2015

Transportation Alliance Bank, a Utah Banking Corporation, Plaintiff/Appellee, vs. International Confections Company, LLC, an Ohio Limited Liability Company; Ng Acquisition, LLC, an Ohio Limited Liability Company; And Michael D. Ryan, and Individual, Defendants/Appellants

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

TRANSPORTATION ALLIANCE BANK, a Utah banking corporation, Plaintiff / Appellee, vs. INTERNATIONAL CONFECTIONS COMPANY, LLC, an Ohio limited liability company; NG ACQUISITION, LLC, an Ohio limited liability company; and MICHAEL D. RYAN, an individual, Defendants / Appellants.	Case No. 20150784-CA

APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HON. LAURA S. SCOTT, CIVIL NO. 140907314

BRIEF OF APPELLANT

Karra J. Porter, #5223
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111-2047
Telephone: (801) 323-5000

Steven C. Strong
Bradley M. Strassberg
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Attorneys for Plaintiff / Appellee

Rex H. Elliott
Barton R. Keyes
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
Attorneys for Appellants

LIST OF ALL PARTIES

Original Plaintiff:
Transportation Alliance Bank

Intervening Creditors purportedly substituted as plaintiffs on December 11, 2014/Appellees:
Arcadia Holdings LLC
Wasatch Peak Holdings LLC
Back Bay Investments
Dynamic Confections Inc.
Bank of American Fork

Defendants/Appellants:
International Confections, LLC
NG Acquisition, LLC
Michael D. Ryan

Intervening Party/Appellee:
Mrs. Fields Confections, LLC

Receiver:
Kent W. Goates

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under Utah Code Ann. § 78A-4-103(2)(j). The case was properly transferred under Utah Code Ann. § 78A-3-102(4) from the Supreme Court, which had jurisdiction under Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUES

Issue 1: When the plaintiff dismisses a case under Rule 41(a)(1) of the Utah Rules of Civil Procedure, no case in controversy exists any longer, so a court lacks jurisdiction to proceed. Transportation Alliance Bank was the only plaintiff when it filed a notice of voluntary dismissal with prejudice. No intervenors had filed pleadings, and no defendant had responded to the complaint. Did the trial court lack jurisdiction to proceed after the dismissal?

Standard of Review: De novo. *See State Dept. of Social Services v. Vijil*, 784 P.2d 1130, 1132 (1989).

Preservation: R. 1030-1031.

Issue 2: When an attorney withdraws, Rule 74(c) of the Utah Rules of Civil Procedure prohibits further proceedings until 21 days after the adverse party files a notice to appear or appoint counsel. Appellants' former counsel withdrew by notice when no motions were pending. Even though no adverse party had served or filed a notice to appear and appoint counsel, the trial court nonetheless

approved a receivership sale while Appellants were unrepresented. Should the trial court have granted relief from judgment based on Rule 74(c)?

Standard of Review: Abuse of discretion. *See Vijil, supra* at 1132.

Preservation: R. 1027-1030.

Issue 3: The trial court granted the receiver's expedited motion to approve a receivership sale five days after it was filed, even though former counsel for Appellants had withdrawn as counsel before the receiver's motion. Was the failure to object to the proposed sale within that five-day window excusable neglect?

Standard of Review: Abuse of discretion. *See Vijil, supra at 1132.*

Preservation: R. 1022-1027.

DETERMINATIVE PROVISIONS

Utah Rules of Civil Procedure 24, 41, 60, and 74, and Utah Code Ann. § 78A-5-102 are determinative. Those provisions are set forth in the addendum.

STATEMENT OF THE CASE

This case involves an attempt by Intervenor/Appellee Mrs. Fields Confections, LLC ("Mrs. Fields Confections") to secure a general release of all claims through an asset purchase in receivership not only for itself (the purchaser), but for any companies affiliated with it. In doing so, Mrs. Fields Confections has tried to insulate a purported affiliate, Mrs. Fields Franchising, LLC ("Mrs. Fields Franchising"), from liability for the very misconduct that led to the receivership in the first place—the breach and improper termination of a 17-year license and distribution agreement in its second year.

I. Transportation Alliance Bank files a complaint, other creditors seek intervention, and the trial court appoints a receiver.

This case began when the original plaintiff, Transportation Alliance Bank ("Transportation Alliance") filed a Verified Complaint on October 21, 2014 in the trial court. (R. 1–234.) Transportation Alliance claimed that Defendants/Appellants International Confections Company, LLC ("International Confections"), NG Acquisition, LLC ("NG"), and Michael D. Ryan ("Ryan") breached their obligations under a loan agreement and related payment guarantee. Transportation Alliance moved for the immediate appointment of a receiver. (R. 238–294.)

While Transportation Alliance's motion for appointment of a receiver was pending, other putative creditors of International Confections, NG, and Ryan filed

a stipulated motion to intervene in the case. The creditors were Back Bay Investments, LC, Dynamic Confections, Inc., Wasatch Peak Holdings, LLC, Bank of American Fork, and Arcadia Holdings, LLC (collectively, "Intervening Creditors"). (R. 422–424.) The motion did not specify whether the Intervening Creditors sought to intervene as plaintiffs or defendants. The proposed order stated that the Intervening Creditors were "deemed parties" without specifying plaintiffs or defendants. (R. 425–426.) The trial court granted the motion to intervene on November 5, 2014, using the proposed order and therefore stating that the intervenors were "deemed parties," not plaintiffs or defendants. (R. 429–430; *see also* Addendum.) The intervenors did not file complaints, answers, or any other pleadings either when they moved to intervene or at any time thereafter.

The trial court granted Transportation Alliance's motion for appointment of a receiver on November 13, 2014, appointing Kent W. Goates as receiver ("Receiver"). (R. 663–678; see also, Addendum.)

II. Transportation Alliance dismisses the case with prejudice, yet the case continues.

Transportation Alliance, who remained the only plaintiff in the case, settled its claims with International Confections, NG, and Ryan. At that time, none of the Defendants had ever filed an answer or other response to Transportation Alliance's complaint. Accordingly, Transportation Alliance filed a notice of voluntary

dismissal with prejudice on November 24, 2014. (R. 720–722; see also Addendum.)

Two of the Intervening Creditors—who still had not filed complaints or other pleadings—filed "objections" to the dismissal. (R. 726–730 (Bank of American Fork); 734–740 (Arcadia Holdings).) International Confections, NG, and Ryan responded to these objections, pointing out that Transportation Alliance had the unilateral right to dismiss its case and arguing that Transportation Alliance had obtained the extraordinary remedy of a receivership based on Transportation Alliance's unique contractual relationship with International Confections, NG, and Ryan. (R. 750–754.)

The trial court held a hearing on the dismissal issue on December 3, 2014. At that point, the parties consented that the Intervening Creditors would be substituted into the third cause of action of Transportation Alliance's complaint (the receivership count) and that the rest of the causes of action would be dismissed. (R. 765.) The trial court entered an order on December 11, 2014. (R. 779–783.) In relevant part, the order stated:

> 1. The intervening creditors in this case are substituted as plaintiffs under the third cause of action in the complaint only, and the case shall remain pending. All previously scheduled hearing dates are canceled, as stated at the hearing.

> 2. Plaintiff's claims are dismissed with prejudice, pursuant to Plaintiff's Dismissal Notice.
>
> 3. The November 11, 2014 Order Approving the Immediate Appointment of Receiver (the "Receivership Order") remains in full force and effect.

(R. 780; see also Addendum.) Thus, the Intervening Creditors purportedly became plaintiffs for the first time on December 11, 2014, seven days after Transportation Alliance had dismissed the case.

III. The Receiver negotiates the sale of International Confections's assets.

During the course of the Receivership, Mr. Goates received two offers to purchase the assets of International Confections. The first offer came on November 20, 2014 from BBX Sweet Holdings, LLC ("BBX"). For a variety of reasons, BBX insisted that all material terms be agreed to in writing by December 11, 2014. Negotiations continued between BBX and the Receiver until December 11.

Meanwhile, on December 3, 2014 (during the course of the receivership), Mrs. Fields Franchising sued International Confections in federal court for alleged trademark infringement, breach of the License Agreement, and unjust enrichment.

Eight days later, on December 11, Famous Brands International—the parent company of Mrs. Fields—offered to purchase International Confections's assets. Famous Brand's offer came just 15 minutes before the deadline set by BBX. This offer culminated in an Asset Purchase Agreement signed by the Receiver and Mrs.

Fields Confections on December 17, 2014 ("Asset Purchase Agreement"). International Confections, NG and Ryan were not signatories to the Asset Purchase Agreement and they were not made aware of its terms until after the Court had approved the sale. (R. 1036 (Ryan Affidavit at ¶ 5, 7).) Relevant to the 60(b) motion and this appeal, the Asset Purchase Agreement (R. 891–912) contained the following provision:

> Section 2.06 Release of Claims. Effective upon the Closing of the sale that is the subject of this Agreement, Seller on his own behalf and on behalf of the Companies waives and releases any and all claims he or the Companies may have against the Buyer and its employees, officers, directors, members, affiliates, and agents except for claims arising under this Agreement.

(R. 897.) "Seller" is defined as "Kent Goates only in his capacity as court-appointed receiver of the business and assets of International Confections Company, LLC, dba Maxfield Candy ('Maxfield') and NG Acquisition, LLC ('NG') in case no. 140907314 in the Utah Third District Court." "Companies" is defined as International Confections Company, LLC, dba Maxfield Candy and NG Acquisition, LLC. "Buyer" is defined as Mrs. Fields Confections, LLC. (R. 891.)

IV. Counsel for International Confections, NG, and Ryan withdraws, but the case proceeds anyway.

Mark James, former counsel for International Confections, NG, and Ryan, filed a notice of withdrawal as counsel on December 18, 2014. (R. 787–788.) The

record shows that James filed the notice of withdrawal at 2:42 PM, and that counsel representing the other parties received electronic notice within one minute. (R. 789–791.) No motions were pending at the time. The record shows that the Receiver filed an expedited motion to approve the receivership sale to Mrs. Fields Confections later that same day. (R. at 792–795.)[1] Despite Mr. James's withdrawal, no party or counsel ever filed or served the defendants a notice to appear or appoint counsel under Rule 74.

Even though International Confections, NG, and Ryan were no longer represented by counsel, the trial court held an expedited hearing on the motion to approve the receivership sale five days later, on December 23, 2014. (R. 926–927.) When the trial court judge asked at the hearing about the defendants not appearing, counsel for the Receiver acknowledged that Mr. James had withdrawn. (R. 1499, line 13 through R. 1500, line 11.) Counsel for the Receiver also made ambiguous statements about who on behalf of International Confections, NG and Ryan, if anyone, had been notified ("They have been notified" and "They've

[1] Although no time-stamped electronic filing confirmation appears in the record for the receiver's expedited motion to approve the sale, the chronological sequence of the record reflects that Attorney James filed his notice of withdrawal before the receiver filed the motion to approve the sale. And Mrs. Fields counsel conceded at oral argument that the receiver's expedited motion was filed "the same day, a couple of hours later, the day the notice of withdrawal was filed[.]" (R. 1558, lines 8–10.)

received notice."). (R. 1500, lines 1-4.) Finally, counsel for the Receiver mislabeled Attorney James's withdrawal a "motion" and stated the Court had not granted it yet, even though it was unambiguously a notice of withdrawal. (R. 1500, lines 6-8.) The trial court proceeded with the hearing and issued an order approving the receivership sale to Mrs. Fields Confections. (R. 928-934; see also Addendum.) It did so even though International Confections, NG and Ryan were unrepresented by counsel; only five days had passed since the Receiver filed his motion to approve; and no one filed or served a notice to appear or appoint counsel under Rule 74.

V. International Confections sues Mrs. Fields Franchising and Mrs. Fields Confections and learns of the release term in Mrs. Fields Confections' purchase agreement.

International Confections learned about the broad release term in the purchase agreement signed by Mrs. Fields Confections when it tried to pursue claims against both Mrs. Fields Confections and Mrs. Fields Franchising—purportedly an affiliate of Mrs. Fields Confections. That separate lawsuit centered around a breach of contract by Mrs. Fields Confections. On May 16, 2013, Mrs. Fields Franchising entered into a License Agreement with International Confections ("License Agreement").

The term of the License Agreement continued through December 31, 2030. Under the License Agreement, Mrs. Fields Franchising granted International

Confections the irrevocable exclusive right to use certain Mrs. Fields Franchising trademarks, trade names, service marks, and recipes to manufacture, market, and sell various chocolate goods in grocery stores and supermarkets (among other "distribution channels") throughout the United States of America, Canada, and Mexico. International Confections estimates that its revenue from the first year of the License Agreement was between 9 and 11 million dollars. (R. 1035 (Affidavit of Michael D. Ryan), ¶ 3; R. 1051–1084 (License Agreement).)

On August 26, 2014, Mrs. Fields Franchising sent a written notice claiming that International Confections was in default of some of its obligations under the License Agreement. (R. 1043 (International Confections vs. Mrs. Fields Franchising complaint).) The License Agreement allowed Mrs. Fields Franchising to terminate for failure to pay royalties only if the default remained uncured for twenty consecutive days after Mrs. Fields Franchising delivered a written notice of default to International Confections. For default of any other material term, Mrs. Fields Franchising could terminate only if the default continued unremedied for thirty days after written notice. But if the remedy could not be completed within 30 days, Mrs. Fields Franchising could not terminate if International Confections had commenced diligent efforts to remedy the default within 30 days and continued efforts to remedy the default until the remedy was complete. (R. 1042–1043; R. 1065–1066 (default term of License Agreement).) Further, in a related

Consent to Collateral Assignment, Mrs. Fields Franchising and International Confections agreed that Mrs. Fields would not terminate the License Agreement without providing non-party Maxfield Candy Company written notice and the opportunity to cure any alleged default by International Confections. (R. 1088.) Mrs. Fields never provided Maxfield the required notice. (R. 1045.)

International Confections responded to Mrs. Fields Franchising's notice of default on September 15, 2014. International Confections provided necessary information, pointed out the minimum 30-day cure period, and told Mrs. Fields Franchising that International Confections was preparing the remaining requested documentation. International Confections commenced diligent efforts to remedy any purported defaults during the time period permitted by the License Agreement. International Confections could not complete the remedies within 30 days of Mrs. Fields Franchising's notice, so International Confections continued its efforts beyond the 30 days and in fact did complete all necessary remedies. Mrs. Fields Franchising never responded to International Confections's September 15, 2014 letter or acknowledged International Confections's cure efforts. Instead, Mrs. Fields Franchising sent an improper "Notice of Termination" to International Confections on September 26, 2014. (R. 1044–1045.) Mrs. Fields Franchising knew that International Confections had a line of credit with Transportation Alliance. Mrs. Fields Franchising falsely notified Transportation Alliance that

International Confections had defaulted under the License Agreement, which in turn led Transportation Alliance to file this case and request the receivership. (R. 1045.)

International Confections sued Mrs. Fields Franchising and Mrs. Fields Confections in the United States District Court for the Southern District of Ohio on March 9, 2015. (R. 1039–1095.) Almost immediately, attorneys for the two Mrs. Fields entities sent International Confections's counsel a copy of the purchase agreement from the receivership sale and claimed that the release term barred International Confections's claims. International Confections, NG, and Mr. Ryan had not seen the asset purchase agreement, and therefore were unaware of the release language until attorneys for the two Mrs. Fields' entities sent it to International Confections's counsel. (R. 1036 (Ryan Affidavit at ¶¶ 5, 7).)

After learning of the release language, International Confections dismissed the lawsuit against Mrs. Fields Franchising and Mrs. Fields Confections without prejudice. International Confections, NG, and Ryan filed their motion for relief from judgment with the trial court in this case shortly after, on March 23, 2015. (R. 1016–1095.) Mr. Ryan swore under oath that he, International Confections, and NG will not exercise any rights they may have to reclaim the purchased assets if the trial court would have granted relief from judgment. They intend only to pursue legal remedies against Mrs. Fields entities arising out of the unlawful

termination of the License Agreement between International Confections and Mrs. Fields Franchising. (R. 1036 (Ryan Affid., ¶ 12).)

The trial court denied the motion on August 21, 2015. (R. 1451–1460.) International Confections, NG, and Ryan timely appealed on September 21, 2015. (R. 1461–1463; see also Addendum.) Appellants now ask this Court to reverse the order denying relief from judgment.

SUMMARY OF ARGUMENT

This Court should reverse the decision denying relief from judgment for three reasons.

First, the trial court lost jurisdiction to proceed once the only plaintiff, Transportation Alliance, filed a notice of voluntary dismissal with prejudice on November 24, 2014. Transportation Alliance was the only plaintiff as of that date. Although other creditors had received permission to intervene, they never filed a pleading as Rule 24 requires, and therefore never established themselves as plaintiffs. Transportation Alliance was the only plaintiff. And International Confections, NG, and Ryan had not answered or responded to Transportation Alliance's complaint. Transportation Alliance's notice of voluntary dismissal complied with Rule 41(A)(1).

When a party has complied with Rule 41(a)(1), "no case in controversy exists any longer and, hence, the court would lack jurisdiction to proceed any

further with the action." *Thiele v. Anderson*, 1999 UT App 56, ¶ 24, 975 P.2d 481, 489. Because the notice of voluntary dismissal terminated the case, any subsequent agreement by International Confections, NG, and Ryan to allow the case and receivership to proceed was void; there was no case or controversy before the trial court, and therefore no pending matter in which the parties could even consent to continuing the proceedings. Neither the trial court nor the parties could breathe life back into the dismissed case. In turn, the proceedings that occurred after dismissal—including the Court's approval of the receivership sale—were void.

Second, even if Transportation Alliance had not dismissed the case, the trial court should not have proceeded after counsel for International Confections, NG, and Ryan had filed a notice of withdrawal on December 18, 2014. No motions were pending at the time. Rule 74(c) required the opposing parties to serve and file a notice to appear or appoint counsel. Rule 74(c) also prohibited the trial court from proceeding with the case until 21 days after that notice is filed. Utah courts have interpreted Rule 74(c) to "impose[] an unambiguous restriction on opposing counsel and the trial court." *Loporto v. Hoegemann*, 1999 UT App. 175, ¶ 19, 982 P.2d 586.

Opposing counsel's failure to discharge their duty under Rule 74(c) justifies relief from judgment under the catch-all "any other reason justifying relief" prong

of Rule 60(b). *See Sperry v. Smith*, 694 P.2d 581, 582 (Utah 1984) (reversing denial of motion to vacate judgment as abuse of discretion when opposing party failed to serve notice on unrepresented party after counsel had withdrawn). The withdrawal of International Confections, NG, and Ryan's former counsel triggered an immediate and automatic moratorium on any proceedings, and because the opposing parties never served or filed a notice under Rule 74(c), that moratorium never expired. The order approving the receivership sale violated Rule 74(c), and the trial court should have vacated it.

Third, and relatedly, the expedited submission of and decision on the motion to approve the receivership sale made it impossible for International Confections, NG, and Ryan to respond. Counsel for these parties had withdrawn, so they did not receive notice of the Receiver's expedited motion. Plus, Ryan is not an attorney. (R. 1036 (Ryan Affid., ¶ 11).) Even setting aside the lack of notice of the motion and hearing, he could not have represented International Confections and NG anyway. *See Graham v. Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶ 14, 979 P.2d 363, 369 (acknowledging "well-established rule that an unincorporated association, like a corporate entity, may not be represented by a nonlawyer"). The trial court should not have approved the receivership sale because International Confections, NG, and Ryan were unrepresented. It would have been impossible to expect them to

retain new counsel and meaningfully participate in the hearing five calendar days (which spanned a weekend) after the Receiver's motion was filed. The trial court should have vacated the judgment for excusable neglect.

ARGUMENT

I. The case automatically terminated when Transportation Alliance filed the notice of voluntary dismissal with prejudice, so the judgment approving the receivership sale was void for lack of jurisdiction.

A. Transportation Alliance's notice of voluntary dismissal deprived the trial court of jurisdiction to proceed.

The judgment approving the receivership sale was void, and the trial court should have vacated it. Transportation Alliance's November 24, 2014 notice of voluntary dismissal with prejudice terminated the case and deprived the trial court of any jurisdiction to proceed further. All proceedings after that dismissal entry—including the agreement for the case to continue, the substitution of other creditors as plaintiffs for the receivership count, and the approval of the receivership purchase—are void.

Rule 60(b)(4) provides that "the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding . . . [when] the judgment is void." *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 18, 321 P.3d 1080. "A judgment is void under rule 60(b)(4) if the court that rendered it lacked jurisdiction of the subject matter, or parties or the judgment was entered without the notice required by due process." *Judson v. Wheeler RV Las*

Vegas, L.L.C., 2012 UT 6, ¶ 18, 270 P.3d 456 (internal quotation marks omitted). Relief under Rule 60(b)(4) does not require a separate meritorious defense. *Id.* ¶ 15 ("If a judgment is entered by a court that lacks jurisdiction, justice is furthered by setting that judgment aside as void under rule 60(b)(4) even absent a separate meritorious defense.").

"The court's lack of jurisdiction is alone sufficient to void its judgment, and there is thus no need for a separate 'gateway' ground for setting it aside under rule 60(b)(4). A showing of a lack of jurisdiction, in other words, could never be futile, as a jurisdictional defect is enough by itself to void the judgment." *Id.*; *see also Murray Place v. Varela*, 2013 UT App 19, ¶ 4, 297 P.3d 642 (relief from judgment based on lack of jurisdiction for failure of service did not require meritorious defense).

Rule 41(a)(1) explicitly provides that "an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules." When a party has complied with Rule 41(a)(1), "no case in controversy exists any longer and, hence, the court would lack jurisdiction to proceed any further with the action." *Thiele v. Anderson*, 1999 UT App 56, ¶ 24, 975 P.2d 481, 489; *see also Phoenix Indemn. Ins. Co. v. Smith*, 2002 UT 49, ¶ 3, 48 P.3d 976, 978 ("A voluntary dismissal without prejudice renders the

proceedings a nullity and leaves the parties as if the action had never been brought.") (internal citation omitted); *cf. Netwig v. Georgia Pac. Corp.*, 375 F.3d 1009, 1011 (10th Cir. 2004) ("The filing of a Rule 41(a)(1)(i) notice itself closes the file.").

Transportation Alliance filed a Notice of Voluntary Dismissal under Rule 41(a)(1) on November 24, 2014. At no time before (or even after) November 24, 2014 did any party file an answer or a motion to dismiss. In fact, prior to November 24, the only filings related to: (1) appointment of a receiver; (2) objections to the appointment of a receiver; and (3) intervention by various creditors. Because no adverse party filed a response to Transportation Alliance's complaint, this case was properly dismissed on November 24, 2014 "without order of court." U.R.C.P. 41(a)(1). Thus, the trial court lost subject matter jurisdiction on the date the Notice was filed, and such a "jurisdictional defect is enough by itself to void the judgment." *Judson*, *supra*. Ultimately, the order approving the receivership sale and any other actions taken by the trial court after November 24, 2014 are void because the Court lacked jurisdiction to proceed further.

B. International Confections, NG, and Ryan could not waive this issue because the dismissal rendered the case a nullity and the trial court lacked authority to proceed.

The trial court found that International Confections, NG, and Ryan consented and waived any right to the court proceeding notwithstanding

Transportation Alliance's dismissal based on former counsel's representations at the December 3, 2014 hearing and approval of the order from that hearing. (R. 1457.) The trial court assumed without deciding that the dismissal implicated subject matter jurisdiction, but found that International Confections, NG, and Ryan could waive an objection to subject matter jurisdiction if based on a technical or procedural irregularity.

To the contrary, the trial court's continued proceedings in the case after Transportation Alliance's dismissal is more than just a "technical or procedural irregularity." A voluntary dismissal completely terminates the case; any proceedings after the dismissal are a nullity. *See Ptasynski v. Kinder Morgan G.P., Inc.*, 220 Fed. Appx. 876, 878–79 (10th Cir. 2007) (plaintiff's notice of dismissal without prejudice "automatically divested the [trial court] of jurisdiction and left the parties as though no action had been brought," and "rendered the court's [subsequent] order a nullity and without procedural effect").

Relatedly, the various appellees claimed below that International Confections, NG, and Ryan's argument about Transportation Alliance's voluntary dismissal was not an attack on subject matter jurisdiction. Appellees presumably made this claim to avoid the rule that parties can never waive lack of subject matter jurisdiction. *See In Re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 25, 266 P.3d 702 ("Because subject matter jurisdiction goes to the heart of a court's authority to hear

a case, it is not subject to waiver and may be raised at any time, even if first raised on appeal."); *see also State ex rel. D.M.*, 2005 UT App 420 (memorandum decision) (subject matter jurisdiction cannot be waived and may be asserted at any time).

"Subject matter jurisdiction is the authority of the court to decide the case." *Johnson v. Johnson*, 2010 UT 28, ¶ 7, 234 P.3d 1100 (internal quotation omitted). It addresses "the authority of the court to adjudicate a class of cases, rather than the specifics of an individual case." *Id.*, ¶ 10.

This description of subject matter jurisdiction naturally assumes, of course, that there is a "case" to begin with. Utah Code Section 78A-5-102 defines the subject matter jurisdiction of the district courts. It provides in relevant part, "The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law." Utah Code Ann. § 78A-5-102(1) (emphasis added). Thus, for a district court to have original jurisdiction—to have authority to act—there must be a "matter" before the Court. Or, to put it in the terms the Utah Supreme Court used in *Johnson v. Johnson*, the most fundamental requirement of a "class of cases" over which a district court has authority is that a district court can only act in actual, pending controversies.

Further, courts in other jurisdictions have classified dismissals that do not require action by a court to take effect as immediately depriving the court of

subject matter jurisdiction to proceed. For example, in *Pew v. Torma*, the U.S. District Court for the Western District of Pennsylvania denied a plaintiff's motion for injunction to enforce a settlement agreement because the parties had stipulated to the dismissal of the action under Fed. R. Civ. P. 41(a)(1). The court held, "A signed stipulation of dismissal under Rule 41(a)(1)(A)(ii) therefore technically automatically divests a court of subject matter jurisdiction, rendering any subsequent actions by the court regarding the matter ineffective." *See, e.g.*, *Pew v. Torma*, No. 03-1728, 2015 WL 4041956, *2 (W.D. Pa. July 1, 2015) (citing *Anago Franchising, Inc. v. Shaz, L.L.C.*, 677 F.3d 1272, 1281 (11th Cir.2012)); *see also Gruber v. Kopf Builders, Inc.*, 147 Ohio App.3d 305, 308 (Ohio App. 2001) (noting that court of appeals dismissed prior appeal "because the trial court did not have subject-matter jurisdiction over [the case]] after the April 1, 1998 voluntary dismissal").

Particularly on point here, in *Harris v. Billings* a California court of appeal held that the plaintiff's voluntary dismissal terminated the court's subject matter jurisdiction, and that the plaintiff could not waive the jurisdictional defect by continuing to submit to the court's purported jurisdiction. There, the plaintiff voluntarily dismissed the case without prejudice under California Code of Civil Procedure Section 581. After the parties did not appear for a hearing and status conference, the trial court vacated the dismissal without prejudice and entered an

order dismissing the case with prejudice. *Harris v. Billings*, 16 Cal. App. 4th 1396, 1400–01 (Cal. App. 1993). After learning of the court's action, the plaintiff filed a motion to reinstate the dismissal without prejudice and for relief from the court's order of dismissal with prejudice. *Id.* at 1401. The trial court denied the motion to reinstate the dismissal without prejudice, but granted the motion for relief from judgment conditioned upon the plaintiff paying the defendants' attorney fees and costs. *Id*. After the plaintiff did not pay the award, the trial court again dismissed the case. *Id.*

The court of appeals reversed. It held, "Following entry of a dismissal of an action by a plaintiff under section 581, a trial court is without jurisdiction to act further in the action except for the limited purpose of awarding costs and statutory attorney's fees." *Id.* at 1405 (internal citations omitted). Similar to Appellees' arguments in this case, the defendants in *Harris* argued that the plaintiff "waived her right to assert this jurisdictional defect by continuing to submit to the jurisdiction of the court by her subsequent motions for relief." *Id.* But the court of appeals rejected that argument: "A voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties. Such jurisdiction cannot be conferred by consent, waiver, or estoppel. The court's lack of subject matter jurisdiction was not waived." *Id.*

The same rationale applies here. A voluntary dismissal itself closes the file and renders the case a nullity. A party's consent or continuing to seek relief from the court after the dismissal does not revive subject matter jurisdiction.

For these same reasons, the trial court erred when it found that it had already addressed and resolved the subject matter jurisdiction issue at the December 3, 2014 hearing and that Transportation Alliance and defendants effectively withdrew the notice of dismissal as to the third cause of action (R. 1458). Once Transportation Alliance filed the notice of dismissal, there was no further case or controversy and no question for the trial court to determine. The trial court's December 11, 2014 entry states it was "[b]ased on the agreement of the parties" and does not mention jurisdiction. (R. 780.) And because the notice of dismissal was self-effectuating and immediately terminated the case, Transportation Alliance could not withdraw it.

In sum, Transportation Alliance's dismissal terminated the case. No matter existed over which the trial court could exercise its authority, so the court lacked subject matter jurisdiction to approve the receivership sale. The judgment approving the sale is void.

C. The presence of intervening creditors did not prevent Transportation Alliance's dismissal because Transportation Alliance was the only plaintiff.

The trial court also found that Transportation Alliance did not have authority to dismiss the case without order of the court because the Intervening Creditors were parties and the Receiver had been appointed. (R. 1457.) Not so.

Rule 41(a)(1) is unequivocal. "An action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules." The rule does not contain an exception in cases where a receiver has been appointed. This is in contrast to some other jurisdictions that specifically prohibit dismissal without a court order if a receiver has been appointed. *See*, *e.g.*, Fed.R.Civ.P. 41(a)(1)(A) (noting voluntary dismissal rule is subject to Rule 66) and F.R.C.P. 66 ("An action in which a receiver has been appointed may be dismissed only by court order."); *see also* Nev.R.Civ.P. 41(a)(1) (noting that voluntary dismissal rule is subject to Rule 66) and N.R.C.P. 66 ("An action wherein a receiver has been appointed shall not be dismissed except by order of the court.").

Nor does the rule contain an exception in cases where persons have sought to intervene under Rule 24 but have not established themselves as a plaintiff by filing a pleading. Rule 24(c) provides that a motion to intervene "shall be

accompanied by a pleading setting forth the claim or defense for which intervention is sought." U.R.C.P. 24(c) (emphasis added). This requires a pleading containing a statement of the claim and demand for judgment. *See In re United Effort Plan Trust*, 2013 UT 5, ¶38 ("Under 24(c), a party moving for intervention must file an accompanying 'pleading setting forth the *claim or defense* for which intervention is sought.' *Id.* 24(c) (emphasis added [by Court]). And Rule 8 of the Utah Rules of Civil Procedure, in turn, sets forth the requirements for pleading claims and defenses, requiring for the assertion of a 'claim': '(1) [a] statement of the claim showing that the party is entitled to relief; and (2) [a] demand for judgment for specified relief.' *Id.* 8(a)."). A motion to intervene is not a "pleading." *See* U.R.C.P. 8(a) (exclusive list of pleadings does not include motions to intervene). Thus, the Intervening Creditors indisputably failed to comply with Rule 24 and did not become plaintiffs.

Indeed, the Intervening Creditors' motion to intervene referred to the creditors only as "Intervening Parties"—specifically not "Intervening Plaintiffs." (R. 422.) And the Order granting intervention stated only that the Intervening Creditors were "deemed parties for all purposes"—not "deemed plaintiffs." (R. 430.) No Intervening Creditor ever filed a complaint or otherwise asserted a claim against International Confections, NG or Ryan. The first indication that the Intervening Creditors supposedly became plaintiffs was the trial court's December

11, 2014 Order stating that the "intervening creditors in this case are substituted as plaintiffs under the third cause of action in the complaint only, and the case shall remain pending." (R. 780.) That order was invalid because the trial court entered it after Transportation Alliance's voluntary dismissal. But the invalid order shows that even the trial court did not believe the creditors were plaintiffs; if the trial court believed the creditors had to be substituted as plaintiffs on December 11, they could not possibly have been plaintiffs when Transportation Alliance dismissed the case on November 24. Transportation Alliance was the only plaintiff when it filed the notice of dismissal, so the dismissal ended the case.

The case the trial court relied on—*Supernova Media*—does not control here. There, the intervenors filed a motion to intervene in two related cases. When the original parties moved the trial court to dismiss the cases, the trial court granted the motions and denied the still-pending motions to intervene. *Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*, 2013 UT 7, ¶ 12, 297 P.3d 599. The intervenors appealed. The Utah Supreme Court analyzed all of the elements relating to intervention as of right and concluded that the intervenors satisfied those elements. *See id.* at ¶¶ 22–54. The Court thus held that the trial court erred in denying the motions to intervene and reversed that decision. *Id.* at ¶¶ 54, 61. Reversing the trial court's decision, of course, made the intervenors parties, so the stipulated dismissal did not have consent of all the parties. *Id.* at ¶54.

Supernova does not control this case for two reasons. First, the parties filed motions to dismiss that required the approval of the court. *Id.* at ¶ 12. Thus, the trial court had discretion which in turn means the possibility of error. In contrast, this case involves a notice of voluntary dismissal by the only plaintiff. Such a dismissal closes the case automatically and a court has no discretion to accept or reject it.

Second, the intervening parties in *Supernova* specifically moved to intervene as plaintiffs and filed a Complaint in Intervention as intervening plaintiffs. (R. 1219–1235 (Supernova Motion to Intervene and Mem. in Support); R. 1237–1247 (Supernova Complaint in Intervention).) The intervenors thus complied with Rule 24 and presented themselves as intervening plaintiffs in the case. So, when the Utah Supreme Court found that the trial court erred in denying intervention, it established the intervenors as additional plaintiffs. If a case has multiple plaintiffs, one plaintiff cannot terminate the whole case by filing a notice or stipulation of dismissal. But, unlike in *Supernova*, the intervenors here specifically chose not to intervene as plaintiffs and not to file a pleading. The trial court granted the Intervening Creditors leave to intervene on November 5, 2014. (R. 429.) They had nineteen days to file complaints and establish themselves as plaintiffs before Transportation Alliance dismissed the action on November 24. They chose not to

do so. Thus, when Transportation Alliance filed its notice of dismissal, Transportation Alliance was the only plaintiff.

The Intervening Creditors' failure to file a complaint setting out their claims and establishing themselves as plaintiffs is no mere technicality. "The mere act of appointing a receiver is, after all, a drastic and extraordinary remedy." *Wing v. Horne*, No. 2:08-CV-00717, 2009 WL 2929389, *3 (D. Utah Sept. 8, 2009); *see also* 65 Am.Jur.2d Receivers § 9 ("The appointment of a receiver is a harsh, dangerous, extraordinary, and drastic remedy to be exercised with great caution and circumspection, and granted only in cases of clear necessity to protect the plaintiff's interests in the property. In general, a receiver should only be appointed in extreme cases; it should not be resorted to except in clear and urgent cases regardless of the apparent equity of the complainant."). Indeed, to obtain the appointment of a receiver, Transportation Alliance filed a verified complaint in which its representative swore under oath to the truth of the allegations supporting receivership—a remedy expressly provided for in the Loan Agreement between Transportation Alliance and defendants. (R. 12-23 (Receivership cause of action in verified complaint).) If the Intervening Creditors desired to become plaintiffs and show that they too were entitled to the drastic remedy of receivership, they, like Transportation Alliance, had to file complaints alleging sufficient facts. Because they did not, Transportation Alliance was the only plaintiff when it filed

its notice of dismissal. And because International Confections, NG, and Ryan had not responded to the complaint, Rule 41(a)(1) gave Transportation Alliance the unilateral ability to dismiss. That dismissal immediately deprived the trial court of subject matter jurisdiction and made the case a nullity. And neither the trial court nor the parties could resurrect the case by consent or further proceedings.

II. The judgment was void for failure to comply with Rule 74(c).

A. Rule 74(c) imposed a moratorium on further proceedings upon counsel's withdrawal.

Because the trial court violated Rule 74(c) by conducting further proceedings after counsel for International Confections, NG, and Ryan withdrew, the trial court abused its discretion by denying relief from judgment. When an attorney withdraws, Rule 74(c) protects unrepresented parties by halting all proceedings until 21 days after the opposing party and its attorney file and serve on the unrepresented party a notice to appear or appoint counsel:

> [T]he opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 21 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

U.R.C.P. 74(c).

Utah courts have interpreted Rule 74(c) to "impose[] an unambiguous restriction on opposing counsel and the trial court." *Loporto v. Hoegemann,* 1999 UT App. 175, ¶ 19, 982 P.2d 586; *see also Migliore v. Migliore*, 2008 UT App. 208, ¶ 14, 186 P.3d 973, 975–76. Once opposing counsel learns that a party's attorney has withdrawn, Rule 74 requires he or she to file the appropriate notice with the court. Thereafter, the court may not hold any proceedings until 21 days have elapsed from the date of filing of the notice. *Migliore*, *supra*, ¶ 14.

Violation of Rule 74(c) justifies relief from judgment under numerous grounds. First, the Utah Supreme Court has held that opposing counsel's failure to discharge their duty under Rule 74(c) justifies relief from judgment under the catch-all "any other reason justifying relief" prong of Rule 60(b)(6). *See Sperry v. Smith,* 694 P.2d 581 (Utah 1984) (reversing denial of motion to vacate judgment as abuse of discretion when opposing party failed to serve notice on unrepresented party after counsel had withdrawn). Second, in *Harrison v. Thurston*, this Court suggested that a violation of Rule 74(c) may constitute excusable neglect under Rule 60(b)(1). In *Harrison*, plaintiff's counsel was suspended from the practice of law, which left her unrepresented when a motion to dismiss was filed. New counsel was not obtained until three weeks after the court granted the motion to dismiss. Citing Rules 60(b) and 74(c), the Court held that "Harrison's lack of legal representation and the unique facts and circumstances leading up to the effective

removal of her attorneys constitute 'reasonable justification,' amounting to excusable neglect resulting from circumstances over which Harrison had no control[.]" *Harrison v. Thurston*, 2011 UT App 231, ¶ 11, 258 P.3d 665 (internal citations omitted). Third, International Confections, NG, and Ryan submit that because Rule 74(c) unequivocally prohibits further proceedings until compliance, a judgment entered in violation of Rule 74(c) is void under Rule 60(b)(4). Finally, because Rule 74(c) imposes affirmative obligations on adverse parties, violation also constitutes "other misconduct of an adverse party" under Rule 60(b)(3).

The moratorium is supposed to give parties time to retain replacement counsel, permit them to get up to speed on the case, and allow new counsel to make an appearance on behalf of the party. This did not happen. Here, the Notice was served electronically on all nine other attorneys in the case—none of which filed or served the requisite Rule 74 notice. According to the trial court's docket, at the time Attorney James withdrew, there were no motions pending and no hearings were scheduled. Therefore, when James filed his notice of withdrawal, counsel for the opposing parties—the Intervening Creditors and the Receiver—were required by rule to file and serve a notice to appear or appoint counsel. No further proceedings were permitted in the case for 21 days after such notice. Because no party ever filed or served the notice, the moratorium was never lifted

and the trial court's approval of the asset sale five days after Mr. James withdrew violated Rule 74(c).

At bottom, James's withdrawal, opposing counsel's failures, and the trial court's expedited asset sale approval brought about the very situation that Rule 74(c) was designed to prevent: a lawyer withdraws in the middle of a case, the 21-day moratorium on proceedings is ignored, and a significant legal detriment is imposed on Defendants on an ex parte, expedited basis without the benefit of legal representation.

B. Counsel withdrew before the Receiver filed the motion to approve the receivership sale, and no other motions were pending.

Mark James withdrew as Defendants' counsel on December 18, 2014. James filed the notice of withdrawal electronically with the Court, and the Notice clearly stated that it was being sent by email to the Receiver. (R. 788–791.) This happened before the Receiver filed his expedited motion to approve the Asset Purchase Agreement. Therefore, the Receiver had notice of Mr. James's withdrawal before filing the motion for approval of the asset sale.

The trial court found that the withdrawal was ineffective because the Receiver filed his motion the same day. But that is not the rule. Counsel may withdraw by notice under Rule 74(a) if no motion is pending and no hearing or trial set. Electronic filing creates a record of when a paper is filed down to the second. The record shows that Attorney James filed his notice of withdrawal

electronically at 2:42:22 PM. (R. 790.) Further, while the record does not contain a time-stamped filing confirmation for the Receiver's expedited motion to approve the sale, it appears sequentially in the record after James's notice of withdrawal, and counsel for Mrs. Fields conceded at oral argument that the Receiver's motion was filed "a couple of hours later" on the same day as the notice of withdrawal. (R. 1558, lines 8–12.) Thus, the trial court's finding that "it is unclear which was filed first" is in error, and the trial court abused its discretion when it found that the Receiver's motion to approve the sale was a pending motion that precluded James' withdrawal by notice.

C. The purported technical defects in the notice did not eliminate the adverse parties' Rule 74(c) obligations.

The trial court found that Attorney James's failure to include an address for International Confections, NG, or Ryan rendered the notice of withdrawal defective and therefore prevented the Rule 74(c) moratorium from taking effect. (R. 1458.) At most, this is a technical deficiency, not a substantive one. Counsel did not, for example, attempt to withdraw without court permission with a motion pending or a hearing or trial set. And the adverse parties had contact information for Mr. Ryan. An address for Mr. Ryan was already available in the record, in filings attached to Transportation Alliance's Complaint. (R. 225). Further, the Receiver's counsel suggested to the trial court at the December 23 hearing that Mr.

Ryan had been in communication with the Receiver, meaning the Receiver had contact information. (R. 1500, lines 10–12.)

Mr. James's failure to state his clients' address on the notice of withdrawal should not deprive International Confections, NG, or Ryan of Rule 74(c)'s protections. Civil rules designed in the interest of justice "should not fall to a technicality." *Mower v. Bohmke*, 9 Utah 2d 52, 55 (1959) (construing rule allowing officer to postpone judicial sale of property and holding, "Such a rule, designed in the interests of justice, should not fall to a technicality."). Depriving International Confections, NG, and Ryan of the benefit of Rule 74(c) would also violate the command that the Rules of Civil Procedure "shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action." U.R.C.P. 1. Indeed, specifically in the context of notices of withdrawal, the Utah Supreme Court has found substantial compliance with the notice procedures sufficient to trigger the protections for an unrepresented party. *See Sperry v. Smith*, 694 P.2d 581, 582 (Utah 1984) (in applying former Rule 2.5 of the Rules of Practice of the District Courts of the State of Utah, holding that withdrawing counsel substantially complied and that failing to follow rule's requirement of certifying that he mailed copy of notice to his clients did not preclude rule's requirement of a notice to appear and appoint before further proceedings).

What is more, the plain language of Rule 74 does not permit a technical deficiency of the contents of the notice of withdrawal to eliminate the protections to unrepresented litigants. Subdivision (a) of the rule identifies the contents of the notice of withdrawal. But the requirements of a moratorium on proceedings and a notice to appear or appoint counsel appear separately in subdivision (c). The only applicable prerequisite to these requirements is that "an attorney withdraws other than under subdivision (b)...". U.R.C.P. 74(c). Here, International Confections, NG, and Ryan's counsel filed and served a notice of withdrawal. The trial court did not strike the notice or find it ineffective, and no party objected to the notice. And, the trial court and other parties proceeded with a hearing on December 23, 2014, at which no attorney appeared for International Confections, NG, or Ryan. Had the trial court believed James had not effectively withdrawn and still represented International Confections, NG, or Ryan, Mr. James's absence at that hearing would have resulted in much more than a brief colloquy on the record. In other words, counsel withdrew and the trial court and other parties accepted that withdrawal.

III. International Confections, NG, and Ryan's failure to respond to the Receiver's motion to approve the sale was excusable neglect because they were unrepresented and the trial court held a hearing and granted the motion three business days after it was filed.

The withdrawal of counsel had an additional devastating effect on International Confections, NG, and Ryan: it made it impossible for them to respond to the Receiver's expedited motion to approve the sale. The trial court

should have found the failure to respond and object to the motion to approve the sale excusable neglect.

Rule 60(b)(1) of the Utah Rules of Civil Procedure affords a district court broad discretion to relieve a party from a final judgment due to "mistake, inadvertence, surprise, or excusable neglect." *Harrison v. Thurston*, 2011 UT App 231, ¶¶ 7–9, 258 P.3d 665, 669; *see also Jones v. Layton/Okland*, 2009 UT 39, ¶ 17, 214 P.3d 859. The determination of "excusable neglect" is equitable in nature, allowing the court's inquiry "to be flexible, taking into account all relevant factors in light of the particular circumstances * * * [to determine] whether the particular relief sought is justified under principles of fundamental fairness in light of the particular facts." *Jones*, 2009 UT 39 at ¶ 17. "[T]here is no specific legal test for excusable neglect," but case law has established various factors. *Id.*, ¶¶ 18–19 (explaining that there is a veritable "universe of situations" in which excusable neglect could exist).

In examining "excusable neglect," courts look at whether "the moving party has exercised sufficient diligence [to justify] grant[ing] him relief from the judgment entered as a result of his neglect." *Id.*, ¶ 25. Courts have defined "due diligence" as "conduct that is consistent with the manner in which a reasonably prudent [person] under similar circumstances would have acted." *Harrison*, 2011 UT App 231 at ¶ 7 (citing *Menzies v. Galetka*, 2006 UT 81, ¶ 72, 150 P.3d 480).

When there is any doubt "whether a [judgment] should be set aside, that doubt should be resolved in favor of doing so." *Id.*, ¶ 9 (citing *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986) (per curiam)); *accord Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981) ("[D]iscretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing.").

Taking into account all relevant factors in light of the particular circumstances of the case, International Confections, NG, and Ryan's failure to respond to the expedited motion to approve the sale shows excusable neglect. The Receiver filed his motion on December 18, 2014, a Thursday. The trial court held a hearing and approved the sale on December 23, 2014, five calendar days—which included a Saturday and Sunday—later. Further, the purchase agreement was not even submitted to the Court with the motion. (R. 796–889.) The motion summarized the Asset Purchase Agreement, but did not mention the release term. (R. 799–800.) The motion stated that the receivership order required notice to the creditors involved in the receivership before the sale (R. 801), even though the receivership order as amended on December 11, 2014 required "prior notice to all parties." (R. 781.) And it stated that if the Intervening Creditors wanted to see the Asset Purchase Agreement, they could ask the Receiver's counsel. (R. 800.) The notice of hearing specified that anyone who wanted the trial court to consider their

views on the motion had to file a response on or before December 22, 2014 at 3:30 PM. (R. 886.) But the Receiver did not even file the Asset Purchase Agreement until December 22 at 5:49 PM (as Exhibit A to the proposed order approving the sale). (R. 890–924.)

It was impossible for International Confections, NG, and Ryan to respond and object to the sale when 1) they were unrepresented (as all parties and the trial court acknowledged), 2) three business days' notice was provided to their withdrawn counsel instead of to them, 3) the expedited motion did not include the purchase agreement, but only a summary that did not mention the broad release term purporting to cover entities other than the buyer, and 4) the Asset Purchase Agreement was not even filed and served until the evening before the day of the expedited hearing (after the deadline to submit objections). And in addition to the practical impossibilities of responding under these circumstances, Ryan was legally prohibited from representing International Confections and NG because he is not an attorney. *See Graham v. Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶ 14, 979 P.2d 363, 369 (acknowledging "well-established rule that an unincorporated association, like a corporate entity, may not be represented by a nonlawyer").

Under these circumstances, the trial court abused its discretion when it did not find excusable neglect.

IV. To the extent they need one, International Confections, NG, and Ryan have asserted a meritorious defense.

A party seeking to vacate a void judgment need not establish a separate meritorious defense. *See Judson v. Wheeler RV Las Vegas, L.L.C.*, 2012 UT 6, ¶ 15, 270 P.3d 456 ("If a judgment is entered by a court that lacks jurisdiction, justice is furthered by setting that judgment aside as void under rule 60(b)(4) even absent a separate meritorious defense."); *see also Murray Place v. Varela*, 297 P.3d 642 (Utah App. 2013) (relief from judgment based on lack of jurisdiction for failure of service did not require meritorious defense). International Confections, NG, and Ryan have shown that any proceedings after Transportation Alliance filed its notice of dismissal were void, including the judgment approving the receivership sale.

But to the extent International Confections, NG, and Ryan showed their right to relief under other grounds of Rule 60(b), they have shown a meritorious defense. The assertion of a meritorious defense under Rule 60(b) requires only "a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant or counterclaimant." *Lund v. Brown*, 2000 UT 75, ¶ 29, 11 P.3d 277. The proffer of a meritorious defense under Rule 60(b) is subject to a liberal pleading standard analogous to that prescribed under Rule 8, which requires only that a party state the basis for its claims or defenses "in short and plain terms." *Judson*, 2012 UT 6, ¶ 23.

In this case, International Confections, NG and Ryan have a meritorious defense. Mrs. Fields Franchising unlawfully terminated a 17-year license agreement in its second year. Thus, Mrs. Fields Franchising obtained a huge benefit from the release language in the Asset Purchase Agreement, but International Confections, NG, and Ryan were deprived of the ability to object to that language. Extending the release term to Mrs. Fields Confections' "members" or "affiliates," the Receiver—without International Confections, NG, or Ryan's knowledge—purportedly released any and all claims International Confections had against Mrs. Fields Franchising for breach of the License Agreement. Indeed, releasing these claims was worth much, much more than the purchase price paid for International Confections's assets.

Further, releasing such claims against Mrs. Fields Franchising—a non-party to the case and to the Asset Purchase Agreement—exceeded the Receiver's authority. The trial court's November 13 and December 11, 2014 receivership orders do not contemplate the Receiver releasing claims on behalf of International Confections, NG, or Ryan when such releases are not bargained for. The record lacks any evidence that a release of International Confections's claims against Mrs. Fields Franchising was bargained for, or that the potential value of any such claims was even contemplated. And, the trial court's December 11 Order authorized the Receiver to market and sell Defendants' assets, "but subject to (a) prior notice to

all parties to this action, through their counsel of record, who may object to any such proposed sale[.]" (R. 781.) Counsel for International Confections, NG, and Ryan withdrew before the Receiver filed the expedited motion to approve the sale, and the Receiver did not provide notice to International Confections, NG, or Ryan.

The fact that they were unrepresented when the Receiver filed his expedited motion to approve the sale and when the trial court held an expedited hearing, plus opposing counsel's failure to comply with Rule 74(c), shows that International Confections, NG, and Ryan were deprived of reasonable notice and the opportunity to object to the Receiver's December 18 motion. Had opposing counsel complied with Rule 74, International Confections, NG and Ryan would have known of the situation as it existed at that time, would have retained replacement counsel, and would have filed objections to the Receiver's motion based on the overly broad release language in the Asset Purchase Agreement. (R. 1036 (Ryan Affid., ¶ 10).) They also would have had time to try to negotiate the release term out of the Asset Purchase Agreement, or at least try to find another buyer whose release would not have eliminated the significant breach of contract and related claims International Confections has against Mrs. Fields Franchising.

In light of their counsel's withdrawal and opposing counsel's failure to serve and file the notice required by Rule 74(c), International Confections, NG, and Ryan were deprived of notice and the opportunity to be heard. And the withdrawal

of Attorney James coupled with opposing counsel's failure to comply with Rule 74(c) meant the trial court had no authority to approve the receivership sale or take any other proceedings in this case. These facts reflect a meritorious defense for purposes of Rule 60(b).

CONCLUSION

Substantial justice was denied here. The trial court proceeded forward after a voluntary dismissal with prejudice deprived it of jurisdiction. And the trial court approved a receivership sale on an ex parte, expedited basis even though International Confections, NG, and Ryan were unrepresented and the opposing parties did not comply with Rule 74(c). The result was that Mrs. Fields Franchising—who was not a party either to this case or to the Asset Purchase Agreement—received a purported release supposedly insulating it from its improper termination of a seventeen-year, multimillion dollar license agreement. The events in this case deprived International Confections, NG, and Ryan of their rights, and the trial court should have vacated the judgment approving the receivership sale and dismissed the case for lack of jurisdiction.

Accordingly, International Confections, NG, and Ryan ask this Court to reverse the trial court's August 21, 2015 order. Because Transportation Alliance's notice of voluntary dismissal with prejudice deprived the trial court of subject matter jurisdiction, this Court should reverse the trial court's denial of the 60(b)

motion, vacate the order approving the receivership sale, and order the trial court to dismiss the case. Alternatively, because International Confections, NG and Ryan's counsel withdrew before the Receiver filed the motion to approve the sale, this Court should vacate the order approving the receivership sale and remand for further proceedings.

DATED this 31st day of March, 2016.

/s/ Karra J. Porter
Karra J. Porter
CHRISTENSEN & JENSEN, P.C.

Rex H. Elliott
Barton R. Keyes
COOPER & ELLIOTT, LLC
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2016 two true and correct copies of the **BRIEF OF APPELLANT** were mailed to the following:

Steven C. Strong – strong@cohnekinghorn.com
Bradley M. Strassberg – bstrassberg@cohnekinghorn.com
COHNE KINGHORN, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Attorneys for Mrs. Fields Confections, LLC

/s/ Karra J. Porter
Karra J. Porter
Attorneys for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 9,792 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

/s/ Karra J. Porter
Karra J. Porter
Attorneys for Plaintiffs/Appellants