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 APPELLANT

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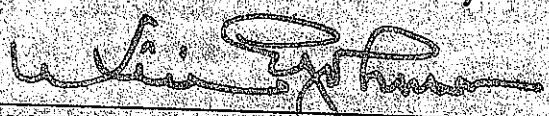
CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Brief for Appellee was mailed, postage prepaid, to: T. Bruce Simpson, Jr., Stoll, Keenon & Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507 and Judge Paul F. Isaacs, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, Kentucky, 40324 and Honorable Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on this the 5th day of October, 2012.



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INTRODUCTION

This matter is before the Court upon Motion for Discretionary Review of a decision issued by the Court of Appeals affirming in part, reversing in part, and remanding an Opinion and Order issued by the Scott Circuit Court. The question before the Court is whether the Court of Appeals erred in holding that a Union failed to properly assert defenses which if properly asserted would result in a dismissal of the case.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests that the Court conduct an oral argument in this case. This appeal presents significant issues regarding civil procedure which will have a great impact on future litigants. Oral Argument will be of assistance to the Court in resolving the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Birchwood Conservation Center filed a complaint against the United Brotherhood of Carpenters (hereinafter "United Brotherhood" or "the Union") on September 21, 2004. (T.R. at 9). The Complaint alleged a breach of contract for the demolition and construction of barns. *Id.* Promissory estoppel was also alleged. *Id.* The specific facts alleged in the Complaint are immaterial to this appeal. United Brotherhood filed its answer on October 12, 2004. (T.R. at 17). On January 6, 2005, Birchwood Conservation Center filed its First Amended Complaint adding Ike Harris as a defendant. (T.R. at 49). Ike Harris was sued in his individual capacity and accused of a breach of contract. *Id.* United Brotherhood and Ike Harris answered the First Amended Complaint on January 13, 2005. (T.R. at 60).

On June 28, 2005, the defendants filed a Motion for Summary Judgment asserting a lack of consideration for the alleged contract. (T.R. at 114). A response to the Motion for Summary Judgment was filed on July 28, 2005, and the Trial Court issued an Opinion and Order on February 10, 2007. (T.R. at 130 and 226). In the Opinion and Order the Trial Court found that there was a lack of consideration for the contract (T.R. 226). However, the Trial Court declined to grant summary judgment because Birchwood Conservation Center argued there was promissory estoppel. *Id.* The Court did dismiss Ike Harris as a defendant, recognizing that the dispute was between United Brotherhood and Birchwood Conservation Center. *Id.* No appeal was taken from this dismissal.

Subsequently, on March 16, 2007, United Brotherhood filed a Motion to Dismiss or in the Alternative Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment. (T.R. at 231, Appendix 3). In its Memorandum in Support of the

Motion, United Brotherhood asserted that it was an unincorporated association not suable under the laws of Kentucky. (T.R. at 233, attached to Appendix 3). On April 24, 2007, Birchwood Conservation Center responded to the Motion. (T.R. at 250). In its Response, Birchwood Conservation Center argued that United Brotherhood had waived the defense of lack of personal jurisdiction. *Id.* Additionally, Birchwood Conservation Center moved the Trial Court to substitute Birchwood Conservancy, a California corporation, in place of Birchwood Conservation Center as the plaintiff in this action. (T.R. at 237). Birchwood Conservation Center alleged that Birchwood Conservancy was now managing Birchwood Conservation Center. *Id.* United Brotherhood objected to the substitution. (T.R. at 260). Contemporaneously with the objection, on April 27, 2007, United Brotherhood filed a Motion for Leave to File Amended Answer. (T.R. at 255, Appendix 4). In the Answer, United Brotherhood asserted the affirmative defense of lack of personal jurisdiction. (T.R. at 258, attached to Appendix 4). Additionally, United Brotherhood specifically denied Numerical Paragraph 1 of the plaintiff's First Amended Complaint wherein Birchwood Conservation Center stated that it was a "non-profit, charitable corporation organized and existing under the laws of the State of Kentucky . . . ." *Id.* This specific denial by United Brotherhood was necessary, because it became apparent during the course of discovery that Birchwood Conservation Center had never been authorized to conduct business in the Commonwealth of Kentucky, having never been incorporated. Because of this lack of authorization, United Brotherhood argued that Birchwood Conservation Center did not have standing to sue. *Id.*

An Opinion and Order was entered by the Trial Court on May 16, 2007, granting United Brotherhood's Motion to File Amended Answer and dismissing the action. (T.R. at 263). In the Opinion and Order, the Trial Court noted that an unincorporated association, such as United Brotherhood, cannot be sued in the name of the association. *Id.* However, the Trial Court relied on Birchwood Conservation Center's lack of standing as its reasoning for dismissing the complaint. *Id.*

On May 25, 2007, Birchwood Conservation Center, pursuant to CR 15.01, filed a Motion for Leave to File Second Amended Complaint against United Brotherhood and Ike Harris. (T.R. at 274). The motion sought to insert Lucinda Christian, Evan Blakeny, Robert Christian, and Birchwood Conservancy as plaintiffs in place of Birchwood Conservation Center. *Id.* The motion stated that "since the inception of this litigation, the Birchwood Conservation Center has been incorporated into Birchwood Conservancy . . . ." *Id.* (T.R. at 275). The Second Amended Complaint sought to bring Ike Harris back into the litigation by once again naming him as a defendant. (T.R. at 277). However, the Second Amended Complaint still failed to name Ike Harris as a union representative, and only asserted that Ike Harris "was a member of the Kentucky division of the Union at all times relevant to this action." (T.R. at 278). It claimed a cause of action against Harris for breach of contract. Birchwood Conservation Center also filed a Motion to Alter, Amend, or Vacate Judgment. (T.R. at 266). The Trial Court, by Opinion and Order entered August 30, 2007, granted Birchwood Conservation Center's Motion to Alter, Amend, or Vacate the Judgment entered on May 16, 2007, and the Motion for leave to file Second Amended Complaint. (T.R. at 305). However, the Trial Court noted as follows:

> The Court decides today that Birchwood may file a second amended complaint, but makes no determination as to whether there exists personal jurisdiction over the Union. Before this case was dismissed on May 16, 2007, the Union moved to file an amended answer in which it would raise this Court's lack of personal jurisdiction over the Union as an affirmative defense. Specifically, the Union argued that an incorporated association could neither sue nor be sued in its name. The Court never decided the issue of personal jurisdiction, and in light of the new procedural posture in which the case now stands, asks the parties to brief the Court on this issue.

(T.R. at 307). The Court ordered the parties to submit simultaneous briefs within 30 days of the Order, discussing whether the Court had personal jurisdiction over the Defendant Union. (T.R. at 308).

In response to the Trial Court's Order, United Brotherhood filed a Motion to Dismiss Second Amended Complaint and Answer. (T.R. at 309, Appendix 5). In this Motion, United Brotherhood specifically raised the affirmative defenses of "lack of jurisdiction over the subject matter and the person in that (1) there is no legal entity by the name of United Brotherhood of Carpenters[1] and (2) an unincorporated association, even if plaintiffs had sued in its proper name, cannot be sued in the name of the association." *Id.* Additionally, the Motion to Dismiss Second Amended Complaint and Answer noted that the Trial Court dismissed Ike Harris as a defendant by Order entered February 9, 2007, and that no appeal was taken from that dismissal. *Id.* United Brotherhood further argued that the Trial Court's Order granting the Motion to Vacate Judgment did not appear to reinstate any claim against

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1. There is no legal entity known as "The United Brotherhood of Carpenters." The proper, legal name of the association is the "United Brotherhood of Carpenters and Joiners of America."

Ike Harris. *Id.* In the Memorandum in support of the Motion to Dismiss Second Amended Complaint and Answer, United Brotherhood once again argued that pursuant to long-standing Kentucky law an unincorporated, voluntary association, such as a labor union, cannot be sued in the name of the association. (T.R. at 312, attached to Appendix 5). The Memorandum also noted that three new individual plaintiffs, with new claims, had been brought into the litigation by way of the Second Amended Complaint. (T.R. at 313). In their Response, Birchwood Conservancy, Lucinda Christian, Evan Blakeny, and Robert Christian (collectively "Birchwood"), argued that the Trial Court should not dismiss the lawsuit because United Brotherhood waived its right to plead the affirmative defense of lack of personal jurisdiction. (T.R. at 317).

In an Opinion and Order dated July 2, 2009, the Trial Court granted the Union's Motion to Dismiss. (T.R. at 325, Appendix 2). In the Order, the Trial Court noted that Birchwood had "been permitted to amend its Complaint to add new parties to the action because the original plaintiff lacked standing to bring the suit." (T.R. at 327). The Trial Court reasoned that the proper question before the court was whether United Brotherhood may assert the defense of lack of personal and subject matter jurisdiction against the new parties by way of a Motion to Dismiss. *Id.* The Trial Court found that United Brotherhood's Motion to Dismiss was well taken, and that the case should be dismissed. *Id.* Relying on CR 15.01 and CR 15.03, the Trial Court held that the Motion to Dismiss should be treated as an Answer to the Second Amended Complaint, and that "whenever a defense is asserted in an amended answer (here in a motion to dismiss) and arises out of the conduct, transaction or occurrence set forth in the plaintiff's original pleading, the defense relates back to the date

of the original pleading." (T.R. at 327-28) *(citing Curry v. Cincinnati Equitable Ins. Co.*, 834 S.W.2d 701, 704 (Ky. App. 1992)). Because United Brotherhood is not suable in the name of the association, the Court concluded that the Motion to Dismiss should be granted. (T.R. at 328). Finally, the Trial Court noted that Ike Harris had been previously dismissed from the case by an Opinion and Order dated February 9, 2007. *Id.* This dismissal, from which no appeal was taken, did not permit Birchwood to reassert its claims against Ike Harris, and as a result, Ike Harris remained dismissed from the case. *Id.* From this Order, Birchwood sought appellate review. (T.R. at 330).

In an Opinion dated October 7, 2011, the Court of Appeals affirmed in part and reversed in part the Opinion and Order of the Trial Court. (Appendix 1). The Court of Appeals held that United Brotherhood waived the defenses of lack of personal jurisdiction and lack of capacity to be sued and thus, the litigation could proceed forward. The Court of Appeals upheld the dismissal of Ike Harris finding that Birchwood failed to appeal that portion of the Trial Court's July 2, 2009, Opinion and Order.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY FOUND THAT THE UNION WAIVED THE DEFENSE OF LACK OF CAPACITY.

In its Opinion, the Court of Appeals expressly acknowledges that "the capacity defense is not irrevocably waivable like the lack-of-personal-jurisdiction defense, [and that] the Union could have asserted it for the first time in response to the second amended complaint." (Opinion at p. 24). The Court of Appeals however holds that "asserting the general principle that unions cannot be sued, and couching the assertion as an objection to

jurisdiction as the Union did in this case, was not enough." *Id.* at 26. The Court of Appeals holds that the Union "simply failed to assert the defense" and relies on *Abbot v. Southern Subaru Star, Inc.*, 574 S.W.2d 684, 688 (Ky. App. 1978), for the proposition that CR 9.01 "require[s] that the 'specific negative averment' shall include 'supporting particulars.'" (Opinion at 26). CR 9.01 states as follows:

> **Capacity**
>
> It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of a partnership or an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

In response to Birchwood's Second Amended Complaint the Union filed a Memorandum in Support of Motion to Dismiss Second Amended Complaint setting forth the applicable law which states that a voluntary association cannot be sued in the name of the association. (Appendix 5). The Memorandum cited to the case of *United Mine Workers of America v. Cromer*, 167 S.W. 891, 159 Ky. 605 (1914), which held that voluntary associations, like the Union, are not suable merely in the name of the association. *Id.* at 892. The Memorandum further cited *Sanders v. International Ass'n of Bridge, Strutural & Ornamental Iron Workers*, 120 F.Supp. 390, 392 (D.C. Ky. 1954), which interpreted *United Mine*, and other cases, as follows:

> The Court of Appeals of Kentucky has held that an unincorporated voluntary association, such as a labor union, is not suable in the name of the association. *United Mine*

> *Workers of America v. Cromer*, 167 S.W. 891; *Diamond Block Coal Co. v. United Mine Workers of America*, 222 S.W. 1079. Such associations are suable under Kentucky law by proceeding against representatives in the nature of a class action. *Jackson v. International Union of Operating Engineers*, 211 S.W.2d 138; *International Union of Operating Engineers v. Bryan*, 255 S.W.2d 471.

The Court of Appeals essentially holds that because the Union did not specifically state three words, "lack of capacity," in the Memorandum, it irrevocably waived this defense forever. This is despite the fact that the Union went into great detail in its Memorandum to cite specific case law that stated this very premise, namely why the Union was not suable solely in the name of the association.

CR 9.01 only requires that when a party desires to raise an issue as to the capacity of any party to be sued, it do so by *specific negative averment*. An averment is defined as "[a] positive declaration or affirmation of fact; esp., an assertion or allegation in a pleading." Black's Law Dictionary, 4th Ed. A negative averment is further defined as "[a]n averment that is negative in form but affirmative in substance and that must be proved by the alleging party." *Id.* Black's gives the example of the statement "'she was not old enough to enter into the contract,' which is more than just a simple denial." *Id.* One would be hard-pressed to find a more specific negative averment than the language in the Memorandum which stated "an unincorporated association cannot be sued nor bring suit" and "[t]he Union continues to take the position that as an unincorporated association the Court lacks jurisdiction over it in this case." While the Union may not have said the specific words "lack of capacity," it is apparent that this is what was being asserted. The Court of Appeals' holding that the Union "simply failed to assert the defense" is simply wrong.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT IKE HARRIS WAS A REPRESENTATIVE OF THE CLASS OF UNION MEMBERS.

As an initial matter, it is important to note that Birchwood did not appeal any dismissal of Ike Harris from the present litigation. Birchwood's own brief lists the Union as the sole appellee. Furthermore, Birchwood never argued, either at the Circuit Court or the Court of Appeals, that Ike Harris was a representative of any class. Despite this, the Court of Appeals goes to great lengths to discuss class status, and how Ike Harris' inclusion in the Second Amended Complaint secured class status for Birchwood against the Union. The Court of Appeals, in Footnote 12, states that "Birchwood was free to amend its complaint a second time, as it did here, to rename Harris as a member of the Union and representative of the class comprised of Union membership, thereby continuing to litigate its claims against the Union 'through the device of a class action.'" (Opinion at p. 25). This statement by the Court of Appeals is curious since this issue was not argued to the Court nor appealed to the Court. The Court of Appeals, on its own initiative, addresses this issue despite the fact that this was not an issue before the Court. Regardless, the Court of Appeals errs in maintaining that Birchwood somehow secured class status by attempting to bring Ike Harris back into the litigation.

CR 23, a civil rule which was not mentioned by either party in their briefs, or directly referred to by the Court of Appeals, sets forth the prerequisites to class actions and states as follows:

> Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are

> questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interest of the class.

In order to maintain a class action the prerequisites of CR 23.01 must be satisfied in addition to the additional requirements set forth in CR 23.02. After the prerequisites are established, CR 23.03 dictates the procedure for certifying the class, and which states in relevant part as follows:

> (1) ***At an early practicable time after a person sues or is sued as a class representative***, the court must determine by order whether to certify the action as a class action.
> (2) An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under CR 23.07.

(Emphasis Added).

Any cursory review of the pleadings in this case shows that steps necessary to maintain a class were never initiated by Birchwood. In order to certify a class Birchwood should have requested that the Trial Court determine by order whether to certify the action as a class action. "The safest course for a party initiating a class action is to plead the existence of all the factors set forth in CR 23.01, allege the existence of a class and the representatives' membership in it, and demonstrated that the action falls within one of the categories enumerated in CR 23.02." Kurt A. Phillips, Jr., David V. Kramer & David W. Burleigh, KENTUCKY PRACTICE SERIES RULES OF CIVIL PROCEDURE, Rule 23.01, p. 506 (6th ed. 2005). Birchwood never sued the Union through a class representative.

The issue of whether the Union was properly sued by the plaintiffs by way of a class action was not before the Court of Appeals. Birchwood never contested the fact that the only

way the Union could be sued was by way of a class representative. In its brief to the Court of Appeals, Birchwood never raised the argument that it had properly sued the Union by way of class representative. The only issue on appeal before the Court of Appeals was whether the Union waived its lack of capacity and jurisdiction defenses. The Court of Appeals, in its attempt to allow the present litigation to proceed, analyzed an issue which was not appealed, had not been briefed, and had never been mentioned, until the first and only time, when it was included in the Opinion from which the Union now appeals.

Even more confounding is the fact that the Court of Appeals holds that since Birchwood did not appeal Ike Harris' dismissal it will affirm that dismissal and that his participation in the litigation is no longer necessary. In one portion of the Opinion the Court of Appeals notes that a class representative is necessary to sue the Union, then, in another part, states that a class representative is no longer required. The Court of Appeals states that "Birchwood did not name Harris as an appellee as he was not an indispensable or necessary party on appeal." (Opinion at 27). This statement flies in the face of all logic, because the Union can only be sued by virtue of a class action with a class representative. The most indispensable party for an appeal involving a Union would be the class representative, since our laws state that a voluntary association cannot be sued without naming one. The fact Birchwood did not name Harris as an appellee shows that Birchwood never sued the Union by one acting in a representative capacity.

Birchwood did not file a cross motion for Discretionary Review of the Court of Appeal's decision affirming the dismissal of Ike Harris from the lawsuit. CR 76.21. Birchwood is barred from asserting Ike Harris' dismissal was improper. The issue should

not have been addressed by the Court of Appeals since Birchwood never raised the validity of his dismissal in its Brief to the Court. Regardless, Ike Harris is dismissed from this lawsuit.

III. THE COURT OF APPEALS ERRED IN FOCUSING ON THE LANGUAGE USED BY THE PARTIES AND THE TRIAL COURT, RATHER THAN RECOGNIZING THAT THE PARTIES AND THE TRIAL COURT ADDRESSED THE ISSUE OF WHETHER THE UNION AS AN UNINCORPORATED ASSOCIATION COULD BE SUED.

The Court of Appeals opinion states repeatedly that the issue on appeal is not whether the Trial Court lacked personal jurisdiction over the Union, but rather the issue is whether the Union waived its lack of capacity defense. Despite stating such, the Court of Appeals goes on to address the issue and holds that the Union waived any defense relating to personal jurisdiction. Essentially the Court of Appeals states that the Union incorrectly framed the issue on appeal. All parties, including the Trial Court, referred to the issue as jurisdictional. But regardless of what the issue was called the question is the same. Did the Union, by specific negative averment raise the issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to be sued in a representative capacity? The pleadings attached as Appendix 3, 4 and 5 show the answer to all of this is yes.

CR 8.06 states that "[a]ll pleadings shall be so construed as to do substantial justice." In construing the Union's Motion to Dismiss Second Amended Complaint as failing to adequately assert the defense of lack of capacity the Court of Appeals casts aside the liberal construction requirement in CR 8.06 in favor of a hyper technical interpretation of the Civil Rules. "Rule 8.06 is the same as FRCP 8(f), and may be called a liberal construction Rule.

The Rule is not simply a precatory statement but reflects one of the basic philosophies of practice under the Rules of Civil Procedure. A pleading will be judged by its substance rather than according to its label or form." Kurt A. Phillips, Jr., David V. Kramer & David W. Burleigh, KENTUCKY PRACTICE SERIES RULES OF CIVIL PROCEDURE, Rule 8.06, p. 200 (6th ed. 2005). Substantial justice would dictate that the Union's Motion to Dismiss Second Amended Complaint should be construed as adequately raising the defense of lack of capacity.

In *Murphy v. Torstrick*, 309 S.W.2d 767 (Ky. 1958), this Court dealt with a similar issue when a party failed to use the word "mistake" in a pleading. This Court held that "[f]ailure to use the word 'mistake' in a pleading does not deprive the pleader of the right to rely on mistake when the sense of the language in the pleading encompasses mistake. . . . [a]ll pleadings are construed to do substantial justice." *Id.* at 770-71. This reasoning is applicable to the case at bar in that failure to use three words - lack of capacity - should not be determinative of the substance of the Union's Motion to Dismiss Second Amended Complaint. Substantively, the Motion addressed capacity to be sued. The Court of Appeals opinion allows form to prevail over substance which is exactly what CR 8.06 is designed to prevent.

IV. THE TRIAL COURT WAS ALSO CORRECT IN FINDING THAT THE RESPONSES TO AMENDED COMPLAINTS PROPERLY RELATED BACK TO THE INITIAL COMPLAINT.

The facts of this case set forth hereinabove show that the Trial Court properly granted United Brotherhood's Motion to Dismiss to the Second Amended Complaint. CR 15.03(1) states as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Birchwood Conservation Center, in its Second Amended Complaint, was permitted to amend its complaint and add entirely new parties to the lawsuit. The original plaintiff, Birchwood Conservation Center, lacked authority to file suit in the Commonwealth of Kentucky. This defense was pled by the Union in its Amended Answer. (Appendix 4). The Second Amended Complaint listed Birchwood Conservancy, a California Corporation, Lucinda Christian, Evan Blakeny, and Robert Christian as plaintiffs. The Second Amended Complaint set forth similar claims against United Brotherhood arising from the same conduct, transaction, or occurrence as the original complaint, but also added new parties with new claims. Because Birchwood amended its complaint, United Brotherhood had the right to respond thereto. The relation back doctrine set forth in CR 15.03 would literally have no meaning whatsoever if a defendant like United Brotherhood could not raise affirmative defenses against entirely new parties and new claims.

In reaching its ruling, the Trial Court properly relied upon the case of *Curry v. Cincinnati Equitable Ins. Co.*, 834 S.W.2d 701 (Ky. App. 1992). In *Curry,* Joann Curry filed an action to recover benefits allegedly due under a group health insurance plan. The Trial Court dismissed Curry's state law claims on the ground that the claims were preempted by ERISA. On appeal, Curry contended the defense of ERISA preemption was waived because

it was not asserted as an affirmative defense. The Court determined that ERISA preemption was an affirmative defense which could be waived because it had the effect of eliminating state law causes of action. However, the Court held that the affirmative defense was not waived. In so holding, the Court explained as follows:

> Curry's initial claim was for breach of contract. Subsequently, she filed an amended complaint asserting a claim for bad faith, as well as claims under the Kentucky Consumer Protection Act and the Kentucky Unfair Settlement Practices Act. Once Curry filed her amended complaint, CEIC was entitled under CR 15.01 to plead in response to the amended complaint. Indeed, a defendant is specifically allowed to file an amended answer to an amended complaint. Although CEIC responded to the amended complaint by filing a motion to dismiss rather than an amended answer, such a motion is usually treated by courts as an answer. Thus, CEIC clearly pleaded ERISA preemption as a defense to the claims asserted in the amended complaint. Moreover, whenever a defense is asserted in an amended answer (here in a motion to dismiss) and arises out of the conduct, transaction or occurrence set forth in the plaintiff's original pleading, the defense relates back to the date of the original pleading. CR 15.03. It follows, therefore, and we conclude that the defense of ERISA preemption was not waived.

Id. at 704 (internal citations omitted).

By adding new plaintiffs, some with new claims, Birchwood was in essence filing an entirely new lawsuit. But because the causes of action arose out of the conduct, transaction or occurrence set forth in the plaintiff's original pleading (initial Complaint), the defense that the Union could not be sued solely in the name of the association related back to the original pleading. CR 15.03. It should be noted, however, that the original plaintiff was no longer even a party to the case, having been found to lack standing. Whether the Motion to Dismiss the Second Amended Complaint relates back to the original Complaint

is not significant under the circumstances here. New defenses were appropriate to the Second Amended Complaint with new parties and new claims.

In the Court of Appeals, Birchwood relied upon *United Mine Workers* to buttress its argument that the Union waived its ability to raise affirmative defenses. However, *United Mine Workers* actually supports the position taken by United Brotherhood in this appeal. The holding in *United Mine Workers* is set forth as follows:

> As we have in this State no statute authorizing a suit against a voluntary association as such, it is doubtless true that such an association is not suable merely in the name of the association. Notwithstanding this fact, however, we take it that the question must be raised in some proper way; i.e., by special demurrer, where the facts appear on the face of the petition, or by answer in the nature of a plea in abatement, where such facts do not appear. (internal citations omitted).
>
> 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 association was waived.

Id. at 892.

It is apparent from the facts in *United Mine Workers* that the affirmative defense of lack of capacity was never brought to the attention of the lower court and was only raised on appeal. This is in stark contrast to the case at bar, wherein United Brotherhood properly raised the issue in the Motions to Dismiss and Answer. (Appendix 3,4 and 5). Had this case been litigated to finality without United Brotherhood ever raising the affirmative defense, then Birchwood could justly rely upon the holding in *United Mine Workers*. However, because United Brotherhood did properly raise its affirmative defense by Answer and

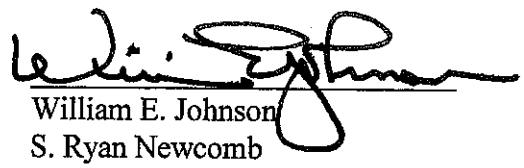
Motions to Dismiss, the holding in *United Mine Workers* illustrates that the Trial Court's Opinion and Order should be affirmed.

CONCLUSION

For the reasons set forth hereinabove, the Opinion of the Court of Appeals should be reversed and the Opinion and Order of the Trial Court reinstated.

Respectfully Submitted,

JOHNSON, TRUE & GUARNIERI, LLP

BY: 

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APPENDIX