RENDERED: OCTOBER 7, 2011; 10:00 A.M.
TO BE PUBLISHED

MODIFIED: OCTOBER 28, 2011; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001413-MR

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 — APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 04-CI-00603

UNITED BROTHERHOOD OF CARPENTERS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND NICKELL, JUDGES.

ACREE JUDGE: Birchwood Conservancy, Lucinda Christian, Evan Blakeny, and Robert Christian appeal the Scott Circuit Court's July 2, 2009 Opinion and Order

dismissing their complaint against the United Brotherhood of Carpenters (the Union). For the following reasons, we affirm in part, reverse in part, and remand.

I. Facts and procedure

Birchwood Conservancy is a California corporation authorized to do business in Kentucky, and the successor-in-interest to Birchwood Conservation Center, an unincorporated association.[1] Birchwood operates a farm in Scott County, Kentucky. Its principals, Lucinda Christian and Robert Christian, are dedicated to caring for rare breeds of domesticated animals, horses in particular.

The Union is an unincorporated association of carpenters.

In 2003, Birchwood sought the help of the Union to demolish an existing barn, reconstruct it in a different location, and build a new barn in the location of the original one. Ike Harris, a Union member and employee, agreed to organize Union membership to carry out this project. The Public Broadcasting Service was filming a documentary on the rare animal conservancy, and the barn's demolition and reconstruction were to be a significant part of the film.

The project began as planned, but a series of delays arose, and the project progressed slowly. As construction stalled, so did production of the documentary. Birchwood's principals began to worry for the safety of the animals, so Union volunteers constructed some smaller shelters with less capacity than the barns which were originally planned. Several animals died, allegedly because they lacked adequate shelter. Birchwood brought suit seeking damages from the Union.

[1] We refer to these entities jointly as Birchwood. Where the context requires, we will differentiate between the corporation and the unincorporated association.

From the filing of the complaint until the entry of the order from which this appeal is taken, this case presents a convoluted procedural history. Our proper review necessarily requires a rather full exposition of that history.

On September 21, 2004, Birchwood filed suit in Scott Circuit Court as the unincorporated association, Birchwood Conservation Center, alleging the Union breached a contract to construct and demolish the barns. The complaint contended alternatively that because the Union induced Birchwood to rely upon its promise to build the barns, the Union should be estopped from failing to do so.

Birchwood indicated in the caption of its complaint that David Tharp of Indianapolis, Indiana, was the Union's agent to be served with process. Tharp was the Union's executive secretary and treasurer. The Clerk of the Scott Circuit Court issued summons and sent the summons and complaint to the Office of the Kentucky Secretary of State by certified mail where it was received on September 23, 2004. The Secretary of State then sent the summons and complaint to the Union in care of David Tharp, via certified mail, restricted delivery, return receipt requested. The summons and complaint were received by the Union's agent who signed for it on September 30, 2004.

Tharp or some other agent of the Union engaged legal counsel and, on October 12, 2004, the Union made a general appearance, filing an answer that denied the existence of a contract, denied that the Union made any representations to Birchwood about when the work would be completed, and denied that its actions caused Birchwood harm.

The Union asserted no affirmative defenses identified in Kentucky Rules of Civil Procedure (CR) 8.03. Nor did the Union "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" either by "specific negative averment" or otherwise. CR 9.01.[2] The Union also asserted no defense identified in CR 12.02, including the defense of lack of personal jurisdiction set forth in CR 12.02(b).

On January 6, 2005, with leave of court, Birchwood filed a First Amended Complaint. The amended complaint added Ike Harris as a defendant. The allegations relating to Harris, his agreement on behalf of the Union to demolish and rebuild barns, and his conduct consistent therewith, according to Birchwood, "identifie[d] the services the Carpenters Union contracted to provide[.]" The claims against the Union itself remained as in the original.

Legal counsel representing both the Union and Ike Harris filed a joint answer to the first amended complaint. This time the Union asserted a generic defense under CR 12.02(f) that "[t]he Complaint as amended fails to state a claim or cause of action against the defendants herein and should therefore be dismissed." The Union and Harris also asserted certain affirmative defenses, none

[2] The full text of CR 9.01 reads as follows: "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."

of which are relevant to our review.[3] Again, however, neither the defense of lack of personal jurisdiction pursuant to CR 12.02(b) nor the defense of lack of capacity pursuant to CR 9.01 was pleaded on behalf of either the Union or Harris.

The parties then began discovery. After five months, the Union filed a motion for summary judgment. The sole ground for the motion was the absence of any genuine issue as to the material fact that the alleged contract between the Union and Birchwood was not supported by any consideration.

More than a year and a half passed before the circuit court ruled on the motion; all the while, the parties continued to engage in significant discovery including the taking of several depositions and exchanging sets of interrogatories.

On February 9, 2007, the circuit court denied the Union's motion for summary judgment. Despite agreeing with the Union that "there was no consideration on Birchwood's side of the agreement[,]" the court denied the summary judgment motion in its entirety "because of Birchwood's promissory estoppel theory."[4] The circuit court also stated that it "recognizes the dispute is between the Union and Birchwood." The court dismissed Harris from the action *sua sponte*. The issues of the Union's capacity and the court's exercise of

[3] The affirmative defenses were: statute of limitations; assumption of the risk; contributory negligence; failure of consideration; waiver and estoppel; and failure to mitigate damages.
[4] Because breach of contract was the only liability theory the Union attacked in its summary judgment motion, and because the motion was denied in its entirety, we consider the issue of breach of contract still before the circuit court. We express no opinion as to the merits of the original motion for summary judgment, nor do we consider a future motion for summary of the issue foreclosed in any way.

jurisdiction were not placed before the court and, therefore, were not addressed.

A month later, on March 16, 2007, after Union member Harris was no longer a party, the Union filed a motion stating, "It has recently been brought to my attention [that is, the attention of counsel for the Union] that an unincorporated association, such as a labor union, cannot sue or be sued in the name of the association." The motion sought to dismiss Birchwood's complaint on three grounds: (1) that under CR 12.02(f) the complaint "fails to set forth a claim or cause of action against the defendants"; (2) that under CR 12.03 the Union was entitled to judgment on the pleadings themselves; and (3) that under CR 56 the Union was entitled to judgment as a matter of law because there were no genuine issues as to any material fact that the Union was an unincorporated association. However, the Union did not frame the argument in terms of its lack of capacity. Instead, it argued that its status as an unincorporated association "creates a jurisdictional defense which can be raised at any time[,]" although it did not base the motion on CR 12.02(a) or (b).

Birchwood responded to the Union's jurisdictional argument on April 24, 2007, asserting the Union had waived that defense. Among other authorities, Birchwood cited CR 12.08(1) which states in pertinent part,

> A defense of lack of jurisdiction over the person . . . is waived (a) if omitted from a motion in the circumstances described in Rule 12.07,[5] or (b) if it is neither made by

[5] CR 12.07 says: "A party who makes a motion under Rule 12 may join with it the other motions herein provided for and then available to him. If a party makes a motion under Rule 12 but omits

> 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). Three days later, "[w]ithout directly engaging these [waiver] arguments, the Union followed up with a motion to file an amended answer in which the jurisdictional defense is asserted." (Opinion and Order, May 16, 2007).

The Union's proposed amended answer responded to Birchwood's amended complaint, but did not respond on behalf of Ike Harris because he already had been dismissed from the action *sua sponte*. The amended answer did not deny the substantive allegations, but only asserted that the circuit court "lacks jurisdiction over the subject matter and the person" of the Union, and that "[t]he plaintiff lacks standing or authority to file or maintain an action[.]"

In response to the Union's claim that Birchwood lacked standing, Birchwood filed a "Motion to Substitute Party Plaintiff" simultaneously with its response to the motion to dismiss. The substitute party plaintiff was to be Birchwood Conservancy, a California corporation.

On May 16, 2007, without addressing Birchwood's motion to substitute the party plaintiff, the circuit court resolved the Union's two motions (to amend its answer and to dismiss) by stating: "Whereas the Union's tardy assertion of a jurisdictional defense is awkward, Birchwood's lack of standing is fatal to its

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therefrom any defense or objection then available to him which Rule 12 permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in paragraph (2) of Rule 12.08 on any of the grounds there stated."

complaint. Accordingly, the Court grants the Union's motion to file its amended answer and dismisses Birchwood's action." (Opinion and Order, May 16, 2007).

On May 25, 2007, Birchwood filed a timely motion to alter, amend or vacate the court's May 16, 2007 order dismissing its complaint.[6] Birchwood argued that dismissing its complaint, after two-and-a-half years of discovery, based on Birchwood's lack of standing was "not warranted" considering the ease with which the deficiency could be cured – naming as plaintiffs the real parties in interest. Consequently and simultaneously, Birchwood filed a motion for leave to file a second amended complaint.

The proposed second amended complaint identified the corporate entity, Birchwood Conservancy, as the plaintiff; this was consistent with Birchwood's earlier motion, never decided by the court, to substitute the corporation as the party plaintiff. However, three entirely new parties plaintiff were added: Lucinda Christian, individually and as Birchwood Conservancy's president; Evan Blakeny, individually and as Birchwood's secretary and treasurer; and Robert Christian, individually.

The second amended complaint again named the Union as a defendant, but it also renamed Ike Harris, individually, and as a member of the Union. The claims against the Union – breach of contract and promissory estoppel – were unchanged. However, the damages claimed were ascribed variously to the four parties plaintiff.

[6] The Union's only response to this motion was to deny its timeliness; the timeliness issue was correctly resolved in favor of Birchwood and is not an issue in this appeal.

On August 30, 2007, the circuit court granted Birchwood's motions to vacate the judgment and to amend the complaint. The court specifically stated that it "makes no determination as to whether there exists personal jurisdiction over the Union" and then ordered the parties "to submit simultaneous briefs . . . discussing whether the Court has personal jurisdiction over the Defendant Union."

On September 10, 2007, the Union and Harris filed a joint Motion to Dismiss the Second Amended Complaint, in lieu of simultaneous briefing of the jurisdiction issue with Birchwood. They asserted various grounds. Citing CR 12.02(a) and (b), the Union argued a "lack of jurisdiction over the subject matter and the person in that . . . an unincorporated association . . . cannot be sued in the name of the association." Next, implying application of CR 12.02(f), the Union argued that the second amended complaint failed to state a claim upon which relief could be granted. Specifically citing CR 12.02(f), Harris argued that the second amended complaint failed to state a claim against him. He further argued that the circuit court's August 30, 2007 order did not "attempt[] to reinstate any claim against Ike Harris[,]" that Harris was no longer a Union employee, and that the doctrines of *res judicata* and estoppel justify dismissing the claim against him.

Birchwood responded to the motion to dismiss, citing several cases holding that failure to timely assert affirmative defenses under CR 8.03 constitutes a waiver of those defenses, and stating,

> for 29 months . . . [w]e all acted and conducted ourselves as if, in fact, both parties were legally appropriate to be in this case. . . . [T]he Defendant here made no attempt to

> plead that, as a labor union, it was not subject to being sued in its own name in the absence of a statute enabling a plaintiff to do so. . . . [I]t is clear that the Defendant here has waived its right to assert the defense. This matter should proceed to trial.

Eighteen months passed with no ruling from the circuit court.

On April 22, 2009, Birchwood moved for a status conference. The motion was granted and a "Pre-Trial Conference" was scheduled for July 9, 2009. However, in an Opinion and Order entered one week before the scheduled pre-trial conference, the circuit court granted the Union's motion to dismiss, making the pre-trial conference unnecessary.

The order dismissing relied on *Curry v. Cincinnati Equitable Ins. Co.*, 834 S.W.2d 701 (Ky. App. 1992) and held that "a defendant is specifically allowed to file an amended answer to an amended complaint." (Opinion and Order, July 2, 2009, *quoting Curry*, 834 S.W.2d at 704). The court further stated, "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." *Id.* "Therefore," the circuit court held, "because the Plaintiffs cannot bring an action against a voluntary association in the name of the association and because the Defendants raised this defense in a timely manner, the motion to dismiss is granted."

Birchwood, the Christians, and Blakeny filed a timely notice of appeal of the July 2, 2009 Opinion and Order dismissing their second amended complaint.

II. The issues

The parties do not agree as to the issues now before this Court. Appellants state in their brief that "[t]he issue which this Court will have to decide is whether the trial court erred in dismissing Birchwood's suit against the Union in which the Union . . . never objected as to . . . the *capacity* of the Union to be sued." (Emphasis added). The Union says, on the contrary, "the issue of whether United Brotherhood may be sued merely in the name of the association . . . is not before the Court." Rather, the Union says, "[t]his appeal deals solely with a procedural issue, namely whether United Brotherhood waived the defense of *lack of personal jurisdiction*." (Emphasis added).

The order from which this appeal is taken does not resolve the disagreement because it does not reference subject matter jurisdiction, or personal jurisdiction, or capacity, yet these issues were placed before the court when the Union relied on CR 12.02(a), CR 12.02(b), and CR 12.02(f) in its motion. Therefore, depending on the intended basis of the court's ruling, the order could support the position of either party.

The Union's interpretation of the issue as jurisdictional is correct if the circuit court relied on CR 12.02(a) or (b). On the other hand, the Union's motion also relied on CR 12.02(f), a not uncommon vehicle for challenging capacity. 6 Kurt A. Philipps, Jr., David V. Kramer and David W. Burleigh, Ky. Prac. R. Civ. Proc. Ann. Rule 12.02 (6th ed. 2011) (citing *Farler v. Perry County Bd. of Educ*., 355 S.W.2d 659 (Ky. 1961)); *see*, *e.g.*, *Moore v. City of Harriman*, 272 F.3d 769,

771 (6th Cir. 2001) (applying the federal rules' corollaries to CR 12.02(b) and CR 9.01); *but see Clement Bros. Const. Co. v. Moore*, 314 S.W.2d 526, 531 (Ky. 1958) ("We are not disposed to say that the defect alleged [defendant's lack of capacity] comes within the scope of CR 12.02(6) [sic]."). If CR 12.02(f) was the basis of the circuit court's ruling, then Birchwood's identification of the issue might well be correct.

From a practical point of view, Birchwood can prevail on appeal only if we conclude that the Union was not entitled to a dismissal under any of the three rules urged in the motion to dismiss. Consequently, we address all three.

III. Standard of review

Whether a court had subject-matter jurisdiction over the case is a question of law; therefore our review is *de novo*. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky. 1997). Likewise, whether a court may exercise personal jurisdiction presents a question of law subject to *de novo* review. *Hinners v. Robey*, 336 S.W.3d 891, 895 (Ky. 2011) (citing *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007)). Similarly, when a defendant moves to dismiss a complaint for failure to state a claim, "the circuit court is not required to make any factual determination; rather, the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). A court is not required to make any findings of fact for any of these rulings. Because the case *sub judice* presents all three of these issues, our review is entirely *de novo*.

IV. Analysis

We begin by observing that the parties and the circuit court, at various points in the litigation, confused or conflated the defenses of lack of subject matter jurisdiction, lack of jurisdiction of the person, lack of standing, and lack of capacity. For example, when the Union asserted that an unincorporated association, such as a labor union, cannot sue or be sued in the name of the association, it framed its argument in terms descriptive of the court's jurisdiction rather than in terms either of the Union's lack of capacity, or of Harris's lack of representative capacity. *See Abbott v. Southern Subaru Star, Inc.*, 574 S.W.2d 684, 688 (Ky. App. 1978) ("[J]urisdiction refers to the power of a court to hear and determine the subject matter of the litigation while capacity deals with the ability of a party to participate in that litigation.").

When the Union challenged the right of Birchwood Conservation Center to prosecute the case, it claimed Birchwood lacked standing when, in fact, the proper argument was that, because it was an unincorporated association, it lacked capacity to sue in its own name. *Spencer County Preservation, Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 330 (Ky. App. 2007) ("[O]ur courts have recognized a distinction between capacity to sue – the right to come into court – and standing to sue – the right to the relief sought." Citation omitted.). As discussed more fully below, this particular confusion was mooted when the circuit court allowed Birchwood to file the second amended complaint in its corporate name, thereby eliminating any argument that it lacked capacity to sue the Union.

Nevertheless, our proper review requires that we segregate these legal concepts and separately apply them to the procedural history of this case.

A. Circuit court did not lack subject matter jurisdiction

To some degree, we can attribute the confusion of subject-matter-jurisdiction concepts and capacity concepts to jurisprudence that evolved prior to the rules of modern pleading; however, such jurisprudence is no longer followed.

> Some early decisions suggested that a defect in capacity deprives the court of subject-matter jurisdiction, since a real case or controversy does not exist when one of the parties is incapable of suing or being sued, [footnote omitted] although more recent authority has rejected that characterization. [*Brown v. Keller*, 274 F.2d 779 (6th Cir. 1960), *cert. denied*, 363 U.S. 828, 80 S. Ct. 1599, 4 L. Ed. 2d 1523 (1960).] To treat capacity problems as subject-matter jurisdiction defects seems to exaggerate their significance . . . . In *Van Dusen v. Barrack*,[376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964),] the Court . . . indicates that capacity is not a jurisdictional issue . . . .

6A Wright, Miller, Kane, and Marcus, Fed. Prac. & Proc. Civ. § 1559 (3d ed. & 2011 Supp.).[7] Our own Supreme Court agreed with this analysis in *Baker v. Fletcher*, where that Court said, "Failure to join a proper party is *not jurisdictional*, thus does not warrant a sua sponte dismissal. *The same holds true for allegedly*

[7] "It is well established that Kentucky courts rely upon Federal caselaw when interpreting a Kentucky rule of procedure that is similar to its federal counterpart. *See, e.g., Newsome By and Through Newsome v. Lowe*, 699 S.W.2d 748 (Ky. App. 1985)." *Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010). Our courts also have been persuaded by the interpretation of federal procedural rules as expressed in Wright, *et al.* *See*, *e.g.*, *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009) (quoting 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2024 (2d ed. 1994)).

suing an improper party. CR 9.01[.]" 204 S.W.3d 589, 600 (Ky. 2006) (emphasis added).

In this case, subject matter jurisdiction was never a real issue. "[S]ubject matter does not mean 'this case' but 'this kind of case.' " *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) (citation omitted). The Scott Circuit Court, as a court of general jurisdiction, has been vested with subject-matter jurisdiction over just such cases as Birchwood brought – contract disputes and suits in equity. Ky. Const. §§ 109 & 112(5); Kentucky Revised Statutes (KRS) 23A.010; *Peter v. Gibson*, 336 S.W.3d 2, 5 (Ky. 2010).

The Scott Circuit Court "acquired jurisdiction of the subject-matter [of Birchwood's claims] when the petition [or, as in this case, the complaint] was filed and summons issued[.]" *Hudson v. Manning*, 250 Ky. 760, 63 S.W.2d 943, 945 (1933). There is no merit in the argument that the circuit court was not vested with subject matter jurisdiction. We move on to the issue of the lack of personal jurisdiction of the Union.

B. Defense of lack of personal jurisdiction was irrevocably waived

The sole basis of the Union's lack-of-personal-jurisdiction argument is the notion that "voluntary associations, such as [unions], have neither power to sue nor to be sued in the association name[.]" *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079, 1085 (1920). While true, this statement of law describes legal capacity; it is not the basis of an argument for a court's lack of personal jurisdiction. *See Lawrence v. Marks*, 355 S.W.2d 162, 163 (Ky. 1961) ("[A]ppellee maintains that the question raised . . . was one of *jurisdiction* [when] it is clear that the question is merely one of capacity to sue.").

"Jurisdiction over the person of a defendant can be acquired by the service of process upon him or by his voluntary appearance and submission." *Hudson*, 63 S.W.2d at 945. In this case, the circuit clerk served process on the Union through the Secretary of State and the Union's executive secretary, thereby summoning the Union to appear before the Scott Circuit Court, which it did.

A defendant summoned to appear before a Kentucky court has a limited opportunity to challenge the exercise of personal jurisdiction.[8] First, the defendant may file a pre-answer motion pursuant to CR 12.02(b) to dismiss the complaint for lack of jurisdiction over the person, in which case the time for filing an answer

[8] In this case, the Union might also 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 did not. By operation of CR 12.08(1), our ruling regarding the Union's irrevocable waiver of the personal jurisdiction defense, CR 12.02(b), is equally applicable to the CR 12.02(d) and (e) defenses the Union could have asserted but never did.

would be suspended. CR 12.01. Second, if no such motion is made, the defense may be asserted in the answer. In this case, the Union did neither.

The Union filed its answer to the original complaint on October 12, 2004, but raised no objection to the Scott Circuit Court's exercise of personal jurisdiction. As of that date, the Union had one last opportunity to avoid the irrevocable waiver of the defense – amendment of the answer "as a matter of course[.]" CR 15.01; CR 12.08(1).

Amendment *as a matter of course* is the first of three methods of amending a pleading and the only method requiring neither leave of court nor the agreement of the other parties to the action. CR 15.01. As the rule states,

> A party may amend his pleading once *as a matter of course* at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served.

CR 15.01 (emphasis added). Because the Union's answer was a pleading to which no responsive pleading is permitted, the Union had twenty days from October 12, 2004, to amend its answer, *as a matter of course*, to timely assert the defense of lack of personal jurisdiction. The Union failed to do so.

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[.]" CR 15.01. 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 Philipps, *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); *Limbright 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);[9] Wright and

[9] Now found at 2 James Wm. Moore *et al*., Moore's Federal Practice § 12.21 (3d ed. 2009) ("[A]mending a complaint does not revive omitted defenses or objections that the defendant could have raised in response to the original complaint.").

> Miller, Federal Practice and Procedure 1388, p. 845 (1969).[10] 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 Rule 12 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.

[10] Now found at 5B Wright, *et al.*, Fed. Prac. & Proc. Civ. § 1347 (3d ed. & 2011 Supp.) ("[I]f the plaintiff has raised new matter in the amended complaint that may be vulnerable to one of the defenses enumerated in Rule 12(b)[corollary to CR 12.02], the defendant may assert that defense by a pre-answer motion or in the responsive pleading even if she did not assert it initially. [footnote omitted] If, however, the amendment to the complaint merely corrects a technical defect or is designed to contradict or preempt a defense previously raised by the defendant, defenses waived prior to the amendment will not be revived.").

But the analysis cannot stop here. While the Union clings only to its personal jurisdiction argument, Birchwood contends the issue is one of capacity, which requires a different analysis.

C. Defense of lack of capacity was waived

Birchwood frames the issue before us as the Union's failure to assert the defense of capacity for the first two-and-one-half years of the litigation. Capacity, Birchwood asserts, is a "matter constituting an avoidance or affirmative defense[,]" CR 8.03, and the Union's failure to assert that affirmative defense in a timely manner resulted in its waiver. We agree that the Union waived the defense. However, both Birchwood's and the Union's focus on the period prior to the filing of the second amended complaint is misplaced.

"[A]lthough an objection to a party's capacity . . . 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*." 5A Wright, *et al.*, Fed. Prac. & Proc. Civ. § 1295 (3d ed. & 2011 Supp.) (emphasis added). Seizing on this principle of pleading, the Union points to the order from which this appeal is taken. That order references the fact that on May 16, 2007, the circuit court "granted the [Union] leave to amend their [sic] answer [to the *first* amended complaint] to assert the defense at issue in this motion."[11] (Opinion and Order, July 2, 2009).

[11] As noted in this opinion, and during oral argument, the circuit court did not make clear the specific defense to which it was referring. We have proceeded as though it could have been any defense directly or indirectly raised in the motion to dismiss before the circuit court, or in the briefs before this court.

However, this is a red herring; the Union's amended answer to the first amended complaint was made irrelevant by the circuit court's August 30, 2007 order granting Birchwood leave to file a second amended complaint.

"An amended pleading . . . supersedes the former pleading. The original pleading is abandoned by the amendment and is no longer a part of the pleader's averments against his adversary[.]" *Louisville Taxicab & Transfer Co. v. Johnson*, 311 Ky. 597, 224 S.W.2d 639, 642 (1949) (citation and internal quotation marks omitted). Therefore, Birchwood's second amended complaint superseded its first amended complaint which "no longer performs any function in the case." 6 Philipps, *et al.*, Ky. Prac. R. Civ. Proc. Ann. Rule 15.01 (6th ed. 2011) (citing Wright & Miller, Federal Practice and Procedure (2d ed.), Civil § 1476); *see also Kentucky Press Ass'n, Inc. v. Kentucky*, 355 F.Supp.2d 853, 857 (E.D. Ky. 2005) (citing *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000)). Consequently, both the Union's answer and amended answer to the first amended complaint are of no consequence.

And yet, because the capacity defense is not irrevocably waivable like the lack-of-personal-jurisdiction defense, the Union could have asserted it for the first time in response to the second amended complaint. Therefore, our review of Birchwood's argument regarding the capacity defense necessarily focuses only on its second amended complaint and the Union's response thereto.

The second amended complaint was designed to cure what Birchwood perceived to be a capacity-to-be-sued defense and demonstrated the appellants'

recognition that "an unincorporated association[, such as the Union,] may be sued through the device of a class action." *American Collectors Exchange, Inc. v. Kentucky State Democratic Central Executive Committee*, 566 S.W.2d 759, 761 (Ky. App. 1978). Procedurally, this is accomplished by naming both the unincorporated association and a member of the association. *Id.* Birchwood properly brought the Union before the circuit court by re-naming the Union as the unincorporated association, and brought the membership before the court by re-naming Harris as a defendant, representative of the class of Union members.

The Union argues, however, that Birchwood was prohibited from renaming Harris as a defendant. As support, the Union again points to the July 2, 2009 order from which this appeal is taken. That order states: "this Court's February 9, 2007 Opinion and Order dismissed Ike Harris as a defendant in this case. The Court's August 30, 2007 Opinion and Order does not permit the Plaintiffs' [sic] to reassert their claims against Ike Harris[.]" (Opinion and Order, July 2, 2009). That statement, however, is clearly erroneous.

One purpose for Birchwood's motion for leave to file a second amended complaint, as indicated both in the motion and in the tendered second amended complaint itself, specifically was to re-name Ike Harris as a defendant in his capacity as a Union member. The August 30, 2007 Opinion and Order granted that motion without qualification or condition. Therefore, contrary to the court's statement in its July 2, 2009 order, and contrary to the Union's argument,

Birchwood was not prohibited from renaming Harris as a defendant, representative of the class comprised of the Union's members.[12]

The second amended complaint presented the Union with a new opportunity to raise the capacity defense. However, 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. Compliance with CR 9.01 was required of the Union if it chose to assert capacity as a defense, whether the basis of that assertion was its own lack of capacity, or the lack of Harris's capacity as a Union member properly representative of the class.[13] *Abbott v. Southern Subaru Star, Inc.*, 574 S.W.2d 684, 688 (Ky. App. 1978) ("CR 9.01 . . . require[s] that the 'specific negative averment' shall include 'supporting particulars.'"). The Union simply failed to assert the defense.

Our highest court previously held that a defendant's general allusion to its lack of capacity in a CR 12.02(f) motion was ineffective. *Clement Bros.*, 314 S.W.2d at 531. "Any question concerning the legal entity of that Company was

[12] There are other reasons for finding error in the circuit court's ruling. The February 2007 *sua sponte* dismissal of Harris is a practice "Kentucky law strongly discourages . . . ." *Doster v. Kentucky Parole Bd.*, 308 S.W.3d 231, 232 (Ky. App. 2010) (citations omitted). More significantly, the order dismissing Harris did not state that the dismissal was with prejudice; however, it clearly was not upon the merits, and we conclude it was without prejudice. Therefore, with leave of court, 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." *American Collectors*, 566 S.W.2d at 761. Lastly, while the Union finds significance in the fact that Birchwood did not appeal Harris's February 2007 dismissal, we do not. The order did not dispense with all claims as to all parties, nor did it include CR 54.02(1) recitations. It was therefore interlocutory and non-appealable.

[13] Harris's answer to the second amended complaint stated he was no longer a Union employee, but does not deny his membership status. Furthermore, we see no incompatibility between our ruling and the requirements of CR 23.01, *et seq.*

waived through failure to raise it by specific negative averment. CR 9.01." *Id.* Therefore, we conclude that the Union waived the defense of lack of capacity.

Because the Union has waived all defenses that would prevent resolution of Birchwood's claims against it as an entity, Harris's future participation in the litigation is no longer necessary. As the circuit court noted early in the litigation, Birchwood's dispute is with the Union, and as stated by the Union's counsel at oral argument, "Mr. Harris is just a fellow that drives nails." Birchwood did not name Harris as an appellee as he was not an indispensible or necessary party on appeal. *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 625 (Ky. 2011) ("If a party's participation in the appeal is unnecessary to grant relief, and requiring its participation would force unnecessary expense on the party, then, . . . such a party is not indispensable."); *see also Kesler v. Shehan*, 934 S.W.2d 254, 257 (Ky. 1996) ("[F]or purposes of appeal, a person is a necessary party if the person would be a necessary party for further proceedings in the circuit court if the judgment were reversed."). Because Birchwood did not appeal that portion of the July 2, 2009 Opinion and Order dismissing Harris, we will affirm that portion of the order.

Conclusions

The Scott Circuit Court had subject matter jurisdiction of this case. The Union irrevocably waived the defense of lack of personal jurisdiction and subsequently waived the defense of lack of capacity.

Therefore, the order of the Scott Circuit Court dismissing the second amended complaint is reversed as to its dismissal of the Union, affirmed as to its

dismissal of Harris, and this case is remanded for additional proceedings consistent with this opinion.

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