank USA, NA v. Linda Ames</i> , Wash. Ct. App. Div. II, No. 4685-0-II (Apr. 10, 2015).....	1
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## I. INTRODUCTION

Plaintiff-Appellant Linda Ames returns to this Court following her last unsuccessful appeal challenging a routine nonjudicial foreclosure by Defendant-Respondent HSBC Bank USA.<sup>1</sup> Ames's latest post-sale appeal arises from her second lawsuit against HSBC regarding the same completed foreclosure this Court already examined now more than three years ago. Footnote 1, *ante*. There, the Court determined that Ames had waived her claims, and affirmed the trial court's writ of restitution. *Id.*

Following this Court's ruling, Ames persisted in filing this suit against HSBC more than two years after the foreclosure's completion. She again sought to set aside the foreclosure sale based on claims like those she had already raised against the same factual background. This meant that not only were her claims barred by res judicata and collateral estoppel, but those post-sale claims under the Deeds of Trust Act were also barred by the two-year statute of limitations. RCW 61.24.127(2) (a).

When HSBC filed its motion for summary judgment in this latest lawsuit, Ames never addressed — let alone opposed — its multiple affirmative defenses to her action. She fares no better on appeal. The trial court's

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<sup>1</sup> Ruling Granting Mot. on Merits, *HSBC Bank USA, NA v. Linda Ames*, Wash. Ct. App. Div. II, No. 4685-0-II (Apr. 10, 2015) (Schmidt, Comm'r), at 3 (ruling that Ames had “waived her opportunity to invalidate the sale or the trustee's deed” and an “appeal is clearly without merit when the issue on review is clearly controlled by settled law”) (affirming writ of restitution).

rulings were unassailably correct. Its judgment should be affirmed on this review.

## **II. RESTATEMENT OF ISSUES ON APPEAL**

A. Under Washington law, a trial court's denial of a motion for default is not an appealable order since it neither adjudicates nor discontinues a plaintiff's claims. HSBC answered Ames's complaint with leave from the trial court which also repeatedly denied her multiple motions for default. Is Ames's attempted appeal here of these nonappealable, interlocutory orders correctly rejected?

B. The power of a trial court to adjudicate discovery disputes and enter reasonable discovery protective orders is well within the bounds of its discretion. The trial court denied Ames's motions to compel discovery because she could not identify any discovery she had not already received, and it entered a reasonable discovery protective order. Are the trial court's discovery orders correctly affirmed?

C. On a party's motion for summary judgment, the trial court may consider material and competent testimony submitted by sworn declaration of an affiant witness. In adjudicating HSBC's motion for summary judgment, the trial court considered material evidence in declarations submitted by three competent bank representatives. Were Ames's blanket objections to these declarations correctly rejected?

D. More than two years after filing her complaint, and even after HSBC's summary judgment motion had been adjudicated, Ames then proposed to amend her pleading. Was her dilatory request to amend her complaint correctly stricken by the trial court?

### **III. RESTATEMENT OF THE CASE**

#### **A. *Factual Background***

The relevant facts were previously examined by this Court in Ames's prior appeal in No. 46585-0-II.

More than twelve years ago, Ames borrowed \$590,000 from Sierra Pacific Mortgage Company, Inc., in March 2006. The \$590,000 loan to Ames was memorialized in a promissory note. CP 31-43, 1928, 1592-1611. To secure the loan, she executed a deed of trust in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for beneficiary Sierra Pacific, its successors and assigns. The deed of trust was recorded against Ames's Vancouver, Washington property. CP 31-43, 1928, 1592-1611.

The loan to Ames was subsequently sold to a securitized trust, HSBC BANK USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR16 (HSBC), which owned the loan and held the note. CP 1687-1729, 1634. While Wells Fargo Bank, N.A. (Wells Fargo) serviced the loan and served as HSBC's attorney-in-fact (CP 1733), HSBC remained the note holder

(CP 1634), and was the assignee of the trust deed's beneficial interest (CP 45-46, 1729-30).

Ames stopped making her monthly loan payments in September 2011. CP 1620. HSBC appointed Quality Loan Service Corporation of Washington (QLS) several months later in March 2012 as successor foreclosure trustee on the trust deed securing her defaulted loan. CP 1612-14, 1731-32. Wells Fargo, as HSBC's servicer and attorney-in-fact, executed the successor trustee appointment on March 16, 2012. Ten days later, it was recorded with the Clark County Auditor's Office. CP 1614-15.

Several more months passed by, when HSBC commenced nonjudicial foreclosure on September 21, 2012 by issuing a notice of default. CP 1615-31. The default at that point was \$36,265.32, plus additional fees and costs. CP 1620. Ames was notified that reinstatement funds could be paid to Wells Fargo, and was instructed how to make the payment. CP 1621. She was also notified that Wells Fargo was the loan servicer, and that HSBC owned the note for her loan. CP 1618-20. She was given the address and telephone number where she could contact Wells Fargo. CP 1620.

Ames did not reinstate her loan in response. So QLS as foreclosure trustee issued a notice of trustee's sale dated April 5, 2013 and recorded three days later, along with a notice of foreclosure. CP 1636-76. The trus-

tee's sale was scheduled for August 9, 2013. CP 1636. This notice was never discontinued.<sup>2</sup>

Four days before the sale date, Ames filed her first lawsuit in Clark County Superior Court against HSBC, Wells Fargo, MERS, and QLS. CP 1758. She asserted causes of action for an alleged statutory violation of Washington's Consumer Protection Act,<sup>3</sup> for injunctive relief, declaratory judgment, slander of title, to quiet title, and for fraud. CP 1761, 1778–83.

Though she asked for an injunction restraining foreclosure in her complaint (CP 1779, 1784, 1786), she never moved to restrain the trustee's sale, nor did she ever obtain any such injunction. The trustee's sale proceeded on November 22, 2013, in Vancouver, Washington. CP 1685, 1570.<sup>4</sup> HSBC took ownership of the property by virtue of its \$537,900 credit bid. CP 1685.

Five days later, on November 27, 2013, QLS issued a trustee's deed conveying the property to HSBC. CP 1682–85. Contrary to Ames's asser-

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<sup>2</sup> QLS recorded a prior notice of trustee's sale on December 5, 2012, but it subsequently recorded a notice of discontinuance of that notice of trustee's sale. CP 2244.

<sup>3</sup> Ames labeled this cause of action as a violation of the "Washington Unfair Business Practices Act (RCW 19.86).

<sup>4</sup> The sale was held by Bryan Davis, in the presence of about 27 individuals, on November 22, 2013, between 11:12 a.m. and 11:17 a.m., at the Public Service Center Gazebo at 1300 Franklin Street in Vancouver, Washington. CP 1570, 1685. Ames says that she was present at the location of the sale and it never took place. AOB 24, CP 2238.

tion that the sale occurred in California (AOB 9), the trustee's deed for the sale in Washington was merely executed in California. CP 1682–85.<sup>5</sup>

**B. *Procedural History***

On April 8, 2014, HSBC filed an unlawful detainer action in Clark County Superior Court. In response, Ames affirmatively challenged the validity of the trustee's sale. CP 1808. HSBC obtained an order for a writ of restitution on July 11, 2014. CP 1809. Ames appealed to this Division II of the Court of Appeals, Case No. 46585-0-II. CP 1811–28.

On April 10, 2015, this Court granted HSBC's motion on the merits, and it affirmed the trial court's order for a writ of restitution. CP 1846–48. The Court ruled that because Ames had failed to restrain the trustee's sale, she had likewise waived her claims to invalidate the sale and trustee's deed. CP 1848. The Court deemed Ames's appeal without merit because it was clearly controlled by settled law. *Id.*

A few months later, in Ames's first lawsuit, the trial court granted QLS's motion for summary judgment on July 18, 2015, and it dismissed her claims against it with prejudice. CP 1803–04.

That summer ended, and the autumn that followed brought a new season of yet more litigation by Ames. She filed her second lawsuit that is the

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<sup>5</sup> Ames also says that the eviction hearing was scheduled for the same date and time as the foreclosure sale. AOB 9. This is impossible since the unlawful detainer proceeding wasn't filed until April 2014. However, in her first lawsuit against HSBC, a motion to compel was noted for November 22, 2013. CP 1758.

subject of this appeal on November 24, 2015, naming HSBC only.<sup>6</sup> CP 2–60.

This was two years and two days after the trustee’s sale took place, however.<sup>7</sup> CP 2–60. She again sought to set aside the trustee’s sale. CP 19–20. She asserted seven causes of action, and requested damages in the round sum of \$3,080,000. CP 11 (¶47), 12 (¶51), 14 (¶61), 15 (¶71), CP 16 (¶75), 18 (¶85), 20 (¶5). By this second lawsuit, Ames sought to collateral-ly attack the summary judgment order dismissing her claims against QLS in her first lawsuit, without naming QLS to the new action. CP 20 (¶5).

Ames filed a motion for default on February 26, 2016. CP 75–76. HSBC filed a notice of appearance, and requested leave to respond to the her complaint pursuant to CR 55(a) (2) because (a) there was already a pending and contested action between the parties that HSBC was defend- ing; (b) she did not provide counsel for HSBC notice of the default hear- ing; (c) the second action should have been abated given that her first ac- tion was still pending; and even worse, (d) HSBC had not been served. CP 80–94.

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<sup>6</sup> Her first lawsuit was still pending when she filed her second lawsuit. The claims against the remaining parties in the first lawsuit were dismissed without prejudice on September 27, 2016.

<sup>7</sup> November 22, 2015, two years from the sale date, was a Sunday, and she filed her action on Tuesday, November 24, 2015, at least one court day past the two-year statute of limitations afforded by RCW 61.24.127(2) (a).

The trial court agreed with HSBC, denying Ames's motion for default on March 18, 2018, because she lacked adequate proof of service of the summons and complaint, and HSBC had appeared requesting leave to respond. RP 13:1–17.

Less than three months later, Ames filed another motion for default on June 6, 2016, noting it for hearing on July 15, 2016. CP 122–23. On July 11, 2016, HSBC filed its answer. CP 138–49. On July 15, 2016, the trial court denied her motion for default because HSBC had answered. CP 156, RP 22:10–25, 23:1–12, 25:13–17.

Ames propounded requests for admission (CP 175–88), requests for production (CP 159–74), and interrogatories (CP 189–99) on HSBC on August 10, 2016. HSBC responded to her discovery requests on September 12, 2016, lodging its objections. CP 1350, 1387, 1433.

Several months went by. On April 19, 2017, HSBC filed a motion for entry of a confidentiality order to protect any information provided in discovery containing employee information, personal identifiers, financial information, proprietary information, and information protected by the Uniform Trade Secrets Act and other relevant laws. CP 759–79.

HSBC proposed that the parties mark material “confidential,” which would limit their distribution and disclosure. CP 760, 771 (¶1). Any party who disagreed with the classification could move the court for a ruling

that such information should not be protected as confidential. CP 773 (¶4). Ames nevertheless opposed the proposed order. CP 893–903.

The trial court entered a revised version of HSBC’s proposed order on May 24, 2017. CP 1012–20. Ames says that HSBC never produced information it designated as confidential. CP 1308, AOB 18. She appealed this order. CP 2506–07. But she assigned no error to the ruling in her assignments of error, nor does she address any arguments to the order anywhere in her appellate brief. AOB 14–17.

She filed her “fifth [sic]” motion to compel<sup>8</sup> on August 18, 2017, seeking further responses to her requests for production of documents and admissions, as well as her interrogatories. CP 1307–27. She claimed that she had not received a single document, nor any responses to interrogatories, or to any of her twelve requests for admission.<sup>9</sup> CP 1308. She also claimed that HSBC could not produce an authentic note. *Id.*

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<sup>8</sup> Although Ames labeled her motion as her “Fifth Motion to Compel,” it was her fourth.

<sup>9</sup> Unfortunately, the record demonstrated that Ames’s assertion was simply not true. At the hearing on her first motion to compel in January 2017, the court determined that more than 100 pages of discovery were first provided in September 2016, and over 400 pages thereafter. RP 41. Ames did not specify any particular deficiencies with the responses. The trial court requested that HSBC “take a look at supplementing or modifying or updating the discovery responses as may be needed to fully respond to those and to provide the defendant until the end of February to do so.” RP 43. If Ames had further concerns, a Civil Rule 26(i) conference was necessary. RP 42.

In response to Ames’s second motion to compel, the trial court noted on April 21, 2017, that there had been ongoing discovery efforts obviating any need or basis to compel discovery. The court took the request for an order regarding confidentiality under advisement, and set a hearing to review the

On August 25, 2017, the court heard her latest motion to compel. RP 107–22. Once again, she failed to meet and confer before filing it.<sup>10</sup> RP 116:13–15, CP 1554. The trial court determined that HSBC had responded to her requests for admission. RP 116:8–18. It explained to her that denials are responses, so a motion to compel did not apply. RP 113, 120. All responsive documents in HSBC’s possession had already been produced to Ames. RP 117:11–18. It had also allowed her to inspect the original note. *Id.* It likewise had provided her with Bates’ stamp numbers of documents responsive to her requests. *Id.* Therefore, the trial court denied her motion to compel. RP 113, 116, CP 1554.

Nearly two years had passed since Ames had filed this latest lawsuit. On October 5, 2017, HSBC filed its motion for summary judgment (CP 1919–50) noted for hearing on November 17, 2017 (CP 1957–59).

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confidentiality issue and the status of discovery for May 19, 2017. RP 65–66. The court advised Ames to contact HSBC’s attorney to discuss her concerns with discovery responses. RP 65.

When the May 2017 hearing was called, Ames had still not contacted HSBC’s counsel. RP 82–83. The trial court again advised her that she had to have a Civil Rule 26(i) conference with HSBC’s counsel. RP 84–87.

She filed her third motion to compel on June 26, 2017. At the hearing on July 14, 2017, HSBC’s counsel brought the original note for inspection by Ames. RP 96, Sub 83. Contrary to her assertion on appeal (AOB 8), the trial court did not order HSBC to produce a note “that contained her initials on each page.” She simply claimed the note was forged. The court denied her motion to compel, and asked HSBC to timely complete the process of identifying which documents, by page numbers, were produced in response to the specific requests for production. RP 104–105. The court stated another meet and confer was necessary. RP 104.

<sup>10</sup> Ames could only provide an e-mail she had sent to HSBC’s counsel saying she was giving it until August 1, 2017, and if it needed more time, to ask. RP 111:18-23, CP 1308, 1300 (¶3).

Less than two weeks later, Ames filed her “sixth [sic]” motion to compel. CP 1971–2157. She said again that she had not received responses to twelve requests for admission, nor any documents or responses to interrogatories *since her meet and confer* on September 11, 2017. CP 1972 (¶¶3–4), 1977. The trial court had already determined that HSBC’s discovery responses were complete at the prior hearing on August 25, 2017, and denied Ames’s motion to compel. RP 114, 116, CP 1554.

Ames continued attempting to stall, filing a motion to continue HSBC’s motion for summary judgment on October 24, 2017, and stating that she was unable to respond to the summary judgment motion until the motion to compel was ruled upon. CP 2163.

On February 5, 2018, the trial court granted HSBC’s motion for summary judgment, and dismissed Ames’s claims with prejudice. CP 2327–28. Ames filed a notice of appeal on February 26, 2018, and sought review of five trial court orders. CP 2506–07.

Ames’s Notice of Appeal identified the following orders:<sup>11</sup>

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<sup>11</sup> In her opening brief, Ames took issue with the trial court’s decision to strike her motion to amend her complaint filed two months after the summary judgment hearing. AOB 7, CP 2505. The trial court’s decision to strike Ames’s motion after granting summary judgment was not identified in her notice of appeal. RAP 2.4(b) only permits review of an order not designated in the notice of appeal if the order prejudicially affects the decision designated in the notice. The trial court’s decision to strike the motion to amend does not prejudicially affect the order granting HSBC’s summary judgment. This issue has not been preserved for appeal.

(1) order denying plaintiff’s motion for default,<sup>12</sup> CP 2506;

(2) confidentiality/protective order covering materials disclosed during discovery, filed May 24, 2017,<sup>13</sup> CP 2507;

(3) order regarding plaintiff’s “fifth” motion to compel, filed August 25, 2017, CP 2507;

(4) order denying plaintiff’s “sixth” motion to compel, filed February 6, 2018, CP 2507; and

(5) order granting defendant’s motion for summary judgment, filed February 6, 2018, CP 2507.

#### IV. STANDARD OF REVIEW

Summary judgment is reviewed de novo. *Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224 (2004), citing *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854 (1992). The interpretation of a statute, like the statute of limitations, is “a matter of law subject to de novo review.” *Castro*, 151 Wn.2d at 224; citing *State v. Karp*, 69 Wn. App. 369, 372 (1993).

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<sup>12</sup> Ames appealed this order in her notice of appeal, but she did not assign any error to it. AOB 14–17. She says nothing about it in her opening brief. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297, 78 P.3d 177, 189 (2003) (when appellant fails to assign error and to argue the points in the opening briefing, the arguments are waived); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

<sup>13</sup> Ames appealed this order in her notice of appeal, but she assigns no error to it in her assignments of error. AOB 14–17. She also did not address it in her opening brief, forfeiting any challenge to the ruling.

A trial court's decision to deny a motion for default is reviewed for a manifest abuse of discretion. *Gutz v. Johnson*, 128 Wn. App. 901, 916, 117 P.3d 390, 398 (2005), *affirmed by Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

Likewise, a trial court's decision to grant or deny a motion to compel is reviewed for a manifest abuse of discretion. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 892, 250 P.3d 113, 118 (2011), citing *Clarke v. Office of Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144, 149 (2006), *review denied*, 160 Wn.2d 1006 (2007).

A trial court is afforded broad discretion to implement controls on the discovery process to permit full disclosure of relevant information while guarding against harmful side effects. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673, 677 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Discovery orders are reviewed for abuse of discretion that results in prejudice to a party or person. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370, 373 (1991).

The abuse of discretion standard also applies to a trial court's decision to deny leave to amend. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316, 319 (1999). A trial court abuses its discretion when a ruling is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775, 784 (1971).

## V. SUMMARY OF ARGUMENT

Denial of a motion for default is not an appealable order because it does not adjudicate a party's claims, or otherwise discontinue a party's claims. Further, the trial court has broad discretion to grant leave to a party to answer a complaint. The trial court did not abuse its discretion by permitting HSBC to answer Ames's complaint, while denying her motion for default.

Entry of a protective order during discovery is well within the trial court's discretion, and Ames identifies no legally cognizable prejudice from this order. Similarly, the trial court's denial of her "fifth" and "sixth" motions to compel was well within its discretion based on its Ames's purported issues with HSBC's discovery responses.

The declarations filed in support of HSBC's motion for summary judgment all complied with the business records statute where required, and were properly considered by the trial court. The deficiencies that Ames claims regarding the evidence are misplaced.

The trial court properly granted summary judgment based upon res judicata, collateral estoppel, waiver, and the time-bar of the two-year statute of limitations. Its judgment should be affirmed.

## VI. LEGAL ANALYSIS AND ARGUMENT

### A. Denial of a motion for default is not an appealable order, and the trial court did not abuse its discretion when it

**granted HSBC leave to respond to the Complaint and denied Ames's motions for default**

A party may appeal from any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action. RAP 2.2(a) (3). A denial of a motion for summary judgment is generally not appealable, however. *Rye v. Seattle Times Co.*, 37 Wash. App. 45, 52, 678 P.2d 1282, 1287 (1984). The denial of a motion to vacate an order denying a new trial is also not an appealable order. *Wilson v. Katzer*, 37 Wn.2d 944, 946, 226 P.2d 910, 912 (1951).

Ames identifies an order denying her motion for default in her notice of appeal (CP 2521-22), but she assigns no error to it, nor addresses it in her opening brief. AOB 14-17. When a party fails to assign error to an event and fails to argue the points in its opening briefing, those arguments are waived. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297, 78 P.3d 177, 189 (2003); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

The trial court did not err when it denied her motion for default. Denial of a motion for default is not an appealable order because it does not determine the action, prevent a final judgment, or discontinue the action. It merely allows the action to proceed.

After Ames's motion was filed, and before an order of default was entered, HSBC filed its formal appearance. CP 80. If a party appears after a

motion for default is filed, it may respond to the pleading or otherwise defend with leave of court. CR 55(a) (2). Before the hearing on her motion for default, HSBC sought leave from the court to defend, which the trial court granted. CP 91–94, 156–57. Ames failed to establish that she had served HSBC. *Id.* The trial court has broad discretion to grant leave to respond before entering an order of default.

Ames served Unisearch, Inc., with the summons and complaint. CP 61–62. HSBC’s counsel contacted Unisearch to determine if it was HSBC’s registered agent. CP 84–90. Unisearch advised that it was not. CP 85. Ames’s motion for default was improper and correctly denied.

Even if Ames had served HSBC, the trial court did not err in granting it leave to respond prior to entry of a default. Default judgments are generally disfavored. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289, 1292 (1979). In deciding whether to vacate a default judgment, a trial court reviews for abuse of discretion, and applies equitable principles. *Gutz v. Johnson*, 128 Wn. App. 901, 916, 117 P.3d 390, 398 (2005), *affirmed by Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) (reviewing for abuse of discretion) *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019, 1022, 3 P.3d 207 (1999) (applying equitable principles).

A trial court abuses its discretion when its decision is based on untenable grounds or reasons, and a decision is untenable if it rests on an erroneous

ous application of law. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86, 91 (2009); *Morin*, 160 Wn.2d at 753. Review of a trial court's decision to allow leave to respond prior to entry of a default is likewise reviewed for abuse of discretion.

Washington law favors resolving disputes on the merits. Other than general disfavor of adjudication by default, there is no further codified or common law standard to guide a trial court in determining whether to permit leave to respond, such as exists for vacating a default judgment or order of default. The trial court therefore has broad discretion to grant leave to answer prior to entry of any default. The trial court's decision to do so in this case did not rest on any erroneous application of law. Ames identifies no legally cognizable prejudice from its order denying her motion for default after HSBC was permitted to respond to her complaint.

**B. The trial court did not abuse its discretion when it entered a confidentiality protective order covering materials produced during discovery**

Ames appealed this order in her notice of appeal, but again, she assigns no error to it in her assignments of error (AOB 14–17), nor briefs it. Any challenge to the order is waived. *Conrad, supra*, 119 Wn. App. at 297, 78 P.3d at 189 (2003); *Cowiche, supra*, 118 Wn.2d at 809, 828 P.2d at 553.

As a threshold matter, a trial court is afforded broad discretion to implement controls on the discovery process to permit full disclosure of relevant information while guarding against harmful side effects. *Rhinehart, supra*, 98 Wn.2d 226 at 232. Discovery orders are reviewed for abuse of discretion that results in prejudice to a party or person. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370, 373 (1991).

The trial court's order establishing a procedure for designating confidential information was not an abuse of discretion. The opposite is true. Ames claims no information was produced marked "confidential" pursuant to the court's order, thereby obviating any claim of error possibly arising from the order. AOB 18. Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial. *Id.* (citing *James S. Black & Co. v. P&R Co.*, 12 Wn. App. 533, 537, 530 P.2d 722, 725 (1975)). Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097, 1102 (1983) (citing *Ashley v. Lance*, 80 Wn.2d 274, 282, 493 P.2d 1242, 1247 (1972)).

She does not contend that any specific documents were withheld, or inappropriately marked "confidential." Entry of the protective order also did not affect the trial court's ruling on summary judgment. Any error in entering the protective order would be harmless on this record, but she has shown no error at all.

**C. The trial court did not abuse its discretion when it denied Ames’s “fifth” and “sixth” motions to compel. She failed to identify any information she did not receive in discovery that might have addressed the issues raised in HSBC’s motion for summary judgment**

In her “fifth [sic]” motion to compel, Ames asserted she had not received responses to twelve requests for admission. CP 1308. But she did receive responses denying the admissions, just not the responses she hoped for. CP 1328–1524.

She also claimed that the note that HSBC produced was “forged.” AOB 23, 37, RP 30–31, 47, 58, 93, 109, 115, 116, 118. She claimed it was “forged” because her initials at the bottom of each page were missing, apparently having been removed. CP 724, RP 31:3–5, 47:17–19, 93:5–8, 95:19–22. Ames, however, did not dispute her signature on the instrument, the principal amount of the loan, or any term of the instrument.

Ames further claimed HSBC did not produce documents under the confidentiality order, and produced documents without advising her of the specific requests to which they were responsive. CP 1308–13. Multiple copies of the same documents were produced, she says. *Id.*, RP 49:15–18. She did not raise any specific issue with any particular discovery response, or identify any deficiency. She broadly proclaims “all” of her discovery requests were not answered. CP 1308–13.

On August 25, 2017, the court heard Ames's fifth [sic] motion to compel. The court found she did not meet and confer prior to her motion. RP 111:3–23. The court also found that there were responses to the subject Requests for Admission, they were just not admissions. RP 113, 120. Additionally, HSBC's counsel advised the court that all responsive documents in their possession had been provided. RP 117. HSBC had also allowed Ames to view the original Note. *Id.* HSBC had provided Ames with the specific documents' Bates numbers that were responsive to individual requests. *Id.* The court determined that discovery answers had been provided, and denied the motion to compel. RP 116, CP 1554.

Contrary to Ames's assertion, the trial court never found at any point that any of the discovery responses were “wholly evasive and incomplete.” AOB 7–8. The court also never ordered HSBC to respond to discovery requests without objection, nor did it overrule any objections. In fact, objections to all discovery requests were served on Ames in September 2016, prior to any discovery motion, and Ames never took issue with any specific objections that were lodged. The trial court specifically allowed HSBC to assert future objections at the hearing on Ames's first motion to compel. RP 40:22–25, 41:1–5.

The trial court determined that Ames had simply challenged the veracity of the responses, and denied her “fifth” and “sixth” motions to compel. CP 1554, 2329–30.

Ames's discovery issues identified in her opening brief are as follows:

- HSBC must have documents that it did not produce because after the protective order was entered, it did not produce any documents marked confidential. (AOB 26.)
- She was not provided information regarding Leisa Jefferson, the individual who executed the Assignment of the Deed of Trust. (AOB 27 & 37.)
- Multiple duplicates of documents were produced. (AOB 49.)
- HSBC did not identify which documents applied to which request. (AOB 49.)
- The Interrogatories were not signed under oath. (AOB 13.<sup>14</sup>)

Since a trial court is afforded broad discretion to implement controls on the discovery process, *Rhinehart, supra*, 98 Wn.2d at 232, the trial court's attempts over five hearings to determine what discovery responses Ames asserted were deficient were manifestly reasonable, if not laudable. The trial court determined the main issues were that Ames believed that the note that had been produced for inspection was "forged" because it did not contain her initials on each page, and that she was seeking to compel HSBC to admit requests for admission by way of a motion to compel. Nei-

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<sup>14</sup> This issue was not identified in Ames's motions to compel, and accordingly this alleged error was not preserved below, but is impermissibly raised for the first time on appeal.

ther was a basis to compel discovery responses. The trial court did not abuse its discretion when it denied Ames's motions to compel.

Neither has Ames established that she suffered any prejudice resulting from her claimed deficiencies. Ames never described any documents, by title or even by general nature, that she believed were withheld. She also did not establish that failing to obtain information about the individual who executed the Assignment of the Deed of Trust prejudiced her, because *no* assignment is required to transfer the beneficial interest in the Deed of Trust for a successor in interest to foreclose, as discussed in further detail below.

Ames also did not establish that production of multiple copies of documents prejudiced her. And, finally, the trial court determined that HSBC's counsel *did* identify the document pages relevant to each discovery request, as stated by counsel to the court at the hearing, on which the trial court had discretion to rely. Even if that did not occur, however, Ames did not establish that any failure to identify which documents were responsive to which requests, prejudiced her in any way.

The trial court's denials of Ames's "Fifth Motion to Compel" and "Sixth Motion to Compel" were not an abuse of discretion, and should be affirmed.

**D. The trial court did not err when it considered the declarations of competent representatives in support of HSBC's motion for summary judgment**

The Court of Appeals reviews admission of evidence under hearsay exceptions for abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046, 1069 (2001) (citing ER 803(a) (4)); *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977, 1003 (2000) (citing ER 803(a) (2)). A trial court abuses its discretion only when it takes a view that no reasonable person would take. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353, 1354 (1997).

Brandon McNeal signed and submitted a declaration in support of HSBC's motion for summary judgment that met all the requirements for admission of business records.<sup>15</sup> CP 1580–1752. He was familiar with Wells Fargo's practices and procedures in making and maintaining its business records. CP 1580. He reviewed and analyzed the relevant business records and other documents referenced and attached to his declaration. CP 1580. He was also familiar with the systems that Wells Fargo uses to create and record information related to the residential mortgage loans that Wells Fargo services, including the process by which employees of Wells Fargo enter information into those systems. CP 1580.

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<sup>15</sup> One attachment to McNeal's declaration was a true and correct copy of a previously filed declaration by another individual in the first lawsuit Ames filed, which also established the requirements for business records. Ames did not take issue with that declaration in her opening brief. This was not a business record, but a separate declaration.

McNeal testified that he had personal knowledge of the facts set forth in his declaration, or the facts set forth were based upon his review of Wells Fargo business records. CP 1580–81. The business records were records made by him, or created by qualified Wells Fargo representatives with knowledge of the events and information described therein, at or near the time of the act, condition or event described therein, and which records are made, kept, and relied upon by Wells Fargo in the ordinary course of its regularly conducted business activities. CP 1580–81. It was the regular practice of Wells Fargo to create and maintain such business records. *Id.* In short, McNeal’s testimony is a textbook example of the business records exception to the hearsay rule.

Business records of regularly conducted activity are an exception to the hearsay rule. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799, 803 (2005). Such records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify. *Ziegler*, 114 Wn.2d at 538 (citing *State v. Rutherford*, 66 Wn.2d 851, 405 P.2d 719 (1965)). The trial court is not required to examine the person who actually made a record to admit the record under the business record exception. *State v. Iverson*, 126 Wn. App. at 337–38 (citing *Cantrill v. Am. Mail Line, Ltd.*, 42 Wn.2d 590, 607–08, 257 P.2d 179, 189 (1953)).

Testimony by one who has custody of the record as a regular part of his work will be sufficient to introduce the record. *Iverson*, 126 Wn. App.

at 338 (citing *Cantrill*, 42 Wn.2d at 608). The statute's purpose is to permit the admission in evidence of systematically entered records made in the usual course of business without the necessity of identifying, locating, and producing as witnesses each individual who made the original entries in the records. *Bavand v. OneWest Bank, FSB*, 196 Wash. App. 813, 826, 385 P.3d 233, 240 (2016); *City of Seattle v. Heath*, 10 Wn. App. 949, 955, 520 P.2d 1392, 1396 (1974). No particular mode or record form is required. *Id.*

RCW 5.45.020 moreover provides that, "A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Here, Ames asserts that McNeal's declaration was not admissible for three equally unavailing reasons. She says that McNeal personally did not oversee the duties of the individuals who made the records, he did not oversee the operations or oversee the record maintenance, and the records were not "certified." (AOB 32.) But Washington's business records act does not require any of these. McNeal's declaration satisfied Washington's business records rule. The trial court did not abuse its discretion.

The declaration of Aaron Crowe in support of the summary judgment motion was likewise material and competent. He testified that he had custody and control of the files and records of Nationwide, which were kept in the ordinary course of business, by people who had a duty to make such records, and received by Nationwide in the ordinary course of business. The records were made at or near the time of the occurrence of the events that they recorded. CP 1555–79. He had personally reviewed Nationwide’s file and was familiar with the documents and other information contained in it. CP 1556. He attached a variety of exhibits that established the location, time, conduct, and results of the trustee’s sale that Nationwide called for QLS, the foreclosure trustee. CP 1559.

Ames asserts the same three issues with the Crowe declaration, arguing that Crowe does not say he supervises the “input of any data upon which the affidavit is based.” AOB 30. Ames also said Crowe did not oversee any of the individuals who made the records or ensure the information was accurately entered. AOB 30–31. She again claims the records were not “certified.” But none of the foregoing is required to qualify as a business record under Washington law. The trial court did not abuse its discretion by considering the Crowe declaration.

Gwendolyn Wall also submitted a declaration in support of HSBC’s summary judgment motion. CP 1849–1918. Based on her personal knowledge, Wall declared that she was a paralegal with the law firm that

represented Wells Fargo, and that she actually produced documents in discovery. She identified the prior appeal and the Court's decision in that appeal, which were court records, not business records. She listed the dates she produced documents, the number of produced documents and the total pages produced—4,041 pages. CP 1850. Her declaration regarding the production of documents in response to Ames's discovery was based on her personal knowledge. She likewise described the documents that were produced in discovery. CP 1850.

Ames asserts the same boilerplate challenge to Wall's declaration as she did to the McNeal and Crowe declarations, claiming that Wall does not qualify as a record custodian pursuant to RCW 5.45.020. The business records statute, however, is inapplicable to Wall's declaration.<sup>16</sup>

**E. The trial court correctly granted HSBC's motion for summary judgment and dismissed Ames's claims**

Ames did not address most of the arguments that HSBC made in its summary judgment motion—either in the trial court or on appeal. CP 2191–2219. The court in *Holder v. City of Vancouver*, 136 Wash. App. 104, 107, 147 P.3d 641, 643 (2006), held: We do “not consider issues apparently abandoned at trial and clearly abandoned” on appeal. *Seattle First-Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d

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<sup>16</sup> To the extent that Ames challenges Wall's declaration because it attaches court records from the other lawsuits, this information is likewise contained in David Spellman's declaration to which she assigned no error. CP 1753–1848.

1308, 1317 (1978). A party abandons an issue on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148, 1149 (1977); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206, 207 (1974) (holding that it was evident appellant had abandoned a claim on appeal because she failed to include argument or cites to authority on the issue in her opening brief).

Ames has never contested, let alone addressed, the trial court and appellate court's previous determination that her claims to set aside the completed trustee's sale were waived because she failed to restrain the sale. Nor did Ames contest the statute of limitations issue - that her remaining claims were time-barred by the two-year statute of limitations in the Deeds of Trust Act. RCW 61.24.127. This Court can affirm the trial court's summary judgment ruling on that basis alone.

1. ***Ames's claims to set aside the trustee's sale were barred by res judicata and collateral estoppel***

Both res judicata and collateral estoppel bar Ames's claims to set aside the completed trustee's sale. In her defense to HSBC's prior unlawful detainer proceeding, Ames claimed that several defects in the nonjudicial foreclosure made the trustee's sale void. CP 1816-19. Because Ames failed to restrain the trustee's sale, the superior court held her claims were

waived. This Court affirmed. Ames then tried to assert the identical claims all over again in this action.

Res judicata ensures the finality of decisions. A final judgment on the merits bars a party like Ames or her privies from re-litigating issues that she actually raised or could have raised in her prior action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

In Washington, res judicata bars a subsequent action on the same claims when a prior judgment embraces “concurrence” of four “identities”: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons against whom the claim is made. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978).

In determining whether two causes of action are the same, the following criteria are examined: (1) whether the prosecution of the later action would impair the rights established in the earlier action, (2) whether the evidence in both actions is substantially the same, (3) whether an infringement of the same right is alleged in both actions, and (4) whether the actions arise out of the same nucleus of facts. *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474, 477 (1999); *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 328, 237 P.3d 316, 329 (2010).

Similarly, collateral estoppel bars re-litigation of an issue in a later proceeding involving the same parties. *Christensen*, 152 Wn.2d at 306.

Collateral estoppel promotes judicial economy and prevents inconvenience or harassment of parties. *Schibel v. Eymann*, 189 Wash. 2d 93, 99, 399 P.3d 1129, 1132 (2017) (citing *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782, 788 (1998)). The doctrine provides finality, shielding parties and courts from having to devote resources to repetitive litigation. *Id.* at 307. It precludes relitigation of issues that were actually litigated and necessary to the final determination in the earlier proceeding. *Id.* (citing *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858, 860 (1987)).

For collateral estoppel to apply, the party seeking it must show (1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice. *Schibel, supra*, 189 Wash. 2d at 99.

Ames cannot re-litigate her claims to set aside the trustee's sale, because she already litigated them to finality, unsuccessfully, in the prior action. The Court of Appeals already held in the appeal of Ames's unlawful detainer action that where a property owner has notice of a trustee's sale and does not obtain injunctive relief enjoining the sale, she waives her right to contest the validity of the trustee's sale or the trustee's deed. CP 1847–48. The Court determined Ames waived her opportunity to invali-

date the sale or trustee's deed, and that her appeal was clearly without merit. *Id.* Despite this ruling, Ames re-filed claims to set aside the sale.

In the trial court, Ames neither opposed nor even addressed the affirmative defenses of res judicata or collateral estoppel in response to the summary judgment motion. Nor does she do so on appeal. Ames must inform the trial court of the rules of law she wishes the court to apply and afford the court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983). This Court may decline to consider an issue inadequately argued below. *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36–37, 42 P.3d 1265 1268–69 (2002).

Res judicata and collateral estoppel squarely bar Ames's claims to set aside the foreclosure sale.

## **2. Ames's claims are likewise barred by waiver**

Ames also never opposed the waiver defense in her opposition to HSBC's motion for summary judgment. CP 2191–2219.

Four of her seven claims were waived by failing to restrain the trustee's sale. The Deeds of Trust Act provides that objections to the trustee's sale must be raised before the sale, or they may be deemed waived. RCW 61.24.040(1) (f) (IX).

The Washington Supreme Court recently affirmed the waiver principle, which prohibits challenges to the validity and finality of a completed sale. *Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013) (citing *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 223 (2008), and *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003)). The Court in *Frizzell* relied upon RCW 61.24.040(1) (f) (IX), which provides: “Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130.”

Waiver occurs when a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Frizzell*, 179 Wn.2d at 306–307 (internal citations omitted).

In *Frizzell*, the borrower obtained a preliminary injunction enjoining the sale, but the injunction was conditioned upon making payment into the court registry. *Id.* at 305. When the borrower failed to make her payment, the trustee proceeded with the foreclosure, and conducted the trustee’s sale. *Id.* The Supreme Court held that even when an order to enjoin the sale is sought, ignoring the “conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless.” *Id.* at 308. The Court held that *Frizzell* could have paid the sum into the court to

enjoin the sale, made a motion for reconsideration, or appealed the order, all of which she failed to do. *Id.* at 309. The Court held that the borrower waived her claims to invalidate the sale. *Id.* at 307 and 309.

In 2009, the Deeds of Trust Act was amended to permit certain claims for damages to be brought post-sale. *Merry v. NW. Tr. Servs. Inc.*, 188 Wn. App. 174, 194, 352 P.3d 830, 839 (2015). Four damage claims are not waived, and are instead permitted after a completed trustee's sale even if the sale was never restrained. RCW 61.24.127 provides:

Failure to bring civil action to enjoin foreclosure — Not a waiver of claims.

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026.

Ames's post-sale causes of action to quiet title (first), for conversion (third), civil conspiracy (sixth), and for declaratory relief (seventh) were therefore waived under *Frizzell* and the Deeds of Trust Act. Ames's seventh cause of action was for declaratory relief to set aside a prior summary judgment order dismissing claims against QLS due to alleged fraud. If this

claim did survive waiver under the DTA, then it fails for the reasons set forth below.

Ames's causes of action were based on the following facts that she alleged that she knew or could have known before the November 22, 2013 foreclosure sale: that she entered into a loan modification and was induced to default on her loan in 2011; that the assignment of the deed of trust recorded on December 8, 2011 was invalid because the person who executed it lacked authority to sign it; that the appointment of the successor trustee recorded on March 26, 2012 was invalid; that the Notice of Trustee's Sale recorded on April 8, 2013 was discontinued on April 9, 2013; HSBC was not licensed; and the Note (a copy of which Ames attached to her complaint) was "forged" because her initials were removed from it.

On August 5, 2013, four days before the scheduled sale, Ames filed a complaint requesting injunctive relief. CP 1929. But she failed to obtain an order restraining the trustee's sale. She had actual or constructive knowledge of her claims. Her four causes of action, all premised on her challenge to the validity of the trustee's sale, were barred by waiver. She never addressed the defense. The trial court correctly dismissed her claims.

**3. Her remaining claims for failure of the trustee to materially comply with the DTA, for fraud and misrepresentation were equally time-barred**

Ames's remaining claims for failure of the trustee to materially comply with the Deeds of Trust Act, and for fraud and misrepresentation, may be brought post-sale, but only within two years from the date of the trustee's sale. RCW 61.24.127(2) (a). These claims were untimely. She never addressed this issue in the trial court. She likewise fails to address it on appeal.

**4. Ames failed to establish fraud in connection with the notice of trustee's sale and the assignment of the deed of trust**

In addition to Ames's fraud claim being barred by the time limitation provided under the Deeds of Trust Act, Ames also failed to establish the necessary elements of fraud over the foreclosure trustee's conduct.

The fraud claim, Ames says, is based on her allegation that the trustee discontinued the sale after it was scheduled, and that the Assignment of the Deed of Trust was invalid because it was executed without authority. CP 17–19. Ames requested that the order granting summary judgment for QLS in the first lawsuit be vacated due to this alleged fraud. *Id.*

There are nine essential elements to a fraud claim: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it should be acted upon by plain-

tiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block*, 130 Wash. 2d 486, 505, 925 P.2d 194, 204 (1996). If the facts pleaded by plaintiff do not establish each of these conjunctive elements, then there is no fraud claim.

Ames neither pleaded nor established in response to the summary judgment motion any of the elements necessary for a fraud claim. The trustee discontinued an earlier notice of trustee's sale recorded in December 2012 (Footnote 2, *ante*), not the operative notice that was recorded in April 2013, which set the sale for August 2013.

Since the discontinuance addressed an earlier notice of trustee's sale, there was no representation that was ever made, that was false, by a speaker with knowledge of its falsity. Ames was also not ignorant of any claimed falsity — in fact, she filed her first action to restrain the August 2013 sale four days before the sale. CP 1929, 1757. She also did not establish that she had relied on the truth of a representation that the sale had been canceled. She did not establish she had any right to rely on it, nor that she suffered any damages.

She also established no fraud concerning assignment of the deed of trust. On December 6, 2011, an assignment was executed by MERS as nominee for Sierra Pacific, and its successors and assigns. CP 1731. It as-

signed the beneficial interest in the deed of trust to HSBC. *Id.* The assignment was recorded on December 8, 2011. *Id.*

Like Ames here, the borrowers in *Wilson* alleged that an assignment of a deed of trust by MERS was fraudulent because, they said, it lacked authority to transfer the deed of trust. *Wilson v. Bank of Am., N.A.*, No. C12-1532JLR, 2013 U.S. Dist. LEXIS 9814, at \*16–17 (W.D. Wash. Jan. 23, 2013). According to *Wilson*, the defendants colluded to undermine the chain of title, and they knew that the loan’s securitization would not result in a clear chain of title.

Plaintiffs failed to plead that the defendants knowingly made a false misrepresentation in the assignment, the *Wilson* court held. And even if they did, the court continued, the plaintiffs also could not, as a matter of law, show they relied upon the defendants’ representations to their detriment. *Id.* The court determined that the borrowers could not show that the assignment was the proximate cause of their alleged damages, as they did not allege they would have taken any alternate course but for the fraud. *Id.* at 18.

No damages flowed from the assignment: “They do not allege the Assignment caused them to enter into the Loan, nor do they allege it caused them to default on the loan. To the extent the Wilsons are faced with the threat of foreclosure, that threat results from their own default, not from the alleged misrepresentation.” *Id.* at 19.

Ames's fraud claims regarding the assignment of the deed of trust fail for the same reasons. Her claims are not only time barred, they also lack necessary elements.

**5. *Ames never disputed the material provisions of the note and it was manifestly enforceable***

Ames's forgery claims also fail as a matter of law. Even if Ames's initials do not appear on each page of the Note, the Note was still enforceable because Ames never disputed her signature. The court in *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wash. App. 318, 387 P.3d 1139 (2016), discussed the applicable standards to challenge the originality of a note, holding that a note is original if it contains the original signature of the maker. *Id.*, 197 Wash. App. at 332. Relying upon RCW 62A.3-308(a), the court held that the validity of a signature is admitted unless specifically denied in the pleadings. *Id.* Here, Ames repeatedly claimed the Note that was produced was missing her initials, but she critically never disputed that she signed the Note, nor did she dispute a single term of the Note, including the principal, interest, and repayment obligations. AOB 23, 37, CP 724, RP 30–31, 47, 58, 93, 109, 115, 116, 118, 31:3-5, 47:17-19, 93:5-8, 95:19–22.

The court in *Bucci* further held that, if the validity of the signature is admitted, then so long as the party producing the instrument is the “holder” of the instrument under RCW 62A.3-301, that party is entitled to payment unless the borrower proves a defense or claim in recoupment. *Id.* at

332–33. Here, Ames did not dispute her signature, and HSBC was the holder. CP 1634. Accordingly, Ames’s claims relating to the Note fail.

6. ***Ames’s quiet title claim fails because HSBC was the beneficiary of the deed of trust as MERS’s assignee***

Under Washington law, the security instrument follows the Note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash.2d 83, 104, 285 P.3d 34, 44 (2012). The *Bavand* court explained: “In *Bain*, the supreme court stated in its discussion regarding MERS that the Deeds of Trust Act “contemplates that the security instrument will follow the note, not the other way around.” This statement is consistent with well settled law. Commentators have stated that the “transfer of the [note] alone will carry the [deed of trust] along with it.” Other commentators have elaborated, stating:

[B]etween the parties to a transfer, the assignment or negotiation of the note itself is all that must be done. It is unnecessary to have any separate document purporting to transfer or assign the mortgage on the real estate, for it will follow the obligation automatically.

...

The purported assignment of a nonexistent beneficial interest in *Bavand*’s deed of trust is immaterial.

*Bavand*, 196 Wash. App. at 843 (2016) (internal citations omitted).

Ames sued to quiet title, free and clear of the Deed of Trust, asserting that the Assignment of the Deed of Trust was invalid because the individual who executed that Assignment lacked capacity to do so. CP 4–5, 8–11, 13, 14, 16, 17, 19, 20. Since HSBC held the note, it was the

beneficiary of the Deed of Trust, *regardless* of whether there was any assignment. Accordingly, the foreclosure was valid even if the Assignment was not executed at all.

What's more, when a challenge is made to the assignment of a deed of trust, a party is not entitled to quiet title free and clear of that interest unless the party can establish that she paid the loan in full. In *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wash. App. 294, 320–21, 308 P.3d 716, 728 (2013), the borrower, Walker, alleged that because MERS could not be the beneficiary of the deed of trust, the interest in the deed of trust was “segregated” from the Note, so that the deed of trust was no longer valid. The beneficiary and the trustee argued that he must allege payment of the loan to sufficiently plead a claim to quiet title. The court affirmed the dismissal, noting that Walker did not allege a claim to quiet title based on the strength of his own title. *Id.* 176 Wash. App. at 322–23. *See Evans v. BAC Home Loans Servicing LP*, No. C10-0656 RSM, 2010 U.S. Dist. LEXIS 136282, at \*10 (W.D. Wash. Dec. 10, 2010)(Court held that borrowers' claims that creditor failed to establish evidence of debt did not warrant quiet title in borrowers' favor where borrowers did not establish that they satisfied their obligations under the Deed of Trust).

The trial court correctly dismissed Ames' quiet title claim. The assignment was not required, and a defect in the assignment did not entitle

Ames to quiet title free and clear of the deed of trust when she never satisfied the debt in full.

**7. *The foreclosure itself was not barred by the statute of limitations***

Ames' quiet title claim based upon the statute of limitations likewise fails. HSBC commenced the foreclosure and issued a Notice of Default in September 2012, because Ames failed to make her payment in September 2011, and each month thereafter. CP 1617–29. The foreclosure was well within the statute of limitations.

An action on a contract or agreement in writing must be commenced within six years. RCW 4.16.040. A deed of trust foreclosure remedy is therefore subject to a six-year statute of limitations. *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 927, 378 P.3d 272, 276 (2016). The court in *Edmundson* also held that a notice of default commences an action. *Id.* 194 Wn. App. at 930.

**8. *QLS's appointment as successor trustee was indisputably valid***

As noted earlier, Ames's claims regarding the validity of the appointment of the successor trustee were waived because she did not restrain the trustee's sale. These claims also failed because the QLS's appointment was valid—HSBC's attorney-in-fact, Wells Fargo Bank, N.A., executed the Appointment on behalf of HSBC. CP 1614–15. Noteholders can have

their interests represented by agents. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash. 2d 83, 106, 285 P.3d 34, 45 (2012).

“[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *Id.* (quoting *Moss v. Vadman*, 77 Wn.2d 396, 402–03, 463 P.2d 159, 164 (1970)). “[A]gency requires a specific principal that is accountable for the acts of its agent.” *Id.* at 107.

HSBC held the Note, and Wells Fargo was the attorney-in-fact for HSBC. CP 1614–15, 1634. Ames has never addressed or disputed these facts, but simply argued that Wells Fargo executed the Appointment of Successor Trustee when it was not the beneficiary. AOB 38–40. Ames has never provided authority or argument in response to the fact that Wells Fargo could act for HSBC in appointing the successor trustee. Accordingly, the trial court did not err when it granted HSBC’s motion for summary judgment.

**9. *No registration was required for HSBC to enforce Ames’s debt in Washington***

Ames waived her claims that HSBC was required to register in Washington to conduct business because she failed to restrain the trustee’s sale. They were also time barred because she did not file them before the statute of limitations expired.

HSBC established it held and owned the Note and was the beneficiary of the Deed of Trust. It was not required to be registered to do business in Washington. RCW 23.95.520(1) identifies activities that do not constitute doing business in the state, which include: “(a) Maintaining, defending...an action or proceeding; ... (g) Creating or acquiring indebtedness, mortgages, or security interests in property; (h) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts; ... (j) Owning, without more, property[.]”

Former RCW 23B.15.010(2) (a) and (h), in effect during the 2013 foreclosure here, also provided that doing business does not include maintaining or defending suits or collecting debts.

The court in *Deutsche Bank Nat'l Tr. Co. v. Shields*, No. 75044-5-I, 2017 Wash. App. LEXIS 2288, at \*6 (Ct. App. Oct. 2, 2017) (unpub'd),<sup>17</sup> rejected a similar claim made regarding the trustee of a securitized trust that held the beneficial interest in a deed of trust. The court held that RCW 23.95.520(1) (h) provides that enforcing mortgages or security interests in property does not constitute doing business requiring registration of a foreign business entity.

Accordingly, the trial court did not err in dismissing these claims with prejudice.

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<sup>17</sup> Unpublished opinions of the Court of Appeals, while not binding, may be accorded the persuasive value the Court deems appropriate. GR 14.1.

10. *After extensive discovery, Ames was not entitled to a continuance of summary judgment motion for further unspecified discovery*

The trial court, as noted earlier, conducted five hearings to discern Ames's issues with discovery. It denied her "fifth motion to compel" and "sixth motion to compel," ultimately deciding that HSBC adequately responded to Ames's discovery. CP 1307–27, 1308, 1328–1524, RP 113:2–21, 114:3–25. Ames moved to continue HSBC's motion for summary judgment so that she could conduct the discovery at issue in her Sixth Motion to Compel. CP 2161–63, 2158–60. In denying Ames's "Sixth Motion to Compel," the court ruled that although Ames disputed the validity and/or accuracy of HSBC's discovery responses, it appeared that HSBC adequately responded to the Plaintiff's discovery requests. CP 2329–30. No order on Ames's motion to continue was entered, but the trial court granted HSBC's summary judgment. CP 2327–28.

Regardless of the trial court's rulings denying the motions to compel, Ames was not entitled to a continuance of the summary judgment motion. Under CR 56(f), a court may order a continuance to allow a party opposing summary judgment to conduct discovery. The trial court's decision is reviewed for an abuse of discretion. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667, 670 (2007).

Courts may deny a continuance motion when, as here (1) the requesting party does not offer a good reason for the delay in obtaining the

desired evidence; (2) *the requesting party does not state what evidence would be established through the additional discovery*; or (3) *the desired evidence will not raise a genuine issue of material fact*. *Bavand v. OneWest Bank, FSB*, 196 Wash. App. 813, 822, 385 P.3d 233, 238 (2016), italics added.

Here, Ames was not able to say how any evidence she sought might raise a genuine issue of material fact. She attempts to identify five discovery issues in her opening brief (AOB 27–32), but none of them would have created any genuine issue of fact.

Ames is like the plaintiff in *Bavand* who commenced an action challenging a nonjudicial foreclosure of her deed of trust after defaulting on her loan. *Bavand*, 196 Wash. App. 813, 823 (2016). *Bavand* sought to continue the lender’s motion for summary judgment so that she could conduct discovery. She said she was entitled to discovery of documents related to every owner and holder of her note and deed of trust, and was entitled to the original documents. *Id.* at 822. The trial court disagreed, denying her motion. *Id.* at 821.

The Court of Appeal affirmed. *Id.* at 821. *Bavand* had failed to establish that a continuance would produce any discovery that would show the existence of a genuine issue of fact. *Id.* at 823. The note *owner’s* identity is immaterial to the litigation challenging a nonjudicial foreclosure, while the holder is material to enforcement of the delinquent

note and deed of trust. *Id.* The record established OneWest was the holder. *Id.* All Bavand had offered was speculative, argumentative assertions that unresolved factual issues remained concerning the noteholder's identity. *Id.* But unsupported assertions were not sufficient to avoid summary judgment. *Id.*

Likewise, Ames argues here that she was entitled to discovery, none of which could revive claims barred by res judicata, collateral estoppel, and waiver resulting from failing to restrain the trustee's sale. Since she filed her action past the two-year limitation in RCW 61.24.127, her claims were also time-barred.

The discovery Ames identified would not have created a material fact as to any other defenses asserted by HSBC. Ames sought discovery regarding the authority of the individual who executed the Assignment of the Deed of Trust. CP 527–707. No assignment, however, is required to commence and complete a nonjudicial foreclosure, and her claims as to its validity were thus immaterial.

Other issues Ames raised regarding discovery responses were equally immaterial. Ames said that unknown and unidentified documents were not produced because a confidentiality order was entered but nothing was produced marked confidential (CP 1972); multiple duplicates of documents were produced (CP 1974); the interrogatory responses were not verified under oath (CP 2193); and HSBC did not identify which

documents were in response to specific requests. *Id.* None of her assertions establishes any basis for a continuance of the motion for summary judgment, because none create a material issue of fact or possible defense in response to the motion.

Even assuming for sake of argument that the trial court had erred in denying her motions to compel, the purported discovery deficiencies Ames notes did not possibly warrant continuing the motion for summary judgment. Ames has demonstrated no prejudicial error on appeal.

Finally, the trial court did not err when it denied Ames's motion to amend her complaint after it granted HSBC's motion for summary judgment.

On January 16, 2018, more than two years after Ames filed her Complaint in this action, after the trial court had heard HSBC's motion for summary judgment and while the court had HSBC's motion under advisement, Ames filed a motion to amend her complaint. CP 2253–58. She proposed naming Wells Fargo again, which she had done in 2013. *Id.* On February 6, 2018, the trial court granted HSBC's summary judgment motion. CP 2327–28. The court sent the summary judgment order to the parties with an enclosure letter advising the parties that Ames's motion to amend was stricken. CP 2331–32, 2505. Ames did not appeal this decision. RAP 2.4(b).

The trial court did not abuse its discretion when it ordered the twelfth hour motion to amend stricken. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316, 319 (1999); see *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wash. App. 736, 744–745, 577 P.2d 980, 985 (1978) (affirming trial court’s refusal to permit defendant to amend answer after summary judgment argument).

## V. CONCLUSION

Ames brought this untimely action asserting claims that were already litigated to finality. Judgment against her was already affirmed once by this Court.

She has failed to demonstrate reversible error on this record under the legal standards correctly applied. The trial court correctly granted HSBC’s motion for summary judgment. No prejudicial error has been shown on appeal. The trial court’s judgment should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of August 2018.

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**CERTIFICATE OF SERVICE**

I, Tamorah Burt, certify that on this 28th day of August 2018, I caused the foregoing Respondent's Brief of HSBC Bank USA National Association to be delivered to the following parties in the manner indicated below:

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Signed this 28th day of August 2018 at Seattle, Washington.

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