**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF KENTUCKY**
**NO. 2011-SC-000659**

**UNITED BROTHERHOOD OF CARPENTERS** — **APPELLANT**

**VS.**

**BIRCHWOOD CONSERVANCY, a California Corporation authorized to do business in Kentucky as a foreign corporation; LUCINDA CHRISTIAN, individually and as President of Birchwood Conservancy; EVAN BLAKENY, individually and as Treasurer of Birchwood Conservancy; and ROBERT CHRISTIAN, individually** — **APPELLEES**

**ON APPEAL FROM COURT OF APPEALS**
**NO. 2009-CA-001413-MR**
**SCOTT CIRCUIT COURT, HON. PAUL F. ISAACS, JUDGE**
**NO. 04-CI-603**

# BRIEF FOR APPELLEES

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellees was mailed, postage prepaid, to: Hon. William E. Johnson, Johnson Newcomb, 326 West Main Street, Frankfort, Kentucky 40601; Hon. Paul T. Berkowitz, Berkowitz and Associates, 123 West Madison Street, Suite 600, Chicago, IL 60602; Judge Paul F. Isaacs, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, KY 40324; and Honorable Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this the 7th day of December, 2012.

T. Bruce Simpson

COUNSEL FOR APPELLEES

## INTRODUCTION

This is a case in which the two parties to the instant action litigated their dispute for two-and-a-half years where the Appellant (Union) accepted service of the lawsuit, answered the lawsuit, responded to interrogatories, requests for production of documents and Appellee's (Birchwood's) Motion to Compel, responded to and answered Birchwood's Motion to Amend its Complaint, attended multiple appearances before the Scott Circuit Court, prepared and argued its Motion for Summary Judgment, and at no time during any of these proceedings did the Union ever raise any objection about its capacity to be sued or whether the court lacked personal jurisdiction. The question, then, before this Court is whether in light of these undisputed facts, the Union waived any objections to personal jurisdiction or its capacity to be sued.

## STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is not necessary based upon the well-reasoned Opinion of the Court of Appeals.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

On September 21, 2004, Birchwood Conservation Center (hereinafter "Birchwood") filed a Complaint in the Scott Circuit Court against the United Brotherhood of Carpenters (hereinafter "Union") (R. 9). Birchwood is a non-profit organization whose principal purpose and mission for nearly 20 years has been exclusively devoted to the care and well-being of more than 100 different endangered animals on a small farm in Scott County, Kentucky. The two principals of the organization, Lucinda Christian and Evan Blakeny, have always been the only two caretakers for these animals (R.9).

In 2003, the Public Broadcasting System ("PBS") was interested in doing a documentary on Birchwood and, in particular, wanted to focus on the efforts that were going to be undertaken by a number of volunteers to tear down an existing barn on the farm and then relocate it and rebuild it elsewhere on the farm. In addition, through the volunteer efforts of other donors, a new barn would be built, and both barns would provide shelter, safety and a breeding facility so that these animals could be protected and their species preserved (R.9).

The Union agreed to tear down the existing barn, rebuild it at another location on the farm, and also agreed to build a new barn with materials donated by others. In exchange for its work, the Union was going to be prominently recognized in the PBS documentary and other advertising endeavors associated with the project. The Union proceeded to tear down the existing barn, but then failed to rebuild the barn in a different location. It also failed to assemble the new barn for which the materials had already been

provided (R. 9). The materials rotted. As a result, Birchwood was left with no barn to provide for the care and well-being of these precious animals. Many of the animals died from the harsh winter of 2003-2004. (R.9).

After Birchwood filed its suit against the Union, the Union accepted service of process and answered the suit on October 12, 2004 (R. 17). In its Answer, the Union did not set forth any defense that it could not be sued because it was an unincorporated association, nor did the Union contend in its Answer that Birchwood was an unincorporated association and could not sue. The parties then proceeded to litigate the case for the next two-and-one-half years (R. 231). During this time, the parties took the depositions of four different individuals (R. 33-34, 35-36, 37-38, 39-40, and 41-42). On December 30, 2004, Birchwood filed a Motion for Trial Date and also a Motion to Amend the Complaint, which was subsequently granted (R. 45-48). The Union filed an Answer to the Amended Complaint on January 13, 2005 (R. 60). In its Answer to the Amended Complaint, the Union did not assert that it lacked the capacity to be sued because it was an unincorporated association, nor did it plead this defense as an affirmative defense, nor did it object that Birchwood was an unincorporated association and could not sue.

On March 8, 2005, interrogatories and requests for production of documents were tendered to the Union (R. 65). On April 6, 2005, Birchwood filed another Motion for a Trial Date (R. 75). On May 17, 2005, the Union served interrogatories and requests for production of documents on Birchwood (R. 73). On May 27, 2005, Birchwood filed a Motion to Compel Production of Documents and on that same date, the Union submitted answers to the interrogatories and request for production of documents (R. 77-88). On

June 23, 2005, the Union served supplemental answers to interrogatories (R. 101). On June 28, 2005, the Union filed a Motion for Summary Judgment (R. 114). In its Motion for Summary Judgment, the Union did not raise any complaint or objection about Birchwood's being an unincorporated association or about its own lack of capacity to be sued.

On June 29, 2005, the original counsel for Birchwood filed a Motion to Withdraw as counsel, and new counsel, the undersigned counsel, was substituted as counsel for Birchwood (R. 120-122). Subsequently, Birchwood filed a response to the Union's Motion for Summary Judgment on August 3, 2005 (R. 143). Thereafter, on December 1, 2006, Birchwood filed a Motion to Set Oral Argument on the Motion for Summary Judgment (R. 224), and on February 9, 2007, after a hearing on the Motion for Summary Judgment, the court entered an Opinion and Order denying the Union's Motion for Summary Judgment (R. 226). At no time during the summary judgment hearing did the Union complain or object that it could not be sued or that Birchwood could not sue.

After the trial court issued its Order denying the Union's Motion for Summary Judgment, Birchwood, on March 14, 2007, filed a Motion for Pretrial Conference (R. 229). In response to the Motion for Pretrial Conference, on March 16, 2007, the Union filed a Motion to Dismiss Birchwood's Complaint or, in the Alternative, Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, contending **for the first time** after two-and-a-half years that the Union could not be sued because it was an unincorporated association (R. 231). Subsequently, the trial court entered an Order on April 5, 2007, deferring Birchwood's Motion for a Pretrial

Conference and the Union's Motion to Dismiss until May 3, 2007, at which time both motions were scheduled to be heard (R. 235).

On April 24, 2007, Birchwood moved to substitute Birchwood Conservancy, a California corporation authorized to do business in Kentucky, in place of Birchwood Conservation Center (R. 237). In its motion for substitution of parties, Birchwood did not request the filing of any amended complaint, and there were no new claims or causes of action asserted in said motion. The motion was filed merely to substitute one entity for another one. On April 24, 2007, Birchwood also filed its response to the Union's Motion to Dismiss the Complaint by contending that the Union had waited too long to assert its affirmative defense of lack of capacity to be sued (R. 250).

The Union, on April 27, 2007, filed a Motion to File an Amended Answer which, for the first time, set forth the affirmative defense that the Union, being an unincorporated association, could not be sued (R. 255). Following a hearing on the pending motions, the Scott Circuit Court entered an Order on May 16, 200. Over Birchwood's objection, the trial court dismissed Birchwood's Complaint on the basis that the entity known as Birchwood Conservation Center, at the time it filed the Complaint, was itself an unincorporated association and had no standing to file the original action. Likewise, the court also granted the Union's Motion to File an Amended Answer. The trial court denied Birchwood's motion to substitute parties (R. 263).

In neither its Answer to the original Complaint nor its Answer to Birchwood's First Amended Complaint did the Union ever assert as a defense to the action that Birchwood was an unincorporated association and, therefore, could not file its suit. Both parties litigated this case for two-and-a-half years as if Birchwood had standing to sue

and the Union could be sued. The Union never once complained, nor did it file any motion to dismiss. All of this is not in dispute.

In response to the trial court's dismissal, Birchwood timely filed a Motion to Amend, Alter or Vacate the court's May 16, 2007 Order (R. 266), and also filed a Motion for Leave to File a Second Amended Complaint, which merely added Lucinda Christian and Evan Blakeny as party plaintiffs since they were the principal caretakers for the animals, and also added Birchwood Conservancy, which had attempted to be substituted as a party plaintiff in the previous motion denied by the trial court. The Second Amended Complaint also added Robert Christian, Lucinda Christian's father, who actually owned the farm in Scott County where the animals were being nurtured (R. 274). However, the causes of action in the Second Amended Complaint were the same as in the original Complaint and the First Amended Complaint. There were no new causes of action asserted.

On August 30, 2007, following briefing and a hearing on the Motion to Amend, Alter or Vacate, and the Motion to Amend the Complaint, the court granted Birchwood's Motion to Vacate and also granted Birchwood's Motion to Amend the Complaint, but the court reserved ruling on the question of whether the court had "personal jurisdiction" over the Union (R. 305). Thereafter, the Union filed a Motion to Dismiss the Second Amended Complaint on the basis that the court lacked jurisdiction over the person and the subject matter. The Union also tendered an Answer which did not raise any affirmative defenses of lack of capacity, lack of subject matter jurisdiction or lack of personal jurisdiction. Birchwood responded, contending that the Union had waited too long to assert such affirmative defenses and, therefore, had waived them.

After receiving nothing from the court for 18 months, Birchwood filed a motion for a status conference on April 22, 2009, and the court, after hearing said motion, issued an Order for a pretrial conference. However, on the date the pretrial conference was to be held (July 2, 2009), the court issued an Order dismissing Birchwood's claims on the basis that Birchwood could not sue the Union because it was an unincorporated association (R. 325).

A Notice of Appeal was timely filed on July 29, 2009 (R. 330). Thereafter, the parties briefed the issues in this case, oral argument was held, and the Court of Appeals issued its Opinion on October 7, 2011, in which it reversed the trial court's ruling and remanded the case to Scott Circuit Court.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY HELD THAT THE UNION WAIVED THE DEFENSE OF PERSONAL JURISDICTION.

In its Brief to the Court of Appeals, the Union's exclusive argument was based upon its contention that the trial court correctly ruled that the Union properly asserted the affirmative defense of lack of personal jurisdiction. (See the Union's Court of Appeals Brief of record herein). However, Birchwood contended that the Union waived its defenses of personal jurisdiction and lack of capacity to be sued. (See Birchwood's Court of Appeals Brief and Reply Brief of record herein.) The Court of Appeals, after reviewing the Briefs, the Record and conducting oral argument, concluded that the Union had waived both the defenses of lack of personal jurisdiction and lack of capacity to be sued. However, it appears the Union has abandoned its argument as to its defense of lack of personal jurisdiction. It now attempts to argue before this Court that the issue is

whether the Union waived its defense of capacity to be sued. (See Union's Brief at p. 12.) The waiver of the Union's capacity defense is discussed in Section II of this Brief.

The Court of Appeals noted that the sole basis of the Union's lack-of-personal-jurisdiction argument was its contention that "A voluntary association, such as a union, has neither the power to sue nor to be sued in the association name.," citing *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W.1079, 1085 (1920). The Court of Appeals opined that this statement of the law describes legal capacity; it is not the basis for an argument for a court's lack of personal jurisdiction, which is what the Union had argued both before the trial court and the Court of Appeals. (See Court of Appeals Opinion at 16-17.) The Court of Appeals on pp. 16-21 of its Opinion discusses at length the applicable law and pertinent facts which underpin its holding that the Union waved the defense of lack of personal jurisdiction. We agree and adopt its reasoning and incorporate same by reference.

As set forth in the Counterstatement of the Case, the Union accepted service of the lawsuit and answered the lawsuit. It could have challenged the sufficiency of process or service of process under CR 12.02(d) and (e), respectively, or the applicability of Kentucky's long-arm statute, KRS 454.210, but it did neither. Additionally, it is certainly not in dispute that when the Union filed its Answer to the Original Complaint on October 12, 2004, it raised no objection to the exercise of personal jurisdiction. At that point, as opined by the Court of Appeals, "the union had one last opportunity to avoid the irrevocable waiver of the defense – amendment of the answer as a matter of course.," citing CR 15.01 and CR 12.08(1). (Court of Appeals Opinion at p. 17)

The Union had 20 days from its original Answer in which to file an amendment to its Answer alleging lack of personal jurisdiction as a matter of course, pursuant to CR 15.01. This, it did not do. Thus, pursuant to CR 12.08, the Union's failure to amend its Answer "as a matter of course" to include the defense of lack of personal jurisdiction means that it is forever waived, citing CR 12.08(1).

As pointedly and correctly held by the Court of Appeals,

> In accordance with CR 12.08, the Union's failure to amend its answer as a matter of course to include the defense of lack of personal jurisdiction means it is forever waived.
>
> > A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made *as a matter of course*.
>
> CR 12.08(1) (emphasis added). The rule's limitation makes unavailing the Union's argument that, on May 16, 2007, the circuit court allowed it to amend its answer to add the defense of lack of personal jurisdiction. Obviously, that amendment was not accomplished 'as a matter of course' within twenty days of the Union's original answer, but three years after the complaint was served and only "by leave of court[.] CR15.01. As one authority states,
>
> > A party cannot escape the penalty of waiver by amending pleadings. A court does not have authority to grant leave to amend in order to add any one of the waivable defenses. They may be alleged only by an amendment as a matter of course under CR 15.01. This limitation applies only to the defenses enumerated in CR 12.02(b)(e).
>
> 6 Phillips et al. Ky. Prac. R. Civ. Proc. Ann. Rule 12.08 cmt. 2 (6th ed. 2011).

Therefore, to the extent it addresses the Union's motion to dismiss for lack of personal jurisdiction, the order from which the appeal is taken is clearly erroneous in finding that, because the Union and Harris were 'granted leave to amend their answer to assert the defense at issue in this motion, the Defendants did timely raise this defense[.]' (Opinion and Order, July 2, 2009).

The circuit court's error in this regard can be traced to its reliance on *Curry v. Cincinnati Equitable Ins. Co.*, 834 S.W.2d 701 (Ky. App. 1992). *Curry* did not involve a defense under CR 12.02(b) through (e) and is inapplicable to cases that do, such as the one now before us.

The Union argues that it had a right to revive the CR 12.02(b) defense when Birchwood amended its complaint. Such an argument has frequented federal courts and is often addressed by citation to *Rowley v. McMillan*, 502 F.2d 1326, 18 Fed.R.Serv.2d 1449 (4th Cir. 1974). *See, e.g., Lederman v. U.S.*, 131 F. Supp. 2d 46, 58 (D.D.C. 2001); *Limebright v. Hofmeister*, No. 5:09-cv-107-KSF, 2010 WL 1740905, at *2-*3 (E.D. Ky. April 27, 2010) (quoting *Rowley* and citing several other authorities). We agree with *Rowley's* reasoning.

In *Rowley*, as in the case before us, the defendant failed to include the defense of lack of personal jurisdiction in response to the original complaint. As here, the plaintiff amended the complaint more than once. Defendant Rowley's 'response to one of these amended complaints included a claim that the action be dismissed for lack of jurisdiction over his person.' *Rowley*, 502 F.2d at 1332. The court denied the tardy defense, stating,

> The leading commentators are in accord that, once having waived the defense of lack of jurisdiction over the person, as Rowley clearly did, Rule 12(g) prevents the defense from being revitalized even though plaintiffs amended their complaint and provided Rowley with an opportunity to file a new motion under Rule 12, or an answer setting forth a defense which Rule 12 would permit to be presented by motion. 2A Moore's Federal Practice P12.22, pp. 2442-43 (1974) (footnote omitted); Wright and Miller, Federal Practice and Procedure 1388, p. 845 (1969) (footnote omitted.). They conclude, and we agree, that an amendment to the pleadings permits the responding pleader to assert only such of those defenses which may be

> presented in a motion Under Rule12 as were not available at the time of his response to the initial pleading. *An unasserted defense available at the time of response to an initial pleading may not be asserted when the initial pleading is amended.*
>
> *Id.* at 1332-33 (emphasis added). The Union's personal jurisdiction defense was available at the time the Union filed its first responsive pleading; the defense may not be asserted for the first time in response to an amended complaint.
>
> In summary, the defense of lack of personal jurisdiction is among the irrevocably waivable defenses identified in CR 12.02(b)-(e). Because the Union never raised any of those defenses (1) in a pre-answer motion to dismiss the original complaint, (2) in its answer to that complaint, or (3) in a matter-of-course amendment to that answer, the defenses, specifically including the personal jurisdiction defense, were irrevocably waived. Consequently, to the extent the Union is correct in framing the issue before us as 'whether United Brotherhood waived the defense of lack of personal jurisdiction[,]' the answer is, yes, it did.

Birchwood adopts and reaffirms this well-reasoned section in the Court of Appeals Opinion in support of its position that the Union waived personal jurisdiction. (Court of Appeals Opinion, at pp. 19-21).

## II. THE COURT OF APPEALS IS CORRECT: THE UNION WAIVED ITS LACK OF CAPACITY DEFENSE

No one disputes that since the Union failed to assert that Birchwood lacked capacity to sue and that the Union could not be sued until two and a half years after the suit was filed. The trial court should have ruled that the Union was untimely in asserting these defenses and, therefore, they were waived. It did not. This was clear error. The Commonwealth's courts have examined these issues previously. In Williams v. Indiana Refrigerator Lines, 612 S.W.2d 350 (Ky. App. 1981), the court stated:

> Here, the appellee failed to assert the defense of lack of jurisdiction over the person in the answer it filed to the original complaint. It

> appeared generally, rather than specially, therefore giving the trial court jurisdiction over it. Furthermore, the appellee engaged in extensive discovery proceedings as well as litigating the action on its merits. Consequently, it cannot now argue that the trial court had no jurisdiction over it.

Id. at 351. In another applicable decision, Breslin Const. Co. v. Hamilton. Same v. Wilder, 301 Ky. 746, 193 S.W.2d 156 (Ky. 1946), the Court held that a general denial of failure to state a claim by a defendant is "not sufficient to raise the issue of defendant's status as an unincorporated entity," rather, issues regarding an entity's incorporation status should "specifically be done [pled]." Id., 193 S.W.2d at 158.

The Union cannot deny that it failed to specifically address its status or Birchwood's status in its initial Answer, in the Answer to the First Amended Complaint, or in any other subsequent pleading for two-and-a-half years. In addition to failing to specifically plead lack of capacity as required under CR 9.01, the Union also failed to plead it in a **timely** manner. Both requirements are necessary. Lawrence v. Marks, 355 S.W.2d 162 (Ky., 1962) and Cardwell v. Hoskins, 312 S.W.2d 616 (Ky., 1958).

Moreover, in United Mine Workers of America v. Cromer, 159 Ky. 605, 167 S.W. 891 (Ky. 1914), the court held that even an unincorporated union can waive its defense from being sued if not timely raised. The court in Cromer stated as follows:

> In the present case the question was not raised by special demurrer or by answer by way of plea in abatement. On the contrary, both defendants answered to the merits without saving the question. That being true, the defense that the United Mine Workers of America were not suable in the name of the unincorporated association was waived.

Id. at 892.

The Kentucky Rules of Civil Procedure require a party to "set forth affirmatively" any matter "constituting an avoidance or affirmative defense." CR 8.03. In many

contexts, failure to plead an affirmative defense amounts to a waiver of that defense. See Gordon v. NKC Hospitals, 887 S.W.2d 360, 362-63 (Ky. 1994) (workman's compensation); see also Mitchell v. U.S., 396 F.2d 650, 651 (6th Cir. 1968) (contributory negligence) (applying Kentucky law) and Underwood v. Underwood, 999 S.W.2d 716, 720 (Ky. App. 1999) (statute of limitations). Of course, the Court should not cling legalistically to the precise language of an affirmative defense in determining whether the defense has been waived. See Murphy v. Torstrick, 309 S.W.2d 767, 769-70 (Ky. 1958) (holding that failure to use the word "mistake" is insufficient to show that a party did not adequately raise the defense of mutual mistake).

In concluding that the Union also waived its defense of lack of capacity, the Court of Appeals referenced Wright and Miller's treatise, Federal Practice and Procedure, which provides a constructive underlying policy analysis that this Court should consider in evaluating the factual and procedural history of this case. In pertinent part, the Wright and Miller treatise provides:

> The better conclusion, however, is that although an objection to a party's capacity, authority, or legal existence is not technically speaking an affirmative defense, **it can be analogized to an affirmative defense and treated as waived** if not asserted by motion or responsive pleading, subject, of course, to the liberal pleading amendment policy of Rule 15. Early waiver is necessary to give meaning to the requirement in Rule 9(a) [similar to CR 9.01] that these matters must be put in issue by a 'specific negative averment.' **Moreover, an objection to capacity, authority, or legal existence, since it also can be characterized as a matter of abatement, should fall within the class of 'threshold defenses' – issues that must be raised and disposed of at the outset of the suit.**
>
> Along the same lines, the Rule 9(a) [similar to CR 9.01] matters are not of sufficient importance that the right to object to a lack of capacity, authority, or legal existence should be preserved through the trial state. **This approach seems especially**

> **appropriate because of the waste of judicial and litigant resources that would result from the dismissal of a suit as late as the trial when one of the parties lacks the requisite legal existence, capacity or authority to sue or be sued.** Allowing preservation of a defense of this character also could operate to the **plaintiff's prejudice** if the defendant first asserted his objection under Rule 9(a) after the statute of limitations had run against the institution of a new action by the plaintiff in a different capacity. Finally, inasmuch as the liberal amendment policy of Rule 15 gives trial courts the discretion to allow late denials of capacity, authority, or legal existence, **an early waiver rule** is not likely to trap defendants when a plaintiff does lack the proper status.
> Wright and Miller, Federal Practice and Procedure § 1295 (3d ed. 2012 Supp.) (Emphasis added.)

In Caldwell v. Hoskins, 312 S.W.2d, 616 (Ky., 1958), the defendant contended that the plaintiff as administrator lacked the capacity to bring the suit. The court, however, held that the defendant waived the lack-of-capacity defense because it was not **timely** raised. The court stated: "We are of the opinion that the defendant waived the objection by not timely raising this collateral issue." Id at 618.

There should be no question that provisions of Rule 9.01 as applied to the facts of the case sub judice demand that the lack of capacity defense be asserted in a much more timely fashion than 2-1/2 years after extensive litigation. The prejudice is certainly all to Birchwood in this case.

This Court should not set a precedent by allowing a defendant to "lie in the weeds" for two-and-half years and then jump out and assert an affirmative defense. Allowing such a precedent would encourage a wasting of the courts' time and an unnecessary expenditure of legal fees and expenses to the parties. It could also be extremely prejudicial to a plaintiff in a given case, like the instant one.

The Kentucky decision which is most directly on point with the facts of the present case regarding the waiver of the capacity defense is Lawrence v. Marks, 355

two-and-a-half years after litigation had commenced. This is not a timely pleading. Birchwood has been prejudiced.

Finally, the Union on pp. 9-12 of its Brief goes into extended discussion of the Court of Appeals dicta relative to Ike Harris. (See Court of Appeals Opinion, pp. 25-26.) The Court of Appeals conclusion that the Union waived the lack-of-capacity defense has nothing to do with its dicta discussion on Ike Harris. Instead, the Court of Appeals rested its decision in the fact that the Union did not comply with Rule 9.01 by "specific negative averment" with supporting particulars. There is nothing in the Union's tendered Answer to Birchwood's Second Amended Complaint that even mentions a lack-of-capacity defense or lack of personal jurisdiction. Similarly, there is nothing in the Union's final Motion to Dismiss which complies with the specificity required by CR 9.01. (See Court of Appeals Opinion at 26.)

The Court of Appeals' decision to reverse the trial court's erroneous ruling is strengthened by the holding in Lawrence, supra, which requires not only that the lack-of capacity defense must be specifically pled, but that it must also be **timely** filed. Surely, no reasonable person can conclude that the Union's lack-of-capacity defense was timely asserted.

## CONCLUSION

For the reasons recited herein, the Court of Appeals decision should be affirmed, and this case should be remanded to the Scott Circuit Court for a trial on the merits.

Respectfully submitted,

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