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**IN THE UTAH COURT OF APPEALS**

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EMIGRATION IMPROVEMENT  
DISTRICT

Petitioner / Appellee,  
vs.

UTAH STATE RECORDS COMMITTEE

Respondent

and

MARK CHRISTOPHER TRACY D/B/A  
EMIGRATION CANYON HOME  
OWNERS ASSOCIATION,

Respondent / Appellant.

**Court of Appeals No. 20220525-CA**

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**BRIEF OF APPELLEE  
EMIGRATION IMPROVEMENT DISTRICT**

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## INTRODUCTION

This matter involves a GRAMA request for fire flow test results for the water system operated by the Emigration Improvement District (“**EID**”). EID is a small local district that has authority to provide water and sewer service to residents within Emigration Canyon. EID contracts with Eric Hawkes (“**Mr. Hawkes**”) to perform management and accounting services for EID through Mr. Hawkes’ company, Simplifi Company (“**Simplifi**”). Mrs. Hawkes is the wife of Mr. Hawkes, and Mrs. Hawkes does not have any direct involvement with EID.

In this appeal, appellant Mark Christopher Tracy (“**Mr. Tracy**”) does not dispute that Judge Scott was correct to grant EID’s *Motion for Summary Judgment* because the GRAMA request violated a previous order from Judge Kouris prohibiting Mr. Tracy from including Simplifi or Mrs. Hawkes in the GRAMA request. Instead, the appeal asserts four procedural or technical issues, none of which have any merit.

## ISSUES PRESENTED BY THE APPEAL

- I. Is Failure to File Notice of Intent to Appeal is a Jurisdictional Bar to De Novo Judicial Review of an Order of the Utah State Records Committee.
- II. Did Mr. Tracy Waive Personal Service.
- III. Does the District Court Lack Jurisdiction to Grant a Motion for Summary Judgment Not Served on a Necessary Party to the Proceedings.
- IV. Did the District Court Abused its Discretion When it Disregarded a Request for Joinder of EID’s Public Records Office.

## SUMMARY OF THE ARGUMENT

Mr. Tracy asserts that the Court did not have jurisdiction to hear the matter or jurisdiction to grant the motion for summary judgment because: (1) EID did not file a notice of intent to appeal with the State Records Committee (“SRC”); (2) EID did not personally serve Mr. Tracy under Utah R. Civ. P. 4; or (3) EID did not serve the SRC with the Motion for Summary Judgment. However, none of these arguments have merit. First, the notice of intent to file an appeal is simply a courtesy notice to the SRC, and failure to provide the notice of intent to appeal to the SRC does not deprive the Court of jurisdiction. Second, Mr. Tracy waived personal service under Rule 4 by voluntarily appearing in this matter. Third, the SRC was served with a copy of the *Motion for Summary Judgment* and simply did not respond because the SRC typically does not take an active role in appeals from SRC decisions.

Likewise, Mr. Tracy’s assertion that the Court abused its discretion by not granting Mr. Tracy’s cursory argument in his *Memorandum Opposing Motion for Summary Judgment* that the Court should order EID’s public records office, Mr. Hawkes, to enter an appearance in this matter is completely without merit.<sup>1</sup> Mr. Hawkes, Simplifi or AES are clearly not a necessary party to this action, particularly since the Court

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<sup>1</sup> In his Appeal Brief, Mr. Tracy at times argues the records are purportedly in the custody of Simplifi and at times argues they are in the custody of Mr. Hawkes and Mrs. Hawkes. Mr. Tracy’s Appeal Brief does not make any mention of AES (“Aqua Environmental Services”), although Mr. Tracy’s *Memorandum Opposing Motion for Summary Judgment* requested that AES should also be joined. R. 113.

granted EID's *Motion for Summary Judgment* based on the Court's finding that the GRAMA request violated a previous order from Judge Kouris.

## ARGUMENT

### **I. Failure to File Notice of Intent to Appeal is Not a Jurisdictional Bar.**

The Court does not lack jurisdiction because the Petition was filed within 30 days of the SRC decision. Utah Code Ann. § 63G-2-404(1)(a) states: "A petition for judicial review of an order or decision, as allowed under this part or in Subsection 63G-2-701(6)(a)(ii), shall be filed no later than 30 days after the date of the order or decision." It is undisputed that EID timely filed the petition for judicial review and provide the SRC and Mr. Tracy with a courtesy copy of the Petition shortly after filing.

In contrast, a notice of intent to file an appeal under Utah Code Ann. § 63G-2-403(15)(a) simply informs the SRC that the party "intends" to appeal so that the SRC doesn't take adverse action.<sup>2</sup> The notice of intent to file an appeal is simply a courtesy notice and is not jurisdictional. This is supported by the SRC's own *Decision and Order*. At the end of the *Decision and Order*, the SRC includes two sections. The first section is the "Right to Appeal" which details the procedure to appeal. R. 57.

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<sup>2</sup> The SRC does not have a form for the notice of intent to appeal or a procedure to file the notice of intent to appeal, so a governmental entity can comply by just sending an email to the SRC secretary stating that it intends to appeal. However, because of the informal nature of the notice of intent to appeal, if the SRC did not receive a notice of compliance or notice of intent to appeal, the SRC secretary would typically just reach out to the governmental entity to determine the status prior to the SRC taking any action.

The second section is the “Penalty Notice.” *Id.* The first sentence of the Penalty Notice section states, in part: “if the Committee orders the governmental entity to produce a record and no appeal is filed, the governmental entity shall comply with this Order.” *Id.* (emphasis added). Thus, EID was not required to produce any records unless EID had not timely filed an appeal. The penalty notice section further states: “If the governmental entity ordered to produce records fails to file a notice of compliance or a notice of intent to appeal, the Committee may do either or both of the following . . . .” *Id.* (emphasis added). Again, in this case, EID timely filed the appeal and provided a courtesy copy of the actual filed Petition to the SRC prior to the SRC meeting or taking any action.<sup>3</sup>

In summary, the notice of intent to appeal is simply a notice to the SRC that the party may appeal so the SRC doesn’t take any action within that thirty-day period, and failure to provide the notice to the SRC within thirty days after the decision by the SRC does not bar the Court from having jurisdiction over a timely filed appeal.

## **II. Mr. Tracy Waived Any Argument for Lack of Personal Service.**

Lack of personal service of process may, of course, be waived. *Pease v. Industrial Com'n of Utah*, 694 P.2d 613 (1984), *citing Sorensen v. Sorensen*, 18 Utah P.2d 102, 417

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<sup>3</sup> The SRC only meets once a month. Therefore, the notice of intent to appeal is really only necessary if the SRC has ordered documents to be produced and the SRC is meeting prior to the expiration of the 30-day appeal period. Otherwise, providing the SRC with a copy of the actual filed appeal prior to its next meeting, which EID did in this case, would obviously be better than just providing a notice of intent to appeal.



P.2d 118 (1966). Even where a party has not been adequately served with process, a defect in service can be waived if the party makes a general appearance. *See Chen v. Stewart*, 2004 UT 82, ¶¶ 66, 70, 100 P.3d 1177; *see also Barber v. Calder*, 522 P.2d 700, 702 n. 4 (Utah 1974). Utah courts have recognized that "an appearance by the defendant for any purpose except to object to personal jurisdiction constitutes a general appearance." *Barlow v. Cappo*, 821 P.2d 465, 466 (Utah Ct.App.1991) (emphasis omitted); *see also RM Lifestyles, LLC v. Ellison*, 2011 UT App 290, ¶ 20, 263 P.3d 1152 (noting that defendants who "argue[d] the merits ... waiv[ed] any argument related to lack of personal jurisdiction").

In this case, the Petition was filed on September 21, 2021. The courtesy copy of the Petition was served on Mr. Tracy and the SRC via email. On November 21, 2021, prior to being personally served, Mr. Tracy filed *Respondent Mark Christopher Tracy's Motion to Dismiss Petition for Judicial Review of the Decision and Order of the Utah State Records Committee* (the "Motion to Dismiss"). R. 44.<sup>4</sup> Mr. Tracy noted in footnote 1 of the Motion to Dismiss that he had not been served with the Petition under Utah R. Civ. P. 4(d), but Mr. Tracy did not argue that the Court did not have jurisdiction. Instead, Mr. Tracy argued that the Court lacked jurisdiction based on EID's failure to timely file a notice of appeal with the SRC; that the case should be dismissed for failure to state a

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<sup>4</sup> Mr. Tracy filed the appeal with the SRC and prevailed before the SRC. Thus, it is certainly not unexpected that Mr. Tracy would voluntarily submit to the jurisdiction of the Court, as opposed to waiting to get personally served, to expedite the appeal process.

claim; and that Mr. Tracy should be awarded attorney fees.

On February 4, 2021, Mr. Tracy appeared before the Court and argued the Motion to Dismiss. Mr. Tracy prevailed on his argument that EID was not entitled to require Mr. Tracy to pay past due and owing attorney fees prior to EID responding to the GRAMA request. R. 81, ¶ 1. On March 24, 2022, Mr. Tracy filed his *Memorandum Opposing Motion for Summary Judgment*, again arguing the merits of the case. R. 106. Mr. Tracy did not argue in his *Memorandum Opposing Motion for Summary Judgment* that the Court lacked jurisdiction because he was not personally served.<sup>5</sup>

Thus, by voluntarily making an appearance and arguing the merits of the case, Mr. Tracy waived any lack of personal service of process.

### **III. The Motion for Summary Judgment Was Served On All the Parties.**

On November 11, 2021, Mr. Paul Tonks filed an *Answer to the Petition for Judicial Review of Decision of the State Records Committee* on behalf of the SRC. Based on the Answer, Mr. Tonks was registered to receive notice of all future filings through the Court's ECF system. Accordingly, Mr. Tonks and the SRC did receive notice and a copy of the *Motion for Summary Judgment* when it was filed. Mr. Tonks also received a copy of Mr. Tracy's *Memorandum Opposing Motion for Summary Judgment*, which presumably would have prompted Mr. Tonks to object to the *Motion for Summary Judgment* if he had not received a copy. R. 115.

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<sup>5</sup> Because this is a de novo review of an appeal to the SRC filed by Mr. Tracy, it is unclear if EID was required to serve Mr. Tracy under Utah R. Civ. P. 4(d) or 5.

The SRC simply did not file a response to either Mr. Tracy's *Motion to Dismiss* or EID's *Motion for Summary Judgment* because the SRC typically does not take an active role in appeals from SRC decisions.

In summary, the SRC was served with all the pleadings and simply chose not to file a response.

**IV. The Court Did Not Err By Denying Mr. Tracy's Argument that Simplifi and AES Were Necessary Parties.**

In EID's *Motion for Summary Judgment*, EID argued that the Court should grant summary judgment in favor of EID based on Judge Kouris' previous ruling and order finding that the GRAMA Request at issue in this matter directly violated Judge Kouris' decision and order. R. 95-97. Primarily, Judge Kouris had previously found that Mr. Tracy's inclusion of Mrs. Hawkes and Simpli in the GRAMA request at issue in this matter was improper and violated his decision and order. R. 96, 103.

In his response to EID's *Motion for Summary Judgment*, Mr. Tracy essentially ignored EID's arguments, but instead argued that the Court should order Simplifi and AES (Aqua Environmental Services) to enter appearances because they were necessary parties under Utah R. Civ. P. 19(1).<sup>6</sup> The basis of Mr. Tracy's request was his completely unfounded assertion that EID maintains no public records and that Simplifi and AES maintain the requested documents. R. 113. Although EID has never taken the

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<sup>6</sup> Mr. Tracy's entire argument in response to EID's *Motion for Summary Judgment* consisted of essentially four short paragraphs. R. 113.

position that it does not maintain the records in question, even assuming that Simplifi or AES had the records, Judge Scott ruled that the GRAMA request itself was improper because Mr. Tracy violated the order of Judge Kouris by including Simplifi and Mrs. Hawkes in the request. Accordingly, because the form of the GRAMA request was improper and violated Judge Kouris' order, there would have been absolutely no basis or reason for Judge Scott to require the joinder of Simplifi or AES based on Mr. Tracy's position that they may have records responsive to the request.

In summary, the Court's refusal to grant Mr. Tracy's cursory request to order Mr. Hawkes, Simplifi or AES to file appearances in this matter was not an error.

### **CONCLUSION**

The Court should affirm the decision of the District Court.

DATED this 24<sup>th</sup> day of February 2023.

COHNE KINGHORN

*/s/ Jeremy R. Cook*

\_\_\_\_\_  
Jeremy R. Cook

**CERTIFICATE OF COMPLIANCE**

I, Jeremy R. Cook, counsel for Emigration Improvement District, hereby certify that the foregoing Brief of Appellees, complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(g) and contains **2332 words**, excluding the parts of the brief exempted by Utah Rules of Appellate Procedure 24(g)(2). This brief has been prepared using Microsoft Word for Office 365 MSO (16.011929.20708).

I also certify that the foregoing Brief of Appellee complies with the Utah Rule of Appellate Procedure 21(h) and does not contain non-public information.

Dated this 24<sup>th</sup> day of February 2023.

By: /s/ Jeremy R. Cook

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of February 2023, a true and correct copy of the **BRIEF OF APPELLEE EMIGRATION IMPROVEMENT DISTRICT** was served by the CMECF system which will send notice of filing to counsel of record:

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I further certify that on the 24<sup>th</sup> day of February 2023, a true and correct copy of the **BRIEF OF APPELLEE EMIGRATION IMPROVEMENT DISTRICT** was served *via* email and regular U.S. Mail to the following:

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