In the

Supreme Court of Ohio

UNITED TELEPHONE CREDIT UNION, INC.,	:	Case No. 2006-1174
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
KENNETH A. ROBERTS, Acting Deputy Superintendent of Credit Unions,	:	Court of Appeals Case Nos. 05AP-827 and 05AP-870
and	:	
AMERICAN MUTUAL SHARE INSURANCE CORPORATION,	:	
Defendants-Appellees.	:	

FILED
MAR 30 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

JOINT MEMORANDUM OF DEFENDANTS-APPELLEES KENNETH A. ROBERTS AND AMERICAN MUTUAL SHARE INSURANCE CORPORATION OPPOSING MOTION TO INTERVENE OF LAW OFFICES OF SQUIRE AND PIERRE-LOUIS

FORDHAM E. HUFFMAN* (0020870)
*Counsel of Record
Jones Day
325 John H. McConnell Blvd.
P.O. Box 16517
Columbus, Ohio 43216-5017
614-469-5017
614-461-4198 fax

SCOTT MENDELOFF
GABRIEL AIZENBERG
Sidley Austin, LLP
1 South Dearborn Street
Chicago, Illinois 60613
312-853-7000
312-853-7036 fax

Counsel for Plaintiff-Appellant
United Telephone Credit Union, Inc.

MARC DANN (0039425)
Attorney General of Ohio

ELISE PORTER* (0055548)
Acting Solicitor General
*Counsel of Record
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
PEGGY W. CORN (0042197)
Assistant Solicitor
RANDALL W. KNUTTI (0022388)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eporter@ag.state.oh.us

Counsel for Defendant-Appellee
Kenneth A. Roberts

ORLA E. COLLIER III* (0014317)
Counsel of Record
JOHN F. STOCK (0004921)
Benesch Friedlander Coplan & Aronoff LLP
88 E. Broad Street, Suite 900
Columbus, Ohio 43215
614-223-9300
614-223-9330 fax

Counsel for Defendant-Appellee
American Mutual Share Insurance
Corporation

KATHLEEN M. TRAFFORD (0022096)
JOHN C. HARTRANFT (0023037)
POLLY J. HARRIS (0029433)
DAVID S. BLOOMFIELD, JR. (0068158)
JULIE L. ATCHISON (0069907)
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
614-227-2000
614-227-2100 fax

Counsel for Defendant-Appellee
Kenneth A. Roberts
(as special counsel to Attorney General Marc
Dann)

LLOYD PIERRE-LOUIS
Pierre-Louis & Associates, LLC
5 East Long St., Ste. 700
Columbus, Ohio 43215
614-232-9055
614-232-9077 fax

Counsel for Proposed Intervenor
Law Offices of Squire & Pierre-Louis, LLC

TABLE OF CONTENTS

INTRODUCTION

The Court should deny the motion to intervene filed by the Law Offices of Squire and Pierre-Louis ("S&P"). S&P claims that it is the former counsel for appellant United Telephone Credit Union ("UTCU"), and S&P wants to intervene to advance its interest in being paid attorney fees for its earlier representation. But this case, in this Court, is neither the time nor the place for S&P to press its claims for fees. The issue before the Court is whether Natalie Hughes, a former director of UTCU, had the right to direct litigation in UTCU's name. More specifically, the question is whether Hughes had the right to file, in UTCU's name, a challenge to a conservatorship order under R.C. 1733.361(A)(2). Here, the Ohio Department of Commerce's Division of Financial Institutions ("DFI"), which regulates credit unions in Ohio, ordered that UTCU's operations be controlled by a conservator, and in February 2003, DFI appointed Defendant-Appellee American Mutual Share Insurance Company ("ASI") as UTCU's conservator. Hughes's current counsel is vigorously litigating, in this Court, Hughes's right to maintain that challenge against ASI and against DFI's Acting Deputy Superintendent for Credit Unions, Defendant-Appellee Kenneth Roberts. That dispute is all that is before the Court, and it is neither necessary nor appropriate to add S&P's claim for fees to this appellate case.

S&P's intervention attempt is inappropriate for several independent reasons. First, it is too late. This case has been in the Court for over nine months; it has already been briefed on the merits; and it is set for argument in eight weeks. Now is no time to add new parties and new issues. Second, S&P has nothing new or different to say regarding the issues before the Court. Indeed, S&P does not even purport to add a new wrinkle or interest in the outcome on the issues before the Court; instead, it openly seeks to add new issues. Third, S&P's attempt to raise new issues is improper both substantively and procedurally. Substantively, the Court's discretionary jurisdiction is limited to those issues on which the Court has granted review, or to issues that are fairly included in the grant of review. Ancillary issues such as attorney fees do not qualify. And procedurally, while S&P attempts to invoke the Court's original jurisdiction, it fails to explain how one can add an original-jurisdiction case, complete with new complaint, to an existing appellate case. On top of that, S&P seeks to raise claims that are not within the Court's original jurisdiction, such as breach of contract.

For all these reasons and more, S&P's intervention attempt should be denied, and it should save its fight over fees for the proper time and place.

ARGUMENT

S&P's motion for intervention should be denied because it is too late, because S&P adds nothing new to the issues before the Court, and because it is improper to graft its attorney-fee fight onto the existing appeal.

A. S&P has filed too late; this case is fully briefed and ready for argument.

Even if S&P's intervention were otherwise proper—and it is not, for the reasons below—it should be denied for the simple reason that it is too late. This case has already been briefed and is ready for argument, and it should not now be slowed down by adding a new party.

The timeline of this case demonstrates that S&P had several chances to jump in, whether as an intervenor or as an amicus, but it let those chances pass. The appeals court's decision below was released on May 4, 2006, and S&P was then still listed as co-counsel for UTCU. See *United Tel. Credit Union, Inc. v. Roberts* (10th Dist.), 2006 Ohio App. Lexis 2032, 2006-Ohio-2198. Thus, presumably, S&P was served with that opinion and knew, or should have known, that this Court was a possible next stop. UTCU's new counsel filed in this Court in June 2006, and the Court granted review in October 2006. If S&P thought that it had independent rights to protect, it could have and should have filed in this Court last year, at the jurisdictional stage, or when the merits briefing occurred, from December 2006 to February 2007. Indeed, S&P could have easily filed as an amicus, as this Court's rules allow amici filing without the need for Court approval or the parties' consent. Such a filing would still have run into substantive problems, if it tried to raise issues not properly before the Court (as explained below), but at least it would have been timely. Yet S&P did not try to file at those earlier stages. For over ten months from the appeals court's ruling, S&P did nothing in this Court, and that is reason enough to deny intervention now.

Notably, S&P cites and relies on Civil Rule 24(A), and in citing the entire rule, S&P includes the rule's first words: "Upon timely application . . ." See S&P Motion at 7. But, in arguing that it meets the *other* standards for intervention, S&P never mentions timeliness; it does not even attempt to allege that it is timely. Indeed, S&P cannot plausibly claim to be prompt.

As a practical matter, it is hard to see how S&P's intervention could be accommodated now without setting back the argument schedule, which would push the case back for months, prejudicing all involved. The argument is in less than eight weeks, on May 24. Adding new briefs on new issues would be tight, if not impossible. And moving this argument to the fall would in turn delay this Court's resolution, harming all the parties. Such a delay would be especially harmful in a case such as this, which, after all, began with a statute that (1) insists on a 30-day deadline for filing this type of case, and (2) directs a trial court to give such cases "*calendar priority*" over other civil cases; trial courts must "*expeditiously proceed and make a determination on [challenges].*" R.C. 1733.361(A)(2) (emphasis added.).

In short, S&P's late intervention attempt should be denied for being late.

B. S&P adds nothing to the Court's resolution of the issues before the Court, as UTCU's current counsel adequately represents the shared interests of UTCU, Hughes, and S&P in reversing the decision below.

S&P claims that its interests in attorney fees set it apart from the interests of current counsel for UTCU and the Hughes family, but those allegedly divergent interests do not diminish their shared interest in seeing the decision below reversed. The sole issue before the Court is whether Natalie Hughes was empowered to file, and then re-file, a conservatorship challenge in UTCU's name. On that issue, everyone on that side of the "v.," including S&P as former counsel, has the same interest, and that interest is already well-represented here.

That is, if the decision below is upheld, as DFI and ASI urge in our merits briefs, then everyone on that side loses. On the other side, everyone wishes to have the Court reverse the decision below, as part of a multi-front battle between the Hughes family and State regulators over control of UTCU. In the merits briefing here, the UTCU/Hughes side has been represented in this Court by two of the nation's top law firms. Surely that is adequate representation.

Indeed, S&P does not even allege that it adds a new twist, new argument, or new interest *as to the issues before the Court.* Instead, it says that it wants to add new issues to the case, i.e., it wants to fight about attorney fees. But that is not part of the case before the Court. And as detailed below, the Court's rules do not allow for adding issues in this way.

C. S&P's attempt to add new issues to this case is improper both substantively and procedurally, as the Court's rules do not allow for adding an original action with new claims to an existing appellate case.

Finally, the Court should reject S&P's attempt to add a new issue—indeed, to add a whole new *case* by filing an original action with a new complaint—to this existing appellate case. Grafting a new case onto this one, and creating some type of unprecedented hybrid of an appellate case and an original action, is improper both substantively and procedurally.

First, in a discretionary appeal such as this, the Court's substantive jurisdiction is limited to the issues that the Court agreed to review in granting jurisdiction, and to fairly included issues as defined by a body of law regarding appellate practice or procedure. For example, parties may always raise questions of subject-matter jurisdiction, such as standing. *Buckeye Foods v. Cuyahoga County Bd. of Revision,* 78 Ohio St. 3d 459, 460, 1997 Ohio 199. Appellees may add alternate grounds for affirmance, as long as those issues were properly preserved below. See, e.g., *State ex rel. Johnson v. Hunter,* 64 Ohio St. 3d 243, 245, 1992 Ohio 50. But nothing in the Court's rules, or in the case law concerning appellate procedure, allows for adding ancillary issues or other disputes between the parties, let alone an internal dispute on one side between a client and a former lawyer over attorney fees.

Second, what S&P seeks here is procedurally improper, under the Court's rules and by common sense, as an original action cannot be appended to an appellate case. The Court does, as S&P says, have original jurisdiction over certain types of cases, as provided for in Article IV, Section 2(B) of the Ohio Constitution, and procedure in such cases is governed by Rule X of the Court's Rules of Practice. But this case came to the Court under Rules II and III, as a discretionary appeal of an existing case from the lower courts. Nothing in the Court's Rule X, or Rules II and III, allows for an original action to be grafted onto an existing appellate case. If S&P did meet the standards for an original action—though it does not, as explained below—then it should bring a true original action, and it should not try to add the case to an existing appellate vehicle.

Further, even if S&P tried to file this as an original action, it could not, as its proposed complaint shows that these claims and issues do not fall within the Court's original jurisdiction. S&P seeks to raise, against UTCU and Hughes, garden-variety claims such as breach of contract and unjust enrichment, and the Court has no original jurisdiction over such disputes. See Proposed Complaint, attached as Ex. 9 to S&P's Motion. S&P also seeks to raise a declaratory judgment claim, but the Court has repeatedly explained that it does not have original jurisdiction to issue declaratory judgments. See *State ex rel. Ministerial Day Care Assn. v. Zelman,* 100 Ohio

St. 3d 347, 2003 Ohio 6447, ¶ 22; *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St. 3d 185, 187.

The only count that would, in theory, come close to the Court's original jurisdiction is S&P's claim for prohibition, but even that count fails, as it is not a true prohibition claim. Prohibition is a writ designed to prevent the impending and improper exercise of jurisdiction, typically by a court, *State ex rel. Wilkinson v. Reed,* 99 Ohio St. 3d 106, 108-109, 2003 Ohio 2506, ¶14, and at most it can be used in very rare circumstances against non-judicial officers, *State ex rel. Newell v. Brown,* 162 Ohio St. 147, 151-152 (1954) ("A writ of prohibition will issue to prevent placing on the primary ballots candidates' names which may not lawfully be placed there" (quoting *State ex rel. Smith v. Hummel, Secy. of State* (1946), 146 Ohio St. 341, syllabus)). Mandamus, by contrast, is the proper vehicle, in certain cases, to challenge certain government acts by the executive branch. Here, what S&P seeks is not truly prohibition, as DFI is not about to improperly exercise jurisdiction. Nor would mandamus, or any extraordinary writ, be available, because an adequate legal remedy exists to challenge DFI's actions below—namely, an appeal, as shown by the already-existing appeal before the Court.

Consequently, even if S&P were timely (and it is not, for the reasons above), its Motion fails both substantively and procedurally, and it should be denied.

CONCLUSION

For the above reasons, this Court should deny S&P's Motion, and it should not allow intervention.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio

/s/ John F. Stock per authority
ORLA E. COLLIER III* (0014317)
Counsel of Record
JOHN F. STOCK (0004921)
Benesch Friedlander Coplan & Aronoff LLP
88 E. Broad Street, Suite 900
Columbus, Ohio 43215
614-223-9300
614-223-9330 fax

Counsel for Defendant-Appellee
American Mutual Share Insurance Corporation

ELISE PORTER* (0055548)
Acting Solicitor General
Counsel of Record
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
PEGGY W. CORN (0042197)
Assistant Solicitor
RANDALL W. KNUTTI (0022388)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eporter@ag.state.oh.us

Counsel for Defendant-Appellee
Kenneth A. Roberts

KATHLEEN M. TRAFFORD (0022096)
JOHN C. HARTRANFT (0023037)
POLLY J. HARRIS (0029433)
DAVID S. BLOOMFIELD, JR. (0068158)
JULIE L. ATCHISON (0069907)
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
614-227-2000
614-227-2100 fax

Counsel for Defendant-Appellee
Kenneth A. Roberts
(as special counsel to Attorney General Marc Dann)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Memorandum of Defendants-Appellees Kenneth A. Roberts and American Mutual Share Insurance Corporation Opposing Motion to Intervene of Law Offices of Squire and Pierre-Louis was served by U.S. mail this 30th day of March, 2007, upon the following counsel:

Fordham E. Huffman
Jones Day
325 John H. McConnell Blvd.
P.O. Box 16517
Columbus, Ohio 43216-5017

Scott Mendeloff
Gabriel Aizenberg
Sidley Austin, LLP
1 South Dearborn Street
Chicago, Illinois 60613

Counsel for Plaintiff-Appellant
United Telephone Credit Union, Inc.

Lloyd Pierre-Louis
Pierre-Louis & Associates, LLC
5 East Long St., Ste. 700
Columbus, Ohio 43215
614-232-9055
614-232-9077 fax

Counsel for Proposed Intervenor
Law Offices of Squire & Pierre-Louis, LLC

Stephen P. Carney
Deputy Solicitor