Case No. 22-4032

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK CHRISTOPHER TRACY d/b/a
EMIGRATION CANYON HOME OWNERS ASSOCIATION,

Plaintiff/Appellant,

v.

SIMPLIFI COMPANY, a Utah corporation; JEREMY RAND COOK, an individual; JENNIFER HAWKES, an individual; ERIC HAWKES, an individual; and DAVID M. BENNION, an individual,

Defendants/Appellees.

Appeal from the United States District Court for the District of Utah, No. 2:21-cv-00444-RJS, the Honorable Robert J. Shelby, Chief District Judge, presiding

Brief of Appellees Simplifi Company, Jeremy Rand Cook, Jennifer Hawkes and Eric Hawkes

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Oral argument not requested

APPELLEES' RULE 26.1(A) CORPORATE DISCLOSURE STATEMENTS

In accordance with Federal Rules of Appellate Procedure 26.1(a), Defendant Simplifi Company hereby declares that it does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

COHNE KINGHORN, P.C.

By: /s/ Jeremy Cook
Jeremy Cook
Attorneys for Simplifi Company

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STATEMENT OF RELATED CASES[1]

In *USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al*., 2:14-cv-00701-JNP, filed in the United States District Court for the District of Utah, the court dismissed plaintiff Mark Christopher Tracy's suit under the Federal False Claims Act. That case spawned six appeals in this Court: case numbers 17-4062; 18-4109; 19-4021; 19-4022; 21-4059; and 21-4143. The first four appeals were resolved as follows:

- *United States ex rel. Tracy v. Emigration Improvement District*, 717 F. App'x 778 (10th Cir. 2017) (affirming order disqualifying plaintiff's counsel but reversing and remanding to reconsider order dismissing case)

- *United States ex. rel. Tracy v. Emigration Improvement Dist.*, 804 F. App'x 905 (10th Cir. 2020) (reversing order dismissing complaint on statute of limitations grounds based on intervening decision and reversing accompanying orders (1) awarding defendants attorneys' fees, but (2) declining to hold plaintiff's counsel jointly and severally liable for fees)

Appeal numbers 21-4059 and 21-4143 remain pending in this Court.

[1] Defendant David M. Bennion has filed a separate brief from the other defendants because his involvement is fundamentally different than the other defendants. However, to comply with 10th Cir. R. 31.3, sections of the separate briefs that address point that apply equally to all defendants are identical in each brief. These sections include: Statement of Related Cases, Jurisdiction Statement, Procedural History, Argument Section I, Argument Section II, and Argument Section III.A. The Court therefore need read these sections in only one of the defendant appellees' briefs.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Utah dismissed plaintiff's complaint with prejudice for lack of subject matter jurisdiction and denied plaintiff leave to amend. R.216–32 (Attachment 2). The district court had jurisdiction under 28 U.S.C. § 1331, to determine whether plaintiff had established standing and therefore invoked its subject matter jurisdiction.

The district court entered its order dismissing the complaint on March 24, 2022. R.223. Plaintiff filed a timely notice of appeal on April 21, 2022. R.234–35. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Mark Christopher Tracy ("Tracy") has a long history of filing frivolous litigation and claims against the Emigration Improvement District ("EID") and individuals associated with EID, including defendants Eric Hawkes, Jennifer Hawkes, Simplifi Company and Jeremy Rand Cook (collectively "EID Defendants").[2] In *USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al.*, 2:14-cv-00701-JNP, which appeal is pending before this Court, the honorable Judge Parrish awarded the defendants attorney's fees based on a finding

[2] The term "EID Defendants" is used only to distinguish Eric Hawkes, Jennifer Hawkes, Simplifi Company and Jeremy Rand Cook from David Bennion, who is represented by separate counsel. Ms. Hawkes has no direct involvement with EID. In the sections that are identical to Mr. Bennion brief, EID Defendants are sometimes referred to as Simplifi Defendants.

that Tracy's actions were both clearly vexatious and brought for the purpose of harassment. R.19. Likewise, in a recent state court case, the honorable Judge Kouris entered an order finding Tracy to a vexatious litigant. R.61-66. Accordingly, Tracy is no longer allowed to file any actions in Utah state court without the permission and approval of the presiding judge of Utah's third district court. *Id.*

In this case, Tracy, who brought the action as Mark Christopher Tracy d/b/a Emigration Canyon Home Owners Association, alleges that he was assigned a "civil rights claim" of a resident in Emigration Canyon named Karen Penske ("Ms. Penske"). The basis of Ms. Penske's claim appears to be that EID wrongfully imposed a fire-hydrant fee on Ms. Penske and other non-LDS residents, and Defendants conspired to only certify delinquent the accounts of residents who were not members of The Church of Jesus Christ of Latter-day Saints ("LDS Church").

However, the Complaint is devoid of any actual facts to support Tracy's claim. Tracy's only evidence of the purported religious discrimination is: (1) sometime in the fall of 2015 defendant Bennion admonished fellow LDS members of their moral obligation to pay fees and costs billed by simplifi during a LDS religious meeting; and (2) the Defendants are all LDS.[3] Clearly, even if defendants were all LDS, a purported statement in a church meeting sometime in 2015 that members of the

[3] In fact, defendant Jeremy R. Cook ("Mr. Cook), who is attorney of record in this matter, is not LDS and has never been LDS.

congregation should pay their water bills, and the defendants being the same religion, does not support a claim that defendants conspired to discriminate against Ms. Penske because she is not LDS.

In reality, the Complaint is just another excuse for Tracy to harass EID and people associated with EID and to air the same grievances against EID that Tracy has alleged in numerous other actions. Because Tracy would not have been allowed to file this action in state court due to the vexatious litigant order, he manufactured a claim of religious discrimination so that he could have some basis for federal court jurisdiction.

Regardless, section 1983 and 1985 civil rights claims are personal injury torts under Utah law and are therefore not assignable. In addition, district court was well within its discretion to deny Tracy's request to amend. Accordingly, this Court should affirm the district court's decision.

STATEMENT OF THE ISSUES

I. Has Appellant forfeited appellate review by inadequately briefing the issues he attempts to raise?

II. Did the district court correctly dismiss the complaint for lack of standing because Appellant attempted to assert civil rights claims he had acquired by assignment?

III. Did Appellant waive and/or forfeit any challenge to the district court's order denying leave to amend the complaint by not objecting below and inadequately briefing the issue on appeal?

IV. Did the district court abuse its discretion in denying Appellant leave to amend his complaint where the court correctly concluded that any amendment would have been futile?

STATEMENT OF THE CASE

Relevant Facts

Tracy alleged that Defendants "act through the Emigration Improvement District (EID), a special service water district created in 1968 by Salt Lake County."[4] R.217. "(1) . . . EID contracts with Defendant Simplifi Corporation to perform management and accounting services, (2) Defendant Jennifer Hawkes is a current officer and director of Simplifi, (3) her spouse, Defendant Eric Lee Hawkes, is the current general manager of EID," and "(4) Defendant Jeremy Cook represents the Hawkes in pending EID-related litigation. R.217. Tracy referred to these defendants "collectively" as the "Simplifi Defendants." R.6. Defendant Bennion, on the other hand, "'is a religious leader and LDS member' with no direct interest in EID or Simplifi." R.217 (quoting R.7, Complaint at ¶ 6).

The Simplifi defendants acted "to unlawfully enrich themselves though the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints Emigration Canyon Ward." R.217.

[4] As the district court observed, "[n]otably, EID is not named as a Defendant in this action." R.217 n.8.

According to Tracy, the Simplifi defendants "began wrongfully imposing and collecting a 'fire-hydrant rental fee' from Emigration Canyon residents who [we]re not LDS members, including longtime resident Karen Penske, and also demanded past due payment from Penske." R217–18. EID certified to Salt Lake County only delinquent water accounts "belonging to 'LDS Nonmembers.'" R.218.

Tracy claimed that EID's operation of its water system contaminated Penske's private well that provides drinking water to her home. R.12, 218. Penske allegedly has an underground right to water "from Emigration Canyon's Twin Creek Aquifer for her private home." R.218. Tracy further alleged that in September 2018, the Emigration Canyon Stream "suffered total depletion." R.12.

As for defendant Bennion, Tracy asserted that Bennion resides in a housing development that the EID services and is an "LDS religious leader and member." R.14. "[S]ometime in the fall of 2015" "during a[n] LDS religious meeting," Tracy alleges, "Bennion admonished fellow LDS members of their 'moral obligation' to pay fees and costs billed by Simplifi Defendants." R.14. "[S]ince November 2014," the Simplifi Defendants allegedly "have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Bishop Bennion." R.14.

Procedural History

This case is the latest in a long series of Tracy's lawsuits over water issues in Emigration Canyon. R.217. Tracy has filed at least one prior action in the federal district court for Utah (2:14-cv-0071), and four prior actions in Utah state court against EID, its officers, and Simplifi. R.19–21, 33–66. The district judge in the prior federal action found Tracy to be a vexatious litigant and ordered him to pay attorney fees and damages for filing a wrongful lien against EID's water rights. R19. The judge in one of Tracy's state cases also found him to be a vexatious litigant and ordered him to pay attorney fees. R61–66.

In this case, Tracy sued through his "'registered dba entity,' the Emigration Canyon Homeowners Association, or ECHO-Association" alleging violations of sections 1983 and 1985 on behalf of Karen Penske. R.5–6. Tracy asserted that Penske "assigned legal right and title to Civil Rights Act claims to The ECHO-Association." R6.

Tracy alleged that the EID contaminated Penske's private well and charged her illegitimate water fees. R.7–15. He further alleged that Simplifi certified to the Salt Lake County Treasurer delinquent accounts of only individuals who were not members of the LDS Church. R13. His complaint sought damages "for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants" as well as "punitive damages." R.15.

Bennion moved to dismiss on the grounds that (1) Tracy lacked standing because civil rights cannot be assigned, (2) the statute of limitations barred Tracy's claims, and (3) Tracy failed to state a plausible claim for relief. R.70–79. The Simplifi defendants likewise moved to dismiss on the grounds that (1) Tracy lacked standing based on a purported assignment of civil rights, and (2) he failed to state a claim for relief under rule 12(b)(6) of the Federal Rules of Civil Procedure. R.17–30. All defendants asked for their attorney fees, and the Simplifi defendants asked the court to declare Tracy a vexatious litigant. R.26–30, 78–79.

Tracy opposed the motions to dismiss but did not move to amend his complaint. R.81–95. Rather, he asked in his opposition for leave to amend because he claimed to own a right in the surface water in the Emigration Canyon stream, and the stream "suffered total depletion in August 2018." R.87.

The magistrate recommended dismissing the compliant for lack of subject-matter jurisdiction because Tracy lacked standing. R.161–64. (Report and Recommendation attached as Attachment 1.) Tracy lacked standing because he was asserting section 1983 and 1985 civil rights claims that had been assigned to him. R.161–64. But those claims are personal injury torts which, under Utah law, are not assignable. R.161–64.

The magistrate also recommended denying leave to amend and dismissing the complaint with prejudice because she concluded that any amendment would be

futile. R.164–65. In her view, Tracy could not successfully amend, because none of his allegations demonstrated that he had valid claims of his own. R.164–65. Finally, the magistrate recommended denying defendants' claims for attorney fees and to declare Tracy a vexatious litigant. R.166–67.

The district court agreed that civil rights were not assignable under Utah law and Tracy therefore lacked standing to assert another's civil rights. R.223–27 (Attachment 2). The district court thus granted the motions to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. R.223–27.

The district court also agreed that the dismissal should be with prejudice because Tracy did not properly object to that portion of the report and recommendation, and the court found no clear error in the magistrate's conclusions that amendment would be futile. R.227.

The district court declined to impose any sanctions on Tracy. R.227–32. Tracy timely appeals. R.234–35.

SUMMARY OF THE ARGUMENT

I. Tracy attempts to brief two issues in a mere six paragraphs on one page. He offers no analysis. Rather, he merely concludes, without any analysis, that the district court erred. That is inadequate, even for a pro se appellant. Tracy has therefore forfeited any appellate review.

II. The district court correctly dismissed the complaint for lack of subject matter jurisdiction because Tracy could not establish standing. State law governs the assignability of federal civil rights claims. Those claims are personal injury torts. And personal injury claims are not assignable in Utah. This rule furthers the purposes of the federal civil rights statutes because those statutes are intended to protect individual rights. Preventing assignment of those claims ensures that the individual whose rights were infringed recovers for that injury.

III. Tracy waived any appellate challenge to the order denying him leave to amend, because he did not specifically object to that portion of the magistrate judge's recommendation. He has also inadequately briefed the issue on appeal, forfeiting any appellate review. Regardless, the district court acted well within its discretion in denying leave to amend because it correctly concluded that any amendment would have been futile.

ARGUMENT

I. Tracy has forfeited appellate review by his inadequate briefing.

Tracy's brief, consisting entirely of unsupported assertions, is insufficient, even for a pro se litigant, to justify this Court's review. To adequately brief his appellate issues, Tracy had to make an argument consisting of his "contentions *and the reasons for them*, with citations to the authorities and parts of the record" he relies on. Fed. R. App. P. 28(a)(8)(A) (emphasis added). Rule 28 requires all briefs,

even from pro se parties, to contain "more than a generalized assertion of error, with citations to supporting authority." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (cleaned up). "When a pro se litigant fails to comply with that rule," this Court "cannot fill the void by crafting arguments and performing the necessary legal research." *Id.* (cleaned up).

A party "forfeits appellate consideration" of arguments he inadequately briefs. *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007). "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Id.* at 1104.

Tracy's brief is inadequate because it consists entirely of unsupported conclusions without any reasoned legal analysis or argument. Br.Aplt. 1–7. He raises two issues and briefs them in a mere five paragraphs, never explaining how the district court erred. Br.Aplt. 5–6.

Tracy challenges the district court's conclusion that he lacked standing to assert assigned civil rights claims. Br.Aplt. 5, 6. He declares that the district court did not apply the standards in *Wilson v. Garcia*, 471 U.S. 261, 267 (1985), in reaching that conclusion. Br.Aplt. 5, 6. But Tracy never explains how the district court's ruling violates *Wilson*. Br.Aplt. 5, 6. Rather, he merely declares that (1) the district court erred because there is no published decision holding "that the

assignment of federal civil rights is determined by state law" and (2) the ruling "is inconsistent with the legislative history of the [Civil Rights] Act." Br.Aplt.6.

Tracy is wrong about the lack of any published decision on this issue, as explained below. But even if he were right, that assertion provides no reasoned analysis of how the district court erred. And Tracy never explains the legislative history of the Civil Rights Act, how the district court's ruling conflicts with that history, or why that legislative history is even relevant. Br.Aplt. 6.

Tracy next declares that the district court erroneously denied him leave to amend his complaint to assert "his own civil rights." Br.Aplt. 5. But again, he merely concludes, without analysis that, as a pro se litigant, the district court "improper[ly]" held him to "heightened pleading standards." Br.Aplt.6.

Tracy's unsupported declarations that the district court erred are inadequate to avoid forfeiting appellate review. *See Garrett*, 425 F.3d at 841. This Court should therefore refuse to consider his brief at all. *See id.*; *Bronson*, 500 F.3d at 1104; *see also Eagar v. Drake*, 829 F. App'x. 878, 883 (10th Cir. 2020) ("Far more is required, even of a pro se litigant, to disturb the judgment below" than merely declaring that district court erred).

But even if Tracy's brief were adequate to justify this Court's review, he demonstrates no error.

II. The district court correctly dismissed Tracy's complaint for lack of subject matter jurisdiction given his failure to establish standing.

Tracy failed below to establish standing. A plaintiff must demonstrate that he has standing to bring his case in federal court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). To establish standing, a plaintiff must show that he has asserted a "Case" or "Controvers[y]" under Article III of the United States Constitution. *Id.* That showing requires "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 157–58 (cleaned up).

"This court reviews de novo a district court's grant of a motion to dismiss for lack of subject matter jurisdiction." *Tompkins v. United States Dep't of Veterans Affs.*, 16 F.4th 733, 741 (10th Cir. 2021). The district court correctly concluded that Tracy failed to satisfy the first standing requirement (injury-in-fact) because he alleged only violations of *another's* civil rights that were purportedly *assigned* to him. R.223–24. Violations of sections 1983 and 1985 are unassignable in Utah because they are personal injury torts. R.223–24.

A. Utah law governs the assignability of civil rights claims.

Utah law determines whether Tracy could assert another's civil rights claims by assignment. When federal civil rights laws do not provide rules of decision on specific points, federal courts must fill the gaps with the forum state's law. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (applying New Mexico statute of

limitations for personal injury actions to section 1983 claim given lack of federal limitations period), *superseded on other grounds by statute as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)[5]; 42 U.S.C. § 1988(a). Federal courts are statutorily required to apply the forum state's law to supply necessary rules of decision, provided the state law "is not inconsistent with the Constitution and laws of the United States." *See* 42 U.S.C. § 1988(a).[6]

Neither section 1983, nor section 1985, addresses whether an individual may assign her claims under either provision. *See* 42 U.S.C. §§ 1983, 1985. The district court therefore correctly looked to Utah law to determine the assignability of those claims. *See Wilson*, 471 U.S. at 267; 42 U.S.C. § 1988(a); *Pony v. County of Los Angeles*, 433 F.3d 1138, (9th Cir. 2006) (California law barred successful section 1983 plaintiff from assigning to her attorney her right to seek attorney fees).

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[5] The district court stated that 42 U.S.C. § 1988(a) superseded *Wilson*. R.225. Actually, 28 U.S.C. § 1658, establishing a four-year limitations period for "a civil action arising under an Act of Congress enacted" after 1 December 1990, is the statute that partially superseded *Wilson*. *See Jones*, 541 U.S. at 377–78; *see also Pony v. County of Los Angeles*, 433 F.3d 1138, 1143 (9th Cir. 2006) (recognizing 28 U.S.C. § 1658 as superseding *Wilson*).

[6] The statute states, "[I]n all cases where [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988(a).

B. Section 1983 and 1985 claims are personal injury torts.

Whether a claim is assignable under Utah law depends on the type of claim asserted. *See Westgate Resorts, Ltd. v. Consumer Protection Group, LLC*, 2012 UT 55, ¶¶ 30–35, 285 P.3d 1219 (examining nature of claim to determine assignability); *Mayer v. Rankin*, 63 P.2d 611, 616 (Utah 1936) (recognizing that only some causes of action are assignable).

Federal civil rights claims are personal injury torts. "[Section] 1983 claims are best characterized as personal injury actions." *Wilson*, 471 U.S. at 280. "The atrocities that [motivated Congress to enact section 1983] in 1871 plainly sounded in tort." *Id.* at 277. Section 1983 claims are therefore "more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.*; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort."); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (recognizing that section 1983 claims are based on tort liability); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305, (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.") (cleaned up); *Baker v. Bd. of Regents of State of Kan.*, 991 F.2d 628, 630 (10th Cir. 1993) ("Section 1983 claims are best characterized as personal injury actions.").

Section 1985 claims are also personal injury torts. In *Haddle v. Garrison*, 525 U.S. 121, 124, 126–27 (1998), for example, the Supreme Court held that a section 1985 claim alleging a conspiracy to induce an employer to terminate the petitioner's at-will employment was a tort claim. This Court has likewise recognized that because section 1985(3) claims are essentially personal injury torts, the statute of limitations on those claims is the "forum state's personal-injury statute of limitations." *Lyons v. Kyner*, 367 Fed. App'x. 878, 881–82 (10th Cir. 2010). As this Court observed, the Third, Eighth, Ninth, and Eleventh Circuits had reached that same conclusion. *Id.* (citing *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996); *Kaster v. Iowa*, 975 F.2d 1381, 1382 (8th Cir.1992) (per curiam); *McDougal v. County of Imperial*, 942 F.2d 668, 673–74 (9th Cir.1991); *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 79 (3d Cir.1989)). The "unifying theme" of the Federal Civil Rights Act of 1871, which enacted sections 1983 and 1985, lies in the Fourteenth Amendment's language "that unequivocally recognizes the equal status of every '*person*' subject to the jurisdiction of any of the several States." *Wilson*, 471 U.S. at 277.

Personal injury actions are not assignable in Utah. The Utah Supreme Court has "affirm[ed] the universal rule of non-assignability of personal injury claims." *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 459 (Utah 1969); *Am. Charities for Reasonable Fundraising Regul., Inc. v. O'Bannon*, No. 2:08-CV-875,

2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016) ("Tort claims arising out of personal injury are not assignable under Utah law.") (unpublished).[7]

Other states agree with Utah's rule. "Arizona . . . prohibits assignment of personal injury claims." *CVS Pharmacy, Inc. v. Bostwick*, 494 P.3d 572, 577 (Ariz. 2021). As does California. *Pac. Gas & Elec. Co. v. Nakano*, 87 P.2d 700, 701 (Cal. 1939) ("It is well settled in this jurisdiction that a purely tort claim is not assignable."); *see also Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 780 (Cal. App. 2014) ([C]auses of action for personal injuries arising out of a tort are not assignable."). Personal injury claims are not assignable because they seek a remedy for an injury that is *personal* to the injured party. *See Lingel v. Olbin*, 8 P.3d 1163, 1167 (Ariz. App. 2000).

C. Utah law prohibiting assignment of personal injury claims is not inconsistent with federal law.

Tracy did not challenge below the conclusion that personal injury claims are unassignable in Utah. R.184 (Objection to Report and Recommendation). Rather,

[7] This Court later dismissed as moot an appeal from a separate order in *American Charities*. *See Am. Charities for Reasonable Fundraising Regul., Inc. v. O'Bannon*, 909 F.3d 329, 331 (10th Cir. 2018). The plaintiffs appealed from the grant of summary judgment upholding as constitutional Utah's professional fundraising consultant law. *See id.* But the appeal became moot after "Utah substantially revised its law" so that it no longer applied to the plaintiff. *See id.* This Court therefore remanded with instructions for the district court "to vacate its judgment and dismiss the case." *Id.* at 334. But that decision, of course, had no effect on the district court's unrelated conclusion that plaintiff lacked standing to assert assigned section 1983 claims.

his objection to this portion of the magistrate's report and recommendation merely declared—without any analysis—that Utah law barring assignment of personal injury claims should not apply because it is inconsistent with "the purpose and nature of the federal right." R.184 (citing *Wilson*, 471 U.S. at 267). Tracy now appears to reassert that same unsupported conclusion on appeal. Br.Aplt. 5.

This Court should reject Tracy's conclusory assertion. As explained, while this Court will "construe liberally" pro se briefs, it will "not craft their legal arguments for them." *Gammons v. City & Cnty. of Denver*, 505 F. App'x 785, 786 (10th Cir. 2012).

Regardless, Tracy demonstrates no error in the district court's application of Utah law barring assignment of personal injury claims. Preventing a third party from asserting another's civil rights furthers, rather than impairs, the goals of federal civil rights laws.

Federal courts "are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'" *Wilson*, 471 U.S. at 267 (quoting 42 U.S.C. § 1988) (additional quotation and citation omitted). Utah's law limiting assignment of personal injury claims furthers the goals of sections 1983 and 1985 because it ensures that the injured party, not an uninterested third party, recovers for inherently personal civil rights violations. As explained, sections 1983 and 1985 are designed to protect *individual* rights. *Wilson*, 471 U.S. at 277. The Supreme Court

has "repeatedly emphasized," that "the central objective of the Reconstruction-Era civil rights statutes … is to ensure that *individuals whose federal constitutional or statutory rights are abridged* may recover damages or secure injunctive relief." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (emphasis added).

This Court has therefore recognized the "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (citing *Dohaish v. Tooley*, 670 F.2d 934, 936 (10th Cir. 1982)). The plaintiff in *Archuleta* therefore could not assert a section 1983 claim based merely on his "*observing* allegedly excessive police force which was directed entirely at his father." *Id.* (emphasis added); *see also O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) ("'[O]ne cannot sue for the deprivation of another's civil rights.'" (quoting C. Antieau, *Federal Civil Rights Acts, Civil Practice*, § 31 at 50–51).

The bar on assignment of personal injury actions also furthers public policy. "The prohibition against the assignment of personal injury claims is based on public policy, such as avoiding the dangers of maintenance and champerty." *Lingel v. Olbin*, 8 P.3d 1163, 1167 (Ariz. App. 2000) (cleaned up).[8] Those dangers "include

[8] "'Maintenance' is defined as assisting another in litigation without a personal interest in its outcome. 'Champerty' exists if there is an agreement that the person providing litigation assistance will share in the proceeds of the litigation.'" *Id.* (cleaned up).

multitudinous and useless litigation, speculation and gambling in lawsuits, and the annoyance and harassment of those who are already suffering." *Id.*

Applying Utah's bar on assignment of personal injury claims to the assignment here therefore furthers the purposes of federal civil rights claims. The district court thus correctly held that under Utah law, Tracy lacked standing to assert assigned civil rights claims. R.226.

Tracy incorrectly asserts that "no federal court has ruled in a published decision that the assignment of federal civil rights [claims] is determined by state law," as if the existence of a published decision on this issue were dispositive. Br.Aplt. 6. But as explained, the Ninth Circuit has held that California law governed whether a derivative claim for attorney fees arising from a successful section 1983 action could be assigned. *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142–45 (9th Cir. 2006). To reach that holding, the *Pony* court first concluded that the underlying section 1983 claim was unassignable because "[t]he right to sue in tort for personal injury in non-assignable *under California law*." *Id.* at 1143 (emphasis added). Thus, Tracy incorrectly asserts that no published decision supports the district court's dismissal here. Br.Aplt. 6.

Regardless, and contrary to Tracy's suggestion otherwise, the correctness of the district court's ruling does not depend on the existence of a published opinion supporting it. As explained, federal courts are statutorily bound to apply state law to

supply missing rules of decision, so long as that law "is not inconsistent with" federal law. 42 U.S.C. § 1988(a); *see also Wilson*, 471 U.S. at 266–69.

Tracy demonstrates no error in the district court's order dismissing his claims for lack of standing based on the unassignability of federal civil rights claims under Utah law. This Court should therefore affirm.

III. Tracy has both waived and forfeited any challenge to the district court's order denying him leave to amend; alternatively, the district court did not abuse its discretion in denying leave to amend, because the amendment would have been futile.

Tracy further complains, again without any analysis, that the district court erroneously denied him leave to amend his complaint to remedy his lack of standing. Br.Aplt. 6. Tracy has waived this claim by failing to properly object below. He has also forfeited the claim by inadequately briefing it on appeal. Regardless, Tracy has not shown that the district court abused its discretion in denying him leave to amend, because his proposed amendment would have been futile.

A. Tracy waived and forfeited this claim by failing to properly object below and inadequately briefing the issue on appeal.

Tracy has both waived and forfeited his claim that the district court should have granted him leave to amend his complaint under Rule 15. Br.Aplt. 6. Tracy waived appellate review of this claim when he failed to adequately object to the magistrate's recommendation on this point. R227. This Court has "adopted a firm waiver rule providing that the failure to make timely objections to the magistrate

judge's findings or recommendations waives appellate review of both factual and legal questions." *Moore v. Astrue,* 491 F. App'x 921, 923 (10th Cir. 2012) (cleaned up). "To preserve an issue for appellate review, a party's objections to the magistrate judge's report and recommendation must be both timely and specific." *Id.* (cleaned up).

Tracy did not specifically object to the magistrate's judge's recommendation, despite the warning that "[f]ailure to object may constitute a waiver of objections upon subsequent review." R.167; R.227. Tracy's objection to this portion of the magistrate's recommendation was a mere two sentences that declared that he "should be granted leave to assert impairment of his own constitutionally protected property right." R.186. Tracy did not address, or even acknowledge the magistrate's analysis or attempt to explain why this amendment would be proper. R.186. The district court therefore correctly held that his objection was insufficient. R.227. Tracy has thus waived appellate review of this issue. *See Moore,* 491 F. App'x at 923.

As explained above, Tracy has also inadequately briefed any claim that the district court should have granted him leave to amend. *See* Point I, above. His inadequate briefing forfeits any challenge to the order denying him leave to amend. *See Bronson v. Swensen,* 500 F.3d 1099, 1104 (10th Cir. 2007) (holding that inadequately briefed claims are forfeited on appeal).

This Court should therefore hold that Tracy either waived, forfeited, or both waived and forfeited, his claim that the district court erred in denying him leave to amend his complaint. In any event, Tracy could not show any error in the order denying him leave to amend. R.226–27.

B. The district court acted within its broad discretion in denying leave to amend because the proposed amendment would have been futile.

This Court reviews "the denial of a motion to amend for abuse of discretion."[9] *Sanders v. Anoatubby*, 631 F. App'x 618, 621 (10th Cir. 2015). "When, as here, the denial of a motion to amend is based on a determination that amendment would be futile," this Court's "review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Id.* (cleaned up). This is because "[t]he futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim." *Adams v. C3 Pipeline Const., Inc.*, 30 F.4th 943, 972 (10th Cir. 2021) (cleaned up).

The instant action is based entirely on the purported assignment of a "civil right claim" from Ms. Penske to Tracy. However, instead of requesting leave to

[9] Tracy never filed a motion to amend. Rather, he merely asserted in both his opposition to defendants' motions to dismiss, and his objection to the magistrate's report and recommendation, that he should have leave to amend. R.83, 87, 95, 186. As explained, the magistrate judge nevertheless recommended denying leave to amend, and the district court adopted that recommendation, ruling that it was not clearly erroneous. R.165, 226–27.

amend Ms. Penske's claim, Tracy instead requested leave to amend to assert his own separate alleged civil rights claim.

The only basis that Tracy provides to support his request to amend is that he owns a "senior perfected surface water right," and the canyon stream "suffered total depletion" in 2018. R.87, 186. These two facts, even if combined with the allegations in the Complaint, are wholly insufficient to state a section 1983 claim against EID Defendants.

A section 1983 claim generally requires two primary elements. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). A plaintiff must show that she (1) was "deprived of a right secured by the Constitution or laws of the United States," and (2) "that the alleged deprivation was committed under color of state law." *Id.* Tracy's request to amend fails to articulate any facts that would support either prong.

First, Tracy fails to articulate what right secured by the Constitution or laws of the United States he was deprived of. For example, Tracy does not allege a due process violation. In fact, Tracy does not allege, and cannot allege, that he lives in Emigration Canyon, that he has any property in Emigration Canyon, that he has a well in Emigration Canyon, or that he even attempted to utilize his water right in 2018 when the stream went dry. A water right by itself is not a right secured by constitution or laws of the United States.

Second, Tracy fails to articulate how Defendants were acting under color of state law. "Acting under color of state law" requires that a defendant in a § 1983 action have exercised actual or apparent authority possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *West v. Atkins,* 487 U.S. 42, 49 (1988); *Jojola v. Chavez,* 55 F.3d 488, 493 (10th Cir. 1995). Individual defendants may be held liable to the extent they knew, or reasonably should have known, that their alleged conduct would lead to the deprivation of constitutional rights. *See Martinez v. Carson,* 697 F.3d 1252, 1255 (10th Cir. 2012) ("The requisite causal connection is satisfied if [the defendants] set in motion a series of events that [the defendants] knew or reasonably should have known would cause others to deprive [the plaintiffs] of [their] constitutional rights.") (citations omitted).

The fact that Tracy owns a water right and the stream purportedly went dry does not establish that EID Defendants "exercised actual or apparent authority possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." At best, EID Defendants provided service to EID related to EID's operation of its water system. However, EID's operation of its wells and use of its water rights is subject to the same rules and regulations as all other water right owners. Thus, any actions by EID Defendants were not made possible only because they were clothed in authority of state law. Likewise, Tracy

hasn't alleged that EID Defendants knew, or reasonably should have known, that their alleged conduct would lead to the deprivation of Tracy's constitutional rights.

The magistrate therefore correctly concluded that any amendment to state a section 1983 claim would be futile.

C. Tracy did not allege a cause of action under section 1985.

"The essential elements of a section 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993)). But section 1985(3) does not "apply to all tortious, conspiratorial interferences" with other's rights. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). Rather, it applies only those motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id* at 102.

Moreover, "[t]he other 'class-based animus' language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an economic or commercial bias." *Tilton*, 6 F.3d at 686 (citing *United Bhd. Of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 837 (1983)). In fact, "it is a close question whether section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause." *United Bhd.* 463 U.S. at 836.

Tracy's allegations fail to state a section 1985(3) claim because he does not allege any conspiracy directed towards class-based discrimination motivated by something other than "an economic or commercial bias." *Tilton,* 6 F.3d at 686. Specifically, Tracy does not allege that he was discriminated against on the basis of his religion. Tracy's only possible claim is that EID Defendants somehow deprived all water right owners of the property rights by purportedly causing the stream to go dry.

Accordingly, the magistrate judge correctly concluded that Tracy's proposed amendment could not state a viable claim under section 1985(3).

CONCLUSION

For the foregoing reasons, this Court should affirm both the dismissal of the complaint for lack of subject matter jurisdiction and the order denying leave to amend.

Respectfully submitted on July 1, 2022.

/s/ Jeremy R. Cook
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CERTIFICATE EXPLAINING NECESSITY OF SEPARATE BRIEF OF APPELLEE

Bennion has filed a separate brief because his alleged involvement in this case is fundamentally different than that of the EID Defendants. While the EID Defendants, except Ms. Hawkes, provide service for EID, Bennion has "no direct interest in EID or Simplifi." R.217. Bennion acted only as a "'religious leader and LDS member.'" R.217.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief of 6425 words, excluding the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii), complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Having been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font, the brief also complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Jeremy R. Cook

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: (1) all required privacy redactions have been made in compliance with 10th Cir. R. 25.5; (2) the ECF submission is an exact copy of the hard copies submitted to the court; and (3) the digital submission has been scanned for viruses with the most recent version of Bitdefender version 7.92250, last updated on July 1, 2022, and according to the program is free of viruses.

/s/ Jeremy R. Cook

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing Brief of Appellees Simplifi Company, Jeremy Rand Cook, Jennifer Hawkes and Eric Hawkes using the court's CM/ECF system, which will send notification of the filing to

Erik A. Olson
Christopher D. Ballard

Attorneys for David M. Bennion

I further certify that on July 1, 2022, I emailed a copy of the foregoing Brief of Appellees Simplifi Company, Jeremy Rand Cook, Jennifer Hawkes and Eric Hawkes to the following non-ECF participant at

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/s/ Jeremy R. Cook