

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

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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

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ARGUMENT

The arguments of defendants/appellants International Confections Company, NG Acquisition, and Michael Ryan show that the trial court erred and abused its discretion in denying the motion for relief from the judgment approving the receivership sale. The case no longer existed after plaintiff TAB's voluntary dismissal, so the trial court lacked jurisdiction to proceed. Alternatively, proceeding forward after counsel for International Confections, NG, and Ryan withdrew violated [Utah R. Civ. P. 74\(c\)](#), and International Confections, NG, and Ryan could not respond to the receiver's motion under the circumstances. Thus, the trial court should have granted the motion for relief based on [Utah R. Civ. P. 60\(b\)\(1\), \(b\)\(4\), and \(b\)\(6\)](#).

As explained below, none of the arguments by appellants Mrs. Fields Confections or Bank of American Fork overcomes the fundamental flaws that the trial court proceeded in a nonexistent case and in violation of Rule 74(c). Accordingly, this Court should reverse the decision below.

I. Bank of American Fork waived its arguments by not presenting them in the trial court.

As an initial matter, the Court should not consider any of the arguments Appellee Bank of American Fork raises in its brief. Bank of American Fork did not present any of these arguments to the trial court. Rather, in response to the [Rule 60\(b\) motion](#), Bank of American Fork filed an "objection" consisting of six

paragraphs of its description of facts it claimed justified denying the motion. (R. 1164–1167.) Bank of American Fork offered no legal analysis or citations to any authority.

In *Mule-Hide Products Co. v. White*, this Court held that an appellee may not attempt to raise an issue for the first time on appeal:

Appellee, for the first time on appeal, attempts to raise the issues of equitable estoppel, apparent agency, and laches. However, appellee failed to present these arguments to the court below and, therefore, may not raise these issues on appeal. See *State v. Carter*, 707 P.2d 656, 660-61 (Utah 1985). “Failure to raise the point [below] precludes its consideration here.” *Id.* at 661. Appellee also alludes to attorney fees on appeal in its statement of issues but its brief contains no analysis. “Under ordinary circumstances, appellate courts will not consider an issue ... raised for the first time on appeal unless the trial court committed plain error.” *State v. Helmick*, 2000 UT 70, ¶ 8, 9 P.3d 164.

Mule-Hide Products Co. v. White, 2002 UT App 1, fn. 5, 40 P.3d 1155.

The majority of the arguments Bank of American Fork raises in its brief are already addressed in Mrs. Fields’ brief. But as to the few points that only appear in Bank of American Fork’s brief (explained in more detail below), the Court should not consider them.

II. TAB's notice of voluntary dismissal with prejudice terminated the case and the Court's subject matter jurisdiction.

A. Mrs. Fields' res judicata argument fails.

Mrs. Fields Confections argues that res judicata bars International Confections, NG, and Ryan's [Rule 60\(b\)](#) motion because the court considered and determined its subject matter jurisdiction. (Mrs. Fields' Br. at 19-21.) This argument fails because res judicata does not apply in direct attacks to jurisdiction in the same case, and because the trial court did not adjudicate its jurisdiction.

1. The Rule 60(b) motion was a direct attack, not a collateral one, so res judicata does not apply.

In arguing that res judicata applies, Mrs. Fields Confections mischaracterizes the [Rule 60\(b\)](#) motion as a collateral attack on subject matter jurisdiction. (Mrs. Fields' Br. at 19.) The Utah Supreme Court has held that an attempt to deny the legal and binding effect of a judgment in a proceeding with a purpose other than voiding the judgment is a collateral attack. In contrast, an attempt to void a judgment in a manner provided by law to accomplish that object is a *direct* attack:

*A direct attack on a judicial proceeding is an attempt to correct it, or to void it, in some manner provided by law to accomplish that object. It is an "attack, * * * by appropriate proceedings between the parties to it seeking, for sufficient cause alleged, to have it annulled, reversed, vacated or declared void." [Pope v. Harrison](#), 16 Lea, 84 Tenn., 82, 90.* If the suit or proceeding is instituted for the very purpose of setting aside, correcting, or modifying the judgment, it is usually regarded as a direct attack. When the attack upon the

judgment is not incidental to the object of the proceeding, and the end of the proceeding is not something collateral to the judgment, the attack is direct; while a denial of the legal and binding effect of a judgment in a proceeding not instituted for the purpose of annulling or changing it, or of enjoining its execution, is characterized as a collateral attack upon it. *Mosby v. Gisborn*, 17 Utah 257, 54 P. 121. A direct attack is an action or motion for the specific and primary purpose of setting aside or annulling the judgment; and any action which has for its purpose the accomplishment of any other relief than the setting aside or modifying of the judgment is not a direct attack. *Wayne v. Brumley*, 190 Ky. 488, 227 S.W. 996. When the direct purpose and aim of the proceeding is to attain relief other than the setting aside or modifying of the judgment, and the attack upon the judgment is involved merely incidentally, the attack is collateral. *Cohen v. Portland Lodge No. 142, B. P. O. E.*, 152 F. 357, 81 C.C.A. 483; *Cohee v. Baer*, 134 Ind. 375, 32 N.E. 920, 39 Am.St.Rep. 270.

Intermill v. Nash, 94 Utah 271, 75 P.2d 157, 160 (1938) (emphasis added; asterisks *sic*).

Based on this distinction, the Ninth Circuit Court of Appeals held in *Watts v. Pinckney* that a motion to vacate judgment under Fed.R.Civ.P. 60(b)(4) was a direct attack, not a collateral one. There, plaintiff Watts sued defendant Pinckney for damage to a houseboat. Pinckney filed a third-party claim against the United States, and Watts filed an amended complaint to join the United States as a defendant. The district court entered judgment for Watts against Pinckney and the United States. The United States appealed, but Pinckney paid the judgment and did not appeal. *Watts v. Pinckney*, 752 F.2d 406, 407.

On appeal, the Ninth Circuit reversed, holding that Watts' claim lied solely against the United States. On remand, the district court determined that it lacked subject matter jurisdiction over the claim and dismissed the complaint. Seven months later, Pinckney—who had paid the Watts' judgment against him and who had not appealed from the judgment—moved to vacate the judgment as void under [Fed.R.Civ.P. 60\(b\)\(4\)](#), and requested that the court order restitution of the funds he had paid to satisfy the judgment. The district court granted Pinckney's motion. *Id.* at 408.

Watts appealed and argued that Pinckney could not bring his motion because res judicata precludes a collateral attack on a court's determination of its own jurisdiction. *Id.* at 410. Relying on the above-quoted language from [Intermill v. Nash](#), the Ninth Circuit rejected this argument because an attack under Rule 60(b) is direct, not collateral:

Pinckney's attack on the judgment was *direct*, not collateral. A direct attack is defined as follows:

A direct attack on a judicial proceeding is an attempt to correct it, or to void it, in some manner provided by law to accomplish that object. It is an attack ... by appropriate proceedings between the parties to it seeking, for sufficient cause alleged, to have it annulled, reversed, vacated or declared void.

1B J. Moore, [Moore's Federal Practice](#) ¶ 0.407 at 282 n. 1, [quoting Intermill v. Nash](#), 94 Utah 271, 75 P.2d 157.

The doctrine of res judicata does not apply to *direct* attacks on judgments. “Res judicata does not preclude a litigant from making a direct attack [under Rule 60(b)] upon the judgment before the court which rendered it.” *Jordan v. Gilligan*, 500 F.2d at 710, quoting 1B J. Moore, *Moore’s Federal Practice* ¶ 0.407 at 931 (2d ed. 1973).

Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir. 1985) (brackets and emphasis in original). The court concluded that Pinckney could move to set aside the unappealed judgment and recover the amount he had paid. Because the judgment was void, it was a “legal nullity” and the “district court was compelled to exercise its authority under Rule 60(b)(4) to vacate the judgment against Pinckney.” *Id.*

The U.S. Bankruptcy Court for the Western District of Texas also recognized the same rule in *In re Acorn Hotels*. It held, “A Rule 60(b)(4) motion is, by definition, *not* a collateral attack. It is a *direct* attack, brought in the same case and before the same court that entered the offending judgment.” *In re Acorn Hotels, LLC*, 251 B.R. 696, 700 (W.D. Tex. Bankr. 2000) (emphasis in original). Because a Rule 60(b)(4) motion is a direct attack in the same case, res judicata does not apply:

Just as *res judicata* will foreclose a challenge to subject matter jurisdiction in the context of a collateral attack on a judgment, the reverse is true in the context of a “direct attack”—the lack of basis for subject matter jurisdiction may render the resulting judgment void, permitting it to be set aside pursuant to Rule 60(b)(4), even though the jurisdictional challenge might not have been made at

trial, and *res judicata* cannot be raised as a bar to such a direct challenge.

Id. at 700–01. In other words, “*Res judicata*, an affirmative defense that has as its touchstone the principle of finality of judgments, can have no application in a [Rule 60\(b\)](#) action, the very purpose of which is to accord to trial courts an equitable *exception* to the normal rules of finality.” *Id.* at 701 (emphasis in original). *See also* [47 Am. Jur. 2d Judgments, § 747](#) (“An attack on a judgment in proceedings based on equitable relief as allowed by rule or law constitutes a direct attack and is not a barred collateral attack. . . . Thus, for example, a complaint to set aside a judgment alleged to be void is a direct and not a collateral attack upon the judgment.”)

In addition to these authorities, common sense supports the notion that a litigant may challenge a court’s jurisdiction through a Rule 60(b)(4) motion. A lack of jurisdiction is one of the few reasons that a judgment could be void. “‘If the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant’s motion to vacate the judgment under Rule 60(b)(4).’” [Antoine v. Atlas Turner, Inc.](#), 66 F.3d 105, 108 (6th Cir. 1995) (quoting [U.S. v. Indoor Cultivation Equipment](#), 55 F.3d 1311, 1317 (7th Cir.1995)). “A judgment is void under 60(b)(4) ‘if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.’” *Id.* (quoting [In re Edwards](#), 962 F.2d 641, 644 (7th Cir.1992)). It would

render [Rule 60\(b\)\(4\)](#) meaningless if res judicata prevented a litigant from challenging subject matter jurisdiction by a motion under that rule.

In sum, because International Confections, NG, and Ryan’s Rule 60(b)(4) motion was a direct attack on the trial court’s judgment, res judicata does not apply.

2. Res judicata could not apply here in any event because the trial court did not adjudicate its jurisdiction.

Res judicata could not apply here in any event because the trial court did not adjudicate its jurisdiction. In its five pages of argument about res judicata, Mrs. Fields Confections does not offer a single Record citation to a decision by the trial court adjudicating its jurisdiction. That is because the trial court never made one.

Res judicata will not bar a later argument on subject matter jurisdiction when the court *assumed* it had jurisdiction instead of actually *adjudicating* the question. In [Lilly v. Lilly](#), a party sought to attack the subject matter jurisdiction of a California court that adjudicated the same issues in a prior case. This Court held that res judicata did not bar the attack because “although raised before the California court, the issue of subject matter jurisdiction was not adjudicated.” [Lilly v. Lilly](#), 2011 UT App 53, ¶¶ 28–29, 250 P.3d 994. In the prior case, one of the parties objected to the California court’s subject matter jurisdiction. In response, the California court considered personal jurisdiction, but did not expressly determine whether it had subject matter jurisdiction. [Id.](#) at ¶ 29. This Court

explained that the res judicata question depends on whether the prior court assumed jurisdiction or expressly adjudicated it:

The critical inquiry is therefore whether the issue of jurisdiction was fully and fairly litigated and finally decided in the court which rendered the competing judgment. In conducting such an analysis, a distinction must be recognized between the mere assumption of jurisdiction by the foreign court and a recital to that effect, as contrasted with an express adjudication on the subject after the issue has been raised.

Id. at ¶ 28. Although *Lilly v. Lilly* involved a prior foreign case and judgment, the Court should apply the same rule to this case because due process of law—which necessarily applies regardless of whether prior proceedings occurred in another state or in the same one—drives the ability to question jurisdiction in an earlier proceeding. *Fullenwider Co. v. Patterson*, 611 P.2d 387, 389 (Utah 1980) (“It is fundamental that the courts of each state shall give full faith and credit to valid judgments rendered in a sister state. However, this does not preclude the court of the forum state from examining into the question of jurisdiction of the foreign state when that question is properly raised. *This is so because due process of law requires the acquisition of jurisdiction as a prerequisite to the validity of any judgment.*” (emphasis added)).

The trial court never determined its jurisdiction after TAB’s notice of voluntary dismissal, but proceeded with the case after the dismissal “[b]ased on the

agreement of the parties.” (R. 780 (Dec. 11, 2014 entry).) Thus, even if the Rule 60(b) motion constituted a collateral attack, res judicata could not apply because the court never adjudicated its subject matter jurisdiction.

B. The trial court’s proceeding in a non-existent matter renders its judgment void.

International Confections, NG, and Ryan’s consent to ongoing proceedings does not amount to a waiver of jurisdiction because parties can never waive lack of subject matter jurisdiction or establish subject matter jurisdiction by consent or estoppel. 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 (subject matter jurisdiction cannot be waived and may be asserted at any time); *Harris v. Billings*, 16 Cal. App. 4th 1396, 1405 (Cal. App. 1993) (holding that party’s participation in case after voluntary dismissal did not waive later objection to subject matter jurisdiction because voluntary dismissal deprived court of subject matter jurisdiction and “[s]uch jurisdiction cannot be conferred by consent, waiver, or estoppel.”).

Mrs. Fields Confections argues that the trial court’s proceeding after the dismissal was not a bad enough jurisdictional error to make its judgment void. (Mrs. Fields’ Br. at 22–23.) But this case did not involve a mere erroneous

interpretation of a statute defining jurisdiction. Rather, it involved a court taking action and entering judgment when no case existed. No party disputes that Utah courts only have authority to act in a pending case. And no party disputes that a proper notice of voluntary dismissal terminates a pending case. Thus, there was not even an arguable basis for jurisdiction.

Mrs. Fields Confections also argues that the judgment was not void because subject matter jurisdiction is “the authority of the court to hear the case” and that Utah district courts have jurisdiction “in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.” (Mrs. Fields’ Br. at 26 (citing *Johnson v. Johnson*, 2010 UT 28, ¶ 8, 234 P.3d 1100 and Utah Code Ann. § 78A-5-102(1).) Mrs. Fields focuses on the wrong part of the statute. The question is not whether district courts generally have authority to hear civil matters involving receivers. The question is whether a “matter” exists at all after a proper notice of dismissal.

Utah law is clear on this point: it does not. *Thiele v. Anderson*, 1999 UT App 56, ¶ 24, 975 P.2d 481, 489 (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”); *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.”)

Because a voluntary dismissal terminates the matter, any proceedings after a voluntary dismissal are void for lack of subject matter jurisdiction. *See, e.g., Safeguard Bus. Sys., Inc. v. Hoeffel*, 907 F.2d 861, 864 (8th Cir. 1990) (“Because Safeguard filed its notice of voluntary dismissal before Hoeffel filed an answer or a motion for summary judgment, the voluntary dismissal must be given effect. The district court’s orders and judgments filed after September 25, 1989, are, therefore, void for want of jurisdiction.”); *Jones, Blechman, Woltz & Kelly, PC v. Babakaeva*, 375 F. App’x 349, 350 (4th Cir. 2010) (“Babakaeva did not file an answer or a motion for summary judgment prior to the filing of the [Rule 41\(a\)\(1\)\(A\)\(i\)](#) notice. Therefore, the voluntary dismissal became effective upon filing of the notice with the clerk of the district court. At that point, the action terminated, and the district court was divested of jurisdiction. Accordingly, the district court was without authority to conduct the hearing or to enter the order Babakaeva seeks to appeal, and that order is void.” (internal citations omitted)); *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.”).

In sum, a district court only has subject matter jurisdiction over a pending matter. Because a voluntary dismissal terminates a matter and renders it a nullity,

a district court has no subject matter jurisdiction after the dismissal. *Johnson v. Johnson and Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177 did not involve district courts taking action after a voluntary dismissal, so Mrs. Fields’ reliance on them is misplaced.

C. TAB’s voluntary dismissal terminated the case and rendered all further proceedings a nullity.

1. The creditors had not intervened as plaintiffs before TAB’s dismissal.

Mrs. Fields argues that the presence of intervening creditors prevented TAB’s voluntary dismissal. (Mrs. Fields’ Br. at 23–25.) Mrs. Fields also mischaracterizes Rule 41(a) as requiring that “all parties consent to dismissal[.]” (Mrs. Fields’ Br. at 25.) Not so. Only a “plaintiff” needs to consent to a notice of dismissal. *Utah R. Civ. P. 41(a)(1)*. The authorities Mrs. Fields cites on pages 24 and 25 of its brief do not apply here because they involved cases with multiple plaintiffs.

Mrs. Fields argues that International Confections, NG, and Ryan’s stipulation to the motion to intervene and failure to appeal from the order granting intervention made TAB’s dismissal invalid. (Mrs. Fields’ Br. at 24.) But that would only matter if the creditors moved to intervene *as plaintiffs* and then actually intervened *as plaintiffs* by filing pleadings (i.e., complaints) as *Rule 24(c)* requires. They did not. The creditors in this case specifically chose not to file complaints

and not to identify themselves as plaintiffs in their motion to intervene or proposed order granting it. The trial court's December 11, 2014 order substituting the creditors as plaintiffs makes this clear; the creditors would not have to substitute as plaintiffs if they were already plaintiffs. ([R. 780.](#)) That order was a nullity, however, because it came after TAB, the only plaintiff at the time, filed its voluntary dismissal.

The decision to dismiss an action under [Rule 41\(a\)\(1\)](#) belongs exclusively to plaintiffs. Because the creditors chose not to intervene as plaintiffs, they consciously gave up the right to prevent a voluntary dismissal of the action. TAB was the only plaintiff when it filed its voluntary dismissal. That dismissal meant there was no pending matter, and any proceedings after the dismissal are a nullity.

2. International Confections, NG, and Ryan had not responded to TAB's complaint before TAB's dismissal.

Bank of American Fork argues that International Confections, NG, and Ryan responded to the complaint, preventing TAB's dismissal. (Bank's Br. at 6–8.) Bank of American Fork has waived this argument and the Court should not consider it. See [Mule-Hide Products Co. v. White](#), 2002 UT App 1, fn. 5, 40 P.3d 1155. But the argument lacks merit in any event. Rule 41 allows the plaintiff to dismiss a case “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.” [Utah R. Civ. P. 41\(a\)\(1\)](#). The referenced “rules” are,

of course the Rules of Civil Procedure. And the only responses to a complaint that the Rules of Civil Procedure permit are answers, counterclaims, and Rule 12 motions. The Civil Rules do not permit a notice of appearance by counsel and a memorandum in opposition to a plaintiff's motion to serve as responses to a complaint. Accordingly, International Confections, NG, and Ryan had not served an "answer or other response to the complaint permitted under these rules," and TAB could voluntarily dismiss the case by notice.

3. The appointment of a receiver did not prevent TAB's dismissal.

Bank of American Fork argues that the appointment of a receiver prevented TAB's voluntary dismissal. Again, Bank of American Fork has waived this argument and the Court should not consider it. Even so, the argument fails. Bank of American Fork asks this Court to read a provision into the Rules of Civil Procedure that does not appear there. Neither Rule 41 nor any other Civil Rule provides that appointment of a receiver affects a plaintiff's unilateral right to dismiss a case by notice. [Rule 41\(a\)\(2\)](#)—which covers dismissal by order of court—makes clear that dismissal by court order is required only if the plaintiff does not file a timely notice of dismissal under [Rule 41\(a\)\(1\)](#).

What is more, the Civil Rules contain a rule on receiverships: [Rule 66](#). That rule does not say that [Rule 41\(a\)\(1\)](#) ceases to apply when a court appoints a receiver. This is in contrast to some other jurisdictions that specifically prohibit

dismissal without a court order if the court has appointed a receiver. *See, e.g., Fed.R.Civ.P. 41(a)(1)(A)* (noting voluntary dismissal rule is subject to Rule 66) and *Fed.R.Civ.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 *Nev.R.Civ.P. 66* (“An action wherein a receiver has been appointed shall not be dismissed except by order of the court.”). If Utah’s Civil Rules prohibited dismissal by notice where a court has appointed a receiver, they would say so. Bank of American Fork claims these jurisdictions’ rules merely state what is already inherently true, but cites no authority for this conclusory assertion and no authority (Utah or otherwise) holding that Rule 41(a)(1) does not apply in receivership cases.

Bank of American Fork’s reliance on *Shaw v. Robison* is misplaced. The court in *Shaw* appointed a receiver after the plaintiff had responded to the complaint. *Shaw v. Robison*, 537 P.2d 487, 488 (Utah 1975). The plaintiff and defendant in *Shaw* reached a settlement that was subject to court approval. *Id.* at 489. In contrast, the resolution between TAB, International Confections, NG, and Ryan in this case did not require court approval. And unlike in this case, the parties in *Shaw* moved the court to terminate the receivership. *Id.* A motion means that the court had to take further action before terminating the receivership or dismissing the case, and that the court had discretion to deny it. In contrast, a

notice of dismissal is self-effectuating and immediately terminates the case without further action from the court.

In sum, the appointment of the receiver did not preclude TAB's notice of dismissal.

III. Proceeding after counsel's withdrawal violated [Rule 74\(c\)](#).

Mrs. Fields argues that Rule 74's moratorium on proceedings did not apply because the notice of withdrawal by International Confections' former counsel did not contain International Confections' address or a statement that no motion was pending and no trial or hearing set. (Mrs. Fields' Br. at 28–29.) At most, this is a technical deficiency, not a substantive one. International Confections' counsel did not, for example, attempt to withdraw without court permission with a motion pending or a hearing or trial set. And the omitted information was readily available to the other parties' counsel from the Court's record. International Confections, NG, and Ryan have cited case law holding that substantial compliance with attorney withdrawal procedures is sufficient to entitle the party to the rule's benefits. (Appellants' Br. at 34 (citing [Sperry v. Smith](#), 694 P.2d 581, 582 (Utah 1984)). In contrast, Mrs. Fields cites no authority holding that counsel's failure to include a client's address on a notice of withdrawal deprives the unrepresented client of the benefit of [Rule 74\(c\)](#).

Mrs. Fields further argues that the adverse parties did not have to comply with [Rule 74\(c\)](#) because attorney James continued to receive notice of pleadings and hearings after his withdrawal. (Mrs. Fields’ Br. at 29-30.) But that makes no difference. Attorney James had withdrawn and the trial court and all parties acknowledged that. When an attorney withdraws from a matter, the attorney no longer acts as counsel of record. That notices may continue to be sent electronically to that attorney bears no relevance under Rule 74(c).

Mrs. Fields also argues that the trial court’s order approving the purchase agreement triggers the “unless otherwise ordered by the court” exception in [Rule 74\(c\)](#). (Mrs. Fields’ Br., 29–30.) But the trial court’s order did not mention Rule 74(c). This exception can only apply when a Court specifically addresses the rule. Otherwise, any order entered in violation of the rule would eliminate the rule by implication, and the exception would swallow the rule.

Finally, Mrs. Fields argues that Rule 74(c) did not apply because International Confections, NG, and Ryan were aware of the receivership proceedings before their counsel withdrew. (Mrs. Fields’ Br., 30–31.) But Rule 74(c) contains no exception when a party has knowledge of proceedings before counsel’s withdrawal (as all parties in a case would).

The trial court abused its discretion in not vacating the judgment for the adverse parties' failure to comply with [Rule 74\(c\)](#).¹

IV. International Confections, NG, and Ryan showed excusable neglect based on the record.

Mrs. Fields claims that International Confections, NG, and Ryan base their excusable neglect argument on an unsupported version of the facts. (Mrs. Fields' Br. at 31.) To the contrary, International Confections, NG, and Ryan relied on record evidence in the form of undisputed proceedings in the Court below. (Appellants' Br. at 37–38.) The proceedings showed that International Confections, NG, and Ryan's counsel withdrew, that the adverse parties and trial court did not comply with [Rule 74\(c\)](#), that the receiver filed an expedited motion to approve an asset purchase agreement (but did not include the agreement), that the receiver made no effort to serve the motion on the unrepresented defendants, and that the receiver sought approval of the purchase agreement at a hearing three business days later. International Confections, NG, and Ryan's inability to

¹ Mrs. Fields chides International Confections, NG, and Ryan's opening brief for not breaking out its Rule 74(c) argument to parrot the three paragraphs the trial court used in its analysis on this issue. ([R. 1458–59.](#)) But International Confections, NG, and Ryan argued that Rule 74 (c) applied, that attorney James' withdrawal complied with the rule, that the rule required an immediate moratorium, and that International Confections, NG, and Ryan suffered the prejudice that the Rule 74(c) was meant to prevent. These arguments apply to all of the trial court's reasoning.

respond to the receiver's motion under these circumstances demonstrate excusable neglect.

V. The requested relief is not moot.

Mrs. Fields argues that the Court should dismiss this appeal for mootness. (Mrs. Fields' Br. at 33–39.) Mrs. Fields already raised this argument in its motion for summary disposition, which the Court denied. The Court should reject this argument again.

Mrs. Fields argues that because this case involves property sold at a receivership sale, this appeal cannot provide a meaningful remedy and is moot. Not true. As an initial matter, because the judgment is void for lack of subject matter jurisdiction, Mrs. Fields' mootness argument cannot prevent this appeal. "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." *Judson v. Wheeler RV Las Vegas, L.L.C.*, 2012 UT 6, ¶ 15, 270 P.3d 456.

What is more, equitable mootness does not apply here because International Confections, NG, and Ryan do not ask to recover the property sold by the receiver. Instead, they intend only to enforce their legal rights—specifically, those of International Confections—in the License Agreement with Mrs. Fields Franchising. Ryan, International Confections' sole member, has stated as much under oath. (R. 1036 (Ryan Affid., ¶ 12).)

The fact that property has been sold at a receivership sale does not render an appeal of the denial of a 60(B) motion moot where, as here, the movant/appellant seeks something other than to prevent the transfer of property. In relying primarily on *Richards v. Baum*, Mrs. Fields ignores the Utah Supreme Court decision that *Baum* said controlled the outcome—*Franklin Financial v. New Empire Development Co.* See *Richards v. Baum*, 914 P.2d 719, 722 (Utah 1996) (holding that *Franklin Financial* “anticipated the issue in the present case and directed a resolution in accord with our holding”). In *Franklin Financial*, the seller of an apartment house sued to foreclose on a contract of sale and recover amounts due on the contract and some promissory notes. *Franklin Financial*, 659 P.2d 1040, 1042 (Utah 1983). The plaintiff/seller won summary judgment in the trial court, the property was sold, and the seller retained all sale proceeds. Some junior lienholders appealed, challenging the seller’s priority and claiming a share of the sale proceeds. *Id.*

On appeal, the seller argued that the appeal was moot because the foreclosure sale had occurred and the period of redemption had passed. *Id.* at 1043. The Utah Supreme Court explained, “An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.” *Id.* “Thus, if appellants were seeking on this appeal to prevent the foreclosure sale, and

because of their failure to obtain a stay of execution, the sale was legally carried out during the pendency of the appeal and the time for redemption had run, the appeal would be moot.” *Id.* The court held that the appeal was not moot because the appellants sought “not to prevent the sale, but to establish their right to a share of the sale proceeds. That relief could be granted even though the sale is already completed and the time for redemption has elapsed.” *Id.*

Similarly to *Franklin Financial*, courts from other jurisdictions have recognized that a receivership sale does not moot an appeal because an appellant may seek a remedy other than preventing the sale of assets. *See, e.g., Horvath v. Packo*, 985 N.E. 2d 966, 972 (Ohio App. 2013) (“Even if we were to decide the trial court abused its discretion in denying Horvath’s Civ.R. 60(B) motion, and even if the receivership assets are no longer available pursuant to R.C. 2325.03 because they have been sold to a bona fide purchaser, Horvath would still be entitled to monetary relief from the proceeds of the asset sale.”); *U.S. v. Melot*, 606 Fed.Appx. 930, 932 (10th Cir. 2015) (“[I]f it is not impossible for the court to grant some measure of relief, the appeal is not moot.”) (holding that appeal from order confirming judicial sale was not moot though sale had been completed because possibility of some remedy other than preventing the sale existed).²

² While outside of the receivership context, in *Watts v. Pinckney* (discussed in Section II.A.1 above), the Ninth Circuit vacated a judgment for lack of subject matter jurisdiction even though the defendant never appealed the judgment,

Here, as in *Franklin Financial* and other cases finding appeals after a sale of property are not moot, appellants do not seek to prevent a sale of any property or to recover property that has already been transferred. Instead, appellants seek relief from judgment so that International Confections may enforce its contract rights against Mrs. Fields Franchising.

Because defendants seek something other than to prevent the sale of property already sold, the primary Utah case on which Mrs. Fields relies—*Richards v. Baum*—does not apply here. In *Baum*, the plaintiffs brought an action to quiet title, seeking only specific performance of a real estate sale contract. The seller defendants counterclaimed seeking a decree quieting title in their favor. The trial court found for the defendants. The plaintiffs filed a notice of appeal but did not obtain a stay of the judgment. While the appeal was pending, the defendants sold the property. *Baum*, 914 P.2d at 720.

On appeal, the Utah Supreme Court applied the unremarkable rule that if an appellant does not obtain a stay of the judgment and the only relief possible becomes unavailable as a result, the appeal becomes moot. Because the plaintiff/appellant sought specific performance of the real estate sale contract as its only relief in the trial court, and because the defendant/appellee sold the property

actually paid the judgment, and waited for seven months after a judgment against a co-defendant had been overturned to file a motion to vacate.

and no longer had an interest in it, it would have been impossible to grant specific performance even if the Supreme Court reversed the trial court's judgment. *Id.* at 720-21. The appellants argued that the appeal was not moot because if the Supreme Court reversed the judgment, the trial court could award damages on remand. The Supreme Court rejected this argument because the appellants—who were the plaintiffs below—never requested damages in their complaint. The Supreme Court refused to examine the case based on the theoretical possibility of future amendments to the complaint on remand, instead reviewing the action in its then-present form. *Id.* at 721-22.

This case is different from *Baum*. There, the sale of property to a third party mooted the appeal because the *only* relief the plaintiffs/appellants had requested was sale of the property to them. In contrast, the appellants here were defendants in the trial court below. There was no specific remedy for them to demand at the trial court. Indeed, the receivership sale occurred even before the defendants filed an answer to Transportation Alliance Bank's complaint. Further, in their Rule 60(b) motion, defendants do not seek the return of property already sold to third parties. Instead, defendants seek only the ability to enforce the License Agreement against Mrs. Fields.

As with *Baum*, none of the other cases on which Mrs. Fields relies applies here, because each case involved an appellant seeking to prevent the transfer of property that was already transferred:

- *Kelch v. Westland Minerals Corp.*, 484 P.2d 726 (Utah 1971) (trial court ordered defendant to issue free trading stock to plaintiffs; defendants did not obtain a stay of the judgment and plaintiffs transferred the subject stock).
- *Capri Sunshine, LLC v. E&C Fox Investments, LLC*, 2015 UT App. 231 ¶9 (portion of appeal arguing that trial court erred in denying preliminary injunction to stop sale of property was moot because sale had already occurred).
- *BV Lending, LLC v. Jordanelle Special Service Dist.*, 2015 UT App 117, ¶16 (appellant's effort to challenge validity of special service district assessment was moot because service district had foreclosed on property so that appellant no longer owed the assessment).
- *Masonry Arts, Inc. v. Mobile County Com'n*, 628 So.2d 334 (Ala. 1993) (unsuccessful bidder for public contract sought only injunctive relief; bidder's appeal became moot because bidder did not obtain stay of judgment and contract was awarded to different bidder and performance had begun).
- *Westinghouse Elec. Corp. v. Grand River Dam Authority*, 720 P.2d 713 (Okla. 1986) (unsuccessful bidder's appeal from denial of injunction was moot because bidder's failure to obtain stay allowed another bidder to begin performance on contract).
- *U.S. v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987) (appellants sought to set aside receivership and return property to company after numerous changes affecting property, including hiring legal compliance consultants, selling bonds to finance acquisition, compliance agreement with EPA, water quality testing, and implementation financing and long-term improvements).

This appeal is not moot because defendants are not seeking to prevent the transfer of property that already occurred. If this Court reverses the trial court,

defendants will have meaningful relief because setting aside the judgment that imposed the broad release clause on defendants will allow International Confections to enforce its contract rights against Mrs. Fields Franchising.³

CONCLUSION

Mrs. Fields and Bank of American Fork have failed to refute International Confections, NG, and Ryan's arguments. The trial court erred and abused its discretion in denying relief from judgment, and this Court should reverse the denial of the motion. Because TAB's notice of dismissal deprived the trial court of subject matter jurisdiction, this Court should 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 his motion to approve the sale, this Court should vacate the order approving the receivership sale and remand for further proceedings.

³ Contrary to Mrs. Fields' unsupported assertion that the defendant companies "are no more," the receivership sale took only the form of an asset purchase. And it excluded certain assets from the sale. International Confections' License Agreement with Mrs. Fields Franchising *was not sold*.

DATED this 5th day of July, 2016.

/s/ Karra J. Porter

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2016 a copy of the **REPLY BRIEF OF APPELLANTS** was mailed and emailed to the following:

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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 6,434 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

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