[Cite as *Morgan v. Hughes*, 2004-Ohio-637.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 82916

MICHAEL J. MORGAN, ET AL.	:	
	:	JOURNAL ENTRY
Plaintiffs	:	
	:	AND
vs.	:	
	:	OPINION
MARTIN J. HUGHES, ET AL.	:	
	:	
Defendants	:	
	:	
[Appeal by United Telephone Credit Union]	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	February 12, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-429769
	:	
JUDGMENT DATE OF JOURNALIZATION	:	Reversed and remanded.

APPEARANCES:

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SEAN C. GALLAGHER, J.

{¶1} Appellant United Telephone Credit Union, Inc. ("UTCU") and proposed intervening appellant American Mutual Share Insurance Corporation, Conservator for UTCU ("Conservator"), appeal from the April 25, 2003 judgment of the trial court that granted plaintiff-appellee Union Eye Care Center's ("Eye Care") motion for enforcement of a purported settlement agreement and reversed its order that granted the Conservator's motion for leave to intervene. Eye Care filed an action against Martin J. Hughes ("Hughes") and UTCU. Hughes was, simultaneously, a director and officer of UTCU and a trustee, president, and director of operations for Eye Care. Eye Care alleged that Hughes breached his fiduciary duty by misappropriating funds for his own benefit. On October 18, 2002, the parties advised the trial court they had reached a settlement agreement and that agreement would be reduced to writing and submitted to the court as

soon as possible. A journal entry reflecting that the action was "settled and dismissed with prejudice" conditioned on the execution of a confidential settlement agreement was entered by the court on October 18, 2002 before the purported agreement was reduced to writing.[1]

{¶2} The written settlement agreement was circulated to Hughes on November 22, 2002. Hughes refused to sign it. On December 4, 2002, Eye Care filed a motion to enforce the purported settlement. The written settlement agreement sought to bind Hughes and UTCU, jointly and severally, to pay the entire settlement sum of $208,000[2] to Eye Care. The trial court did not initially rule on the motion or hold a hearing on its merits as Eye Care had requested. The record indicates there were problems getting Hughes to cooperate with the parties and the court because of an unspecified illness.

{¶3} Because of financial irregularities involving the management of UTCU, the state superintendent of credit unions appointed American Mutual Share Insurance Corporation as the Conservator on February 24, 2003 under R.C. 1733.361. The statute reads in part:

> **"(A)(1) The superintendent of credit unions may issue an order appointing a conservator for any credit union whenever he considers it necessary in order to conserve the assets of such credit union for members, depositors, and creditors. The superintendent shall appoint a conservator for any credit union whose status as an insured institution has been terminated."**

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[1] The trial court and the parties did not memorialize the details of the purported settlement either in writing or on the record with a court reporter.

[2] The attorney for Hughes also represented UTCU. No objection to this dual representation was raised by either Hughes or representatives of UTCU prior to February 24, 2003.

{¶4} The statute gave the Conservator the sole and exclusive authority to exercise all rights, powers, and authority of the officers, directors, and members on February 24, 2003, the date of the superintendent's order. R.C. 1733.361(B) outlines the authority of the Conservator:

> **"(B) The conservator: "(1) Shall take possession of the business and property of such credit union; "(2) Shall have and exercise, in the name and on behalf of the credit union, all the rights, powers, and authority of the officers, directors, and members of the credit union and may continue its business in whole or in part with a view to conserving its business and assets pending further disposition thereof as provided by law under the supervision of the superintendent and upon such limitations as are imposed by him; "(3) May give notice that he has taken possession of the assets of the credit union to all persons holding or having possession of any assets of such credit union; "(4) In all other respects, operate the credit union in accordance with, and remain subject to, the requirements of this chapter; "(5) May bring or defend suits or proceedings in the name of the credit union under the direction and supervision of the superintendent. "(C) This section does not vest title to any assets of the credit union in the conservator. No person, firm, corporation, or association, knowing that a conservator has taken possession of the business and property of a credit union or having been so notified shall have a lien or charge against any of the assets of such credit union for any payment, advance, or liability thereafter made or incurred. "(D) The superintendent may terminate the conservatorship and permit the credit union to resume the transaction of its business, subject to such terms and restrictions as he prescribes, when the superintendent determines that the termination of such conservatorship may be safely done and would be in the public interest. The superintendent may terminate the conservatorship and issue an order revoking the credit union's articles of incorporation and appointing a liquidating agent to liquidate the credit union in accordance with and on the grounds provided in section 1733.37 of the Revised Code.**
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> **"(E) The conservator may, subject to the approval of the superintendent, submit a plan for the termination of the conservatorship to the members of the credit union. If the majority of the members vote to accept the plan, the members shall elect directors to manage the affairs of the credit union. "(F) The expenses of the conservatorship and**

compensation of the conservator if any, as provided in this section, shall be paid out of the assets of the credit union and shall be a lien thereon prior to any other lien."

{¶5} On March 17, 2003, the Conservator, now representing UTCU, filed a motion for leave to intervene in this action. The trial court held a hearing on Eye Care's motion to enforce the purported settlement agreement on April 25, 2003.[3] The trial court granted the Conservator's motion to intervene. The trial court then recessed the hearing to give the parties the opportunity to "work this matter out." Upon reconvening, Hughes informed the court he had signed the written settlement agreement, personally, and on behalf of UTCU. Hughes informed the court he wrote the date "October 18, 2002" next to his signature even though, obviously, he was signing the agreement more than six months after that date. Hughes had also signed the agreement, indicating it was on behalf of UTCU, with the "October 18, 2002" date. Finally, counsel for Hughes signed the agreement, entering the same date of "October 18, 2002."

{¶6} The trial court granted Eye Care's motion for enforcement of the settlement agreement. The Conservator objected, but was ignored by the trial court. On its own motion, the trial court then reversed its granting of leave for the Conservator to intervene and summarily removed the Conservator from the case. The Conservator, individually and on behalf of UTCU, now appeals these

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[3] Both parties reference an April 21, 2003 hearing; however, the certified copy of the docket indicates that this hearing took place on April 25, 2003 while the judge's signature on the actual journal entry is dated April 24, 2003.

decisions by the trial court and advances three assignments of error.

{¶7} The Conservator's first assignment of error states as follows:

{¶8} "The trial court erred in granting Plaintiff-Appellee's motion for enforcement of settlement agreement since Martin J. Hughes, Director, Officer and Member of The United Telephone Credit Union, and his counsel, Percy Squire, had no right, power or authority to execute the draft settlement agreement on behalf of the credit union or to purport to bind the credit union given the Conservatorship order of February 24, 2003 and Ohio Revised Code 1733.361(B)(2) and (5)."

{¶9} The parties do not dispute that the superintendent lawfully appointed the Conservator for UTCU on February 24, 2003. They further agree that the settlement agreement was actually signed, or executed, by Hughes on behalf of UTCU, after the appointment of the Conservator. Finally, they agree that the endorsement date of October 18, 2002 next to Hughes' signature was written on April 25, 2003 when Hughes signed the agreement.

{¶10} Eye Care argues there was a "meeting of the minds" on October 18, 2002, and, as such, it is the "effective date" of the agreement that Hughes signed six months later. Whether there was a meeting of the minds sufficient to bind the parties on October 18, 2002 is unknown to this court. The trial court did not initially conduct a hearing, nor did it memorialize the settlement terms of

that date for this court to review. While the trial court, in its journal entry of April 25, 2003, indicated there was a meeting of the minds, no testimony or evidence establishing this claimed fact was placed on the record.

{¶11} Eye Care contends that "any delay in execution by all parties was not the result of an alteration of the terms agreed to by all parties on October 18, 2002, but rather the *failure of Martin J. Hughes to execute the Agreement*." (Emphasis added.) The terms of the agreement, however, control the effective date of the settlement. It is undisputed that Hughes did not execute the written settlement agreement until April 25, 2003. The clear language of the agreement is controlling where it states: "13. Effective Date. This Agreement shall be effective upon *the latest date of all parties' execution* of the counterparts." (Emphasis added.)

{¶12} Although Eye Care asserts that the written agreement's "effective date" was October 18, 2002, the agreement was not executed until April 25, 2003. The agreement's plain language requires us to hold that it was executed upon its signing on April 25, 2003 and not at some prior date when a purported "meeting of the minds" took place. The written agreement has no term establishing its effectiveness based upon a "meeting of the minds." Therefore, on April 25, 2003, only the Conservator possessed the authority to execute this written agreement on behalf of UTCU. Hughes' purported binding of UTCU to this written agreement via his

signature on April 25, 2003, therefore, is void. This assignment of error is sustained.

{¶13} The Conservator's second assignment of error states as follows: "The trial court lacked jurisdiction to grant plaintiff-appellee's motion for enforcement of settlement agreement since the action was dismissed by stipulation for dismissal and judgment entry dated October 18, 2002 and plaintiff-appellee commenced no separate civil action for judgment on the draft settlement agreement."

{¶14} "Initially, this court recognizes that a trial court possesses the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit. However, a trial court will lose jurisdiction to proceed into a matter when the court has unconditionally dismissed an action. In contrast, when an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur. The determination of whether a dismissal is unconditional, thus depriving a court of jurisdiction to entertain a motion to enforce a settlement agreement, is dependent upon the terms of the dismissal order." *Tabbaa v. Koglman* (2002), 149 Ohio App.3d 373. (Internal citations omitted.)

{¶15} The October 18, 2002 order dismissing this case states in pertinent part as follows: "All claims by all parties settled and dismissed * * * Parties to execute confidential settlement

agreement. It is so ordered." The trial court clearly dismissed this case "pursuant to a stated condition, such as the existence of a settlement agreement." Id. Therefore, the trial court did retain jurisdiction to entertain a motion to enforce any valid settlement agreement. As found in the first assignment of error, however, the written settlement agreement, signed in April 2003, is not valid. We therefore return to the terms of the purported oral settlement agreement reached on October 18, 2002.

{¶16} As previously stated, the trial court and the parties did not memorialize any of the terms or seal any terms of that purported oral settlement agreement on the record. Further, the trial court did not delay final dismissal until after receipt of an executed written settlement agreement. These failures deprive this court of any information to even attempt to divine the terms of the purported oral settlement agreement reached by the parties on October 18, 2002. Only a proper evidentiary hearing can solve that riddle.

{¶17} It is understood that the trial court's ability to hold an evidentiary hearing may have been limited by the availability of Hughes, but even without his presence, a hearing can resolve questions about the terms of the oral agreement and provide insight into why the initial draft remained unsigned. The reference in the court's journal entry of April 25, 2003 to a "meeting of the minds" is insufficient, by itself, to establish that the terms in the written agreement were the same as the oral agreement purportedly

reached months earlier. The parties need to state that fact, if true, on the record. In spite of the invalidity of the attempted execution of the written settlement agreement, oral settlement agreements are enforceable. *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1, 2002-Ohio-2985. "It is preferable that a settlement be memorialized in writing. However, an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." Id.

{¶18} From the events and negotiations subsequent to the October 18, 2002 hearing, there is a suggestion that there arose a dispute or misunderstanding as to the terms of the purported oral settlement agreement reached on that date. As a result, the trial court should have held an evidentiary hearing in response to the motion to enforce settlement agreement to determine the terms of the purported oral settlement agreement reached on October 18, 2002. "'To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear,' and if there is uncertainty as to the terms then the court should hold a hearing to determine if an enforceable settlement exists." *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374.

{¶19} This assignment of error is overruled as to the claim that the trial court lost jurisdiction to enforce the purported oral settlement agreement. The dismissal did not divest the trial court of jurisdiction over the purported oral settlement. The Conservator's argument that the trial court lacked jurisdiction to

enforce the *written* settlement agreement that was endorsed by Hughes and his attorney, however, is sustained. Nonetheless, the trial court does retain jurisdiction to enforce the purported oral settlement agreement reached on October 18, 2002, provided an evidentiary hearing is held to determine if, in fact, a settlement was reached and the terms thereof.

{¶20} The Conservator's third assignment of error states as follows:

{¶21} "The trial court erred: (A) in reversing, sua sponte, its order granting American Mutual Share Insurance Corporation ("ASI") leave to intervene when ASI had the absolute statutory right to represent and defend the United Telephone Credit Union Under Ohio Revised Code 1733.361(B)(2) and (5); and (B) in failing to hold an evidentiary hearing when evidentiary issues existed as to the enforceability of the draft settlement agreement, including the legal capacity of Hughes to execute the agreement."

{¶22} Subsection (B) of the Conservator's assignment of error was already addressed in the previous assignment of error.

{¶23} The Conservator's argument here is that it was appointed to represent UTCU and, therefore, the trial court improperly refused to permit its intervention in this case to contest the validity of the written settlement agreement.

{¶24} Civ.R. 24 governs interventions as of right and reads in pertinent part:

> **"(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."**

{¶25} "A trial court's decision on the timeliness of a motion to intervene will not be reversed absent an abuse of discretion." *The State ex rel. The First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St.3d 501. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 1994-Ohio-43. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135. With this standard in mind, we review this assignment of error.

{¶26} No party disputes that at the time of the April 2003 hearing, the Conservator had "an interest relating to the property or transaction that is the subject of the action." Further, the terms and enforcement of the written settlement agreement that was being decided at the April 2003 hearing clearly threatened to "impair or impede the applicant's ability to protect that interest."

{¶27} We find that the trial court abused its discretion in rescinding its earlier order permitting the Conservator to intervene in this action on April 25, 2003. In fact, the Conservator was entitled to intervene as a matter of right as it met the criteria of Civ.R. 24(A) on or after February 24, 2003. This assignment of error is sustained.

{¶28} After February 24, 2002, the Conservator, under R.C. 1733.361(B), had the right to represent and defend the UTCU in addition to his obligations to operate it, and had an absolute obligation to intervene in any lawsuit then pending. Concomitant, however, is the duty of the Conservator to honor valid contractual obligations of the UTCU incurred before notification that the Conservator has taken possession of its operation and property.[4]

{¶29} It is clear that Eye Care asserted liability claims against Hughes and the UTCU before the appointment of the Conservator. If Hughes had the authority and capacity to bind the credit union to a settlement of a lawsuit on October 18, 2002, and if the attorney representing the UTCU had no objection to that client having joint and several liability with Hughes for payment of the $208,000, and if the terms of the oral agreement, although later reduced to writing, were agreed upon at that time, a binding oral contract was made. The performance by the parties, however, was delayed until the written agreement was endorsed.[5]

{¶30} Upon remand, should the evidence prove that on October 18, 2002, the authorized parties voluntarily agreed to certain and specific terms and conditions of a settlement, and that a written instrument documenting those terms and conditions was circulated on November 24, 2002, and that the document Hughes endorsed on April 23, 2003 contained the same terms and conditions, the judge could find that a valid oral contract was entered into on October 18, 2002. The endorsement of the November 24,

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[4] R.C. 1733.361(C).

[5] *Effective* is defined as "actually in operation or in force; functioning; ***" Random House Unabridged Dictionary, 2nd Edition, 1998.

2002 document by the parties in interest would then be a ministerial act.

{¶31} We are compelled to note that, even with the most benign intentions, attempting to exercise authority no longer possessed by backdating a written settlement agreement is troubling. The perception that lawyers are professionals and trustworthy is diminished should such conduct be considered harmless, commonplace, or accepted. It clearly is not and should not have been contemplated or permitted.

{¶32} Judgment reversed and remanded for rehearing.

ANNE L. KILBANE, P.J., concurs.

JAMES D. SWEENEY, J.,* concurs in judgment only.

*James D. Sweeney, J., retired, Eighth District Court of Appeals, sitting by assignment.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).