

IN THE SUPREME COURT OF MISSISSIPPI

JAMES BRITTON

APPELLANT

VERSUS

CASE #2007-CA-01293

**AMERICAN LEGION POST 058,
POST 058 FIRE PROTECTION DISTRICT,
and JOHN DOES 1,2, & 3, and X, Y, Z
CORPORATIONS**

DEFENDANT

**APPEAL FROM CHANCERY COURT
OF HANCOCK COUNTY, STATE OF MISSISSIPPI**

REPLY BRIEF FOR APPELLANT, JAMES BRITTON

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STATEMENT OF THE ISSUE

Whether, as a matter of law, Defendant American Legion Post 058, an unincorporated, non-legal entity, had the capacity to contract or lease land, and, if the Defendant American Legion Post 058 had not capacity to contract or lease land, whether the lease agreement between Plaintiff James Britton and Defendant American Legion Post 058 should be declared null and void.

STATEMENT OF THE CASE

As Plaintiff stated in its *Brief for Appellant, James Britton*, this matter is before this Court on appeal of the Chancery Court of Hancock County, Mississippi's denial of Plaintiff's *Motion for Summary Judgment on Plaintiff's Complaint to Annul Lease*. Plaintiffs' Motion for Summary Judgment is exhibited in *Appellant's Record Excerpts*, pages 46 through 67.

Contrary to Defendant American Legion Post 058's sudden position in its *Brief* that the American Legion Post 058 is not an unincorporated association (*See Brief for Appellees*, p. 6), Defendant American Legion Post 058 admitted in response to *Requests for Admissions* that "the American Legion Post 58 is not a Mississippi Corporation," that "the American Legion Post 58 is not a Mississippi Non-Profit Corporation," and that "the American Legion Post 58 is an unincorporated association." (*See Appellant's Supplemental Record Excerpt*, p. 1).

SUMMARY OF THE ARGUMENT

As shown both by Plaintiff in his *Brief* and even by the cases Defendant cites in favor of its position, Defendant American Legion Post 58, as an unincorporated association and non-entity had no capacity to enter any contract or lease agreement with

Plaintiff and, thus, the lease agreement at issue herein should be declared null and void. Congress' chartering of the American Legion does not grant entity status to Defendant American Legion Post 058, and Defendant has never been chartered by Mississippi or Congress as an entity.

Defendant is in fact a non-entity and an unincorporated association, and, unlike the defendants in the cases Defendant cites, no Mississippi state statutes allow it to sue or be sued. Thus, as is clearly stated in the cases even Defendant American Legion Post 058 cites in its *Brief*, the common law rule applies, and Defendant American Legion Post 058 thus has no capacity to contract or lease land. As such, the lease agreement should be declared null and void.

ARGUMENT

- A. American Legion Post 058 is an association separate and apart from the federally chartered American Legion, and Congress has not endowed American Legion Post 058 with any rights to sue or be sued, or to own or lease land.**

Though the federally chartered American Legion was incorporated by Congress and endowed with the ability to lease land and be sued, neither Congress nor Mississippi gave such powers to Defendant American Legion Post 058. Further, Congress did not give the American Legion the power to form Departments and Posts with the ability to lease land and be sued. Defendant American Legion Post 058 is an association separate and apart from the federally chartered American Legion, and is not incorporated by any federal or state entity. As such, Defendant American Legion Post 058 was not granted by Congress with the ability to contract, lease land, or be sued.

In 1919, Congress incorporated the American Legion through 41 Statute 284, which is now codified in 36 U.S.C. § 21701, *et seq.* 36 U.S.C. § 21701 (a) provides that

"The American Legion...is a federally chartered corporation." Through its 1919 enactment, Congress breathed life into the American Legion (as apart from the American Legion and its posts), endowing it with specific powers, powers no codified in 36 U.S.C. § 21704.

Referring to the American Legion as "the corporation," 36 U.S.C. § 21704 provides that "the corporation may --

- (1) adopt a constitution, bylaws, and regulations to carry out the purposes of the corporation;
- (2) adopt and alter a corporation seal
- (3) establish and maintain offices to conduct its activities;
- (4) establish State and territorial organizations and local chapter or post organizations;
- (5) acquire, own, lease, encumber, and transfer property as necessary to carry out the purposes of the corporation;
- (6) publish a magazine and other publications;
- (7) sue and be sued; and
- (8) do any other act necessary and proper to carry out the purposes of the corporation.

A corporation has no powers and can incur no obligations except as authorized or provided for in its charter. *Shoshone Mining Company v. Rutter*, 177 U.S. 505, 509 (1900). Mississippi's code does not give the organizations (departments and posts) the American Legion forms the right to sue or be sued, or to own or lease land.

American Legion posts are associations separate and distinct from the federally chartered American Legion. *D'Amore v. American Legion, Amity Post*, 214 N.Y.S.2d 70, 71 (N.Y. 1961). Though a state may incorporate a post and charter it with authority and ability to sue and be sued and to hold, lease and convey real property, posts only get such power through incorporation through states and do not get such power merely from Congress' charter of the American Legion. (See *Anthony Wayne Post No. 418 v. American Legion*, 5 F.Supp. 395, 396 (E.D. PA 1933), stating that the American Legion

post therein was an unincorporated body; *Legion Clubhouse, Inc. v. City of Madison*, 21 N.W.2d 668, 670 (Wis. 1946), providing that American Legion post was merely unincorporated organization until Wisconsin incorporated it through the passage of a state statute, and only authorized to take and hold real property through passage of that statute; *James R. Kirby, Post No. 50 v. The American Legion*, 155 N.E. 462, 463 (Mass. 1927), showing that the plaintiff American Legion post was chartered by the American Legion, and that the post “subsequently” became incorporated for the purpose of holding real and personal property.).

Defendant American Legion Post 058’s argues that because the American Legion was chartered and given the ability to lease property, that Defendant too has the ability to lease such property. As shown above, American Legion Post 058 is an association separate and distinct from the American Legion, and does not, absent statute or incorporation in a state, have the power to lease property. Congress specifically gave such power to the American Legion, saying the “corporation may...acquire, own, lease....and transfer property...” 36 U.S.C. § 21704. Congress did not give such power to the mere “organizations” Congress empowered the American Legion to create. *Id.*

As shown in *D’Amore*, unless a state has specifically empowered a post to sue and be sued, or own and lease property, an American Legion post does not have those powers. *D’Amore*, 214 N.Y.S.2d at 71. In *D’Amore*, the post therein had the power to sue and be sued because New York had passed the Benevolent Orders Law, § 3-a, specifically making subordinate posts of the federally chartered American Legion corporations and allowing them to sue and be sued “in [New York]. *Id.*, citing *N.Y. Benevolent Orders Law*, § 3-a. New York’s *Benevolent Orders Law* further provides that

American Legion posts “*may not* take, hold, lease, mortgage, convey or otherwise dispose of real property unless it shall have filed the certificate required by section two of the benevolent orders law (emphasis added).” *D’Amore v. American Legion, Amity Post*, 214 N.Y.S.2d 70, 71 (N.Y. 1961). As such, *D’Amore* demonstrates, as is clear from the unequivocal language of 36 U.S.C. § 21704, that Congress did not empower posts to acquire, lease or own land, and unless posts are incorporated or granted such powers by statute, they do not have those powers.

Thus, unless New York’s Benevolent Orders Law is in violation of the supremacy clause, New York’s Benevolent Orders Law demonstrates that 36 U.S.C. § 21704 does not empower American Legion posts to own, acquire or lease land, and that posts will need a charter from a state to do those acts. Hypothetically, if 36 U.S.C § 21704 did give posts power to acquire, lease and own land, then New York’s Benevolent Orders Law, § 3-a would violate the supremacy clause (U.S. Constitution, Article VI, Clause 2) because such would mean New York was taking away powers Congress gave to American Legion posts. Congress never empowered American Legion posts to acquire, own or lease land.

Looking outside of New York, one can see the same theme. As shown above, courts throughout the country have repeatedly stated that American Legion posts are unincorporated associations, unless incorporated pursuant to state statute. (*See supra Anthony Wayne Post No. 418*, 5 F.Supp. at 396, *Legion Clubhouse, Inc.*, 21 N.W.2d at 670, and *James R. Kirby, Post No. 50*, 155 N.E. at 463). Further, knowing they are unincorporated associations, American Legion posts across the country have become incorporated in their respective states specifically so that they can acquire land, and lease and own real property. (*James R. Kirby, Post No. 50*, 155 N.E. at 463). A quick perusal

of the Mississippi Secretary of State website will also show that American Legion Posts throughout Mississippi, including even the American Legion Department of Mississippi, have become incorporated.

But, as Defendant American Legion Post 058 previously admitted in depositions and in responses to requests for admissions, it is unincorporated and is not registered to do business in Mississippi. It thus has no power to contract, or acquire, lease or own property. You will not find American Legion Post 058 listed as an incorporated body or tax exempt entity on the Mississippi Secretary of State website. Congress does not give American Legion Post 058 the power to contract, acquire or lease property, and Mississippi did not statutorily give it that power. Unlike other posts across the country and in Mississippi, American Legion Post 058 did not incorporate itself to obtain those powers and its Lease Agreement is thus null and void.

B. American Legion Post 058, as an unincorporated association, cannot contract or acquire, lease or own land, as Plaintiff showed in his *Brief* and as even Defendant American Legion Post 058's cases demonstrate.

Though Defendant American Legion Post 058 questions Plaintiff's cases he cited in his brief because of their age, the cases Defendant cites affirm the rules outlined in Plaintiff's cases. All of those cases demonstrate that unless authorized by statute, an unincorporated association, like American Legion Post 058, cannot acquire, lease or own land.

Further, American Legion Post 058's cases show that, as demonstrated above, unless a state passes a statute allowing an unincorporated association to sue or be sued, or to own, acquire or lease land, that unincorporated association has no capacity or power to do those activities. Because Defendant American Legion Post 058 is an unincorporated

association and has not been empowered by Mississippi to lease, acquire or own property, American Legion Post 058 has no capacity to contract, or acquire, lease or own land. As such, the *Lease Agreement* at issue here should be annulled.

In Defendant American Legion Post 058's *Brief*, it relies heavily upon *Beta Beta Chapter of Beta v. May* for its argument that unincorporated associations can lease and acquire property. See *Brief for Appellees*, pages 7-8. Notably absent from Defendant American Legion Post 058's summary of *Beta Beta* is the Mississippi Supreme Court's statements therein that the Beta fraternity could only lease property because a Mississippi statute granted the fraternity that power. *Beta Beta Chapter of Beta v. May*, 611 So.2d 889, 891-92 (Miss. 1993). The *Beta Beta* case also states the common law rule that unincorporated associations are "not suable in [their] own name" and cannot own or lease property. *Beta Beta Chapter of Beta v. May*, 611 So.2d 889, 891-92 (Miss. 1993). *Beta Beta* relies on *Varnado v. Whitney*, which provides that "at common law, unincorporated, voluntary associations...could sue or be sued only in the name of its members" and that such an "association is not so suable, unless that rule has been changed by statutes..." *Varnado v. Whitney*, 147 So. 479, 480 (Miss. 1933). The *Beta Beta* court states that "unincorporated associations authorized by statute to contract in its own name for certain purposes, has a legal capacity to be sued on such contracts in its association name." *Beta Beta*, 611 So.2d at 893. There is no such statute in Mississippi giving the American Legion Post 058 authority to contract, or acquire, lease or own land.

As there is no Mississippi statute giving American Legion posts authority to contract or to acquire, lease or own land, the common law rule that unincorporated associations cannot contract or lease, acquire or own property applies. That common law

rule is spelled out both in the *Brief for Appellant, James Britton* and in *Beta Beta*, discussed *supra*.

The Mississippi Supreme Court has consistently held that unincorporated associations have no capacity to contract, or hold, lease or acquire land, and that if no one signed for the unincorporated association on its behalf, any such contracts or leases are null and void, because there is no one to hold accountable on such contracts. *See Beta Beta*, 611 So.2d 891-93; and *Brief for Appellant, James Britton*, pages 6-10. As such, because the American Legion Post 058 is an unincorporated association and because no one signed the *Lease Agreement* for Defendant American Legion Post 058 on its behalf, the *Lease Agreement* is null and void. The subject property should revert to the lessors.

C. Defendant American Legion Post 058's statement that the lessors possibly signed the Lease Agreement for the American Legion Post 058 is absurd, factually and legally.

In addition to Defendant not having capacity to contract or acquire, lease or own land, no one signed the *Lease Agreement* on its behalf to be held accountable as a lessee. Thus, the *Lease Agreement* must be declared null and void.

The *Lease Agreement* unequivocally states that Jonnie Britton, Jim Britton and Billy O. Anderson "hereby lease" the subject property to Defendant. (*See Lease Agreement* on Appellant's Record Excerpts, pp. 57-58). Further, if those lessors are leasing the property to Defendant American Legion Post 058, yet signing the document on American Legion Post 058's behalf (as American Legion Post 058 asserts is a factual issue) to be accountable to themselves, the lease would fail for lack of consideration and for failure to sign and deliver a lease.

To have an enforceable contract there must be 1) two or more contracting parties, 2) consideration, 3) an agreement that is sufficiently definite, 4) parties with legal capacities to contract, 5) mutual assent and 6) no prohibition precluding contract formation. In that were the case, the lessors would essentially be making promises only to themselves, and such cannot be adequate consideration. Also, to lease property, a lessor must sign the lease contract. *Hunt v. Coker*, 741 So.2d 1011, 1015 (Miss. App. 1999).

Further, land cannot be conveyed from one to another unless the conveyance is "signed and delivered." Miss. Code Ann. § 89-1-3.

The lessors were required to sign the Lease Agreement and to deliver it to Defendant American Legion Post 058. Had any lessor not signed for himself, but for American Legion Post 058, that lease would be invalid and void because the lessor could not deliver the lease to himself. Also, one cannot contract with himself, and any such agreement would lack consideration.

The *Lease Agreement* between lessors and American Legion Post 058 unequivocally shows that lessors signed the document for themselves, as they were required to do. As such, American Legion Post 058's assertion that there exists a factual issue about on who's behalf the lessors signed the *Lease Agreement* is factually and legally untenable.

American Legion Post 058 did not have capacity to contract and still does not today. Also, no one signed the lease agreement on its behalf. As shown above and in Appellant's *Brief*, the *Lease Agreement* must therefore be determined null and void and the subject property revering to the lessors.

CONCLUSION

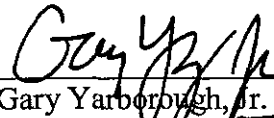
Defendant American Legion Post 058 is an unincorporated association without capacity to contract, acquire, lease or own land. As such the Lease Agreement Defendant purported to enter with Plaintiff is null and void for want of capacity, and the land should revert to the lessors.

WHEREFORE PREMISES CONSIDERED, Appellant James Britton respectfully asks that this Court reverse the Hancock County Chancery Court's denial of his *Motion for Summary Judgment*, annul the *Lease Agreement* and revert the subject property back to lessors.

Respectfully submitted on this the 13th day of June, 2008.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant James Britton does hereby certify that he has this day served the above and foregoing REPLY BRIEF FOR APPELLANT upon the following persons via the following means:

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ON THIS the 13th day of June, 2008.



GARY YARBROUGH, JR.

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The undersigned counsel for Appellant James Britton does hereby certify that he has this day served the above and foregoing REPLY BRIEF FOR APPELLANT upon the following persons via the following means:


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TRIAL COURT JUDGE

ON THIS the 19th day of June, 2008.



GARY YARBOROUGH, JR.