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Separate Legal Entity; Suit by Member; Personal Injuries; Liability; Statutory Provision; Tanner v. Loyal Order of Moose

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other states which still recognize these common law tort distinctions also followed *Merlo*.[72]

CONCLUSION

The confusion that arises out of the *Primes* case may be due to the same problem that other equal protection decisions seem to have been grappling with, namely, what is to be the test? Under what circumstances does a statutory scheme, because it is less than perfect, become invidiously discriminatory? The attempts to derive a middle scrutiny analysis appear to constitute an effort to add flexibility to the old two-tiered standard. The use of the irrebuttable presumption analysis, however, may unnecessarily cloud the issues. Without advancing any legal analysis, the irrebuttable presumption approach appears to be valuable merely as a tool to allow the court to reach a desired result where strict scrutiny cannot be applied.

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UNINCORPORATED ASSOCIATIONS

Separate Legal Entity · Suit by Member · Personal Injuries · Liability · Statutory Provision

Tanner v. Loyal Order of Moose, 44 Ohio St. 2d 49, 337 N.E.2d 625 (1975)

GEORGE and Marguerite Tanner, members of the Columbus Lodge No. 11 of the Loyal Order of Moose, an unincorporated association,[1] were attending a dance sponsored by that Lodge when Mrs. Tanner slipped on a recently waxed area of the dance floor[2] and sustained serious injury. The Tanners filed suit against the Lodge in the court of common pleas,[3] alleging that the dance floor had been negligently waxed, making it slippery and thus causing her fall.

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[72] Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 518 P.2d 362 (Kan. 1974); Johnson v. Hassett, 217 N.W.2d 771 (N. D. 1974).

[1] An unincorporated association has been defined as an organization composed of individuals united without a charter, pursuing some common enterprise. *See* Local 4076, United Steelworkers v. United Steelworkers AFL-CIO, 327 F. Supp. 1400, 1402-03 (W.D. Pa. 1971).

[2] Depositions of the plaintiffs filed with the trial court indicated that shortly before Mrs. Tanner fell, an officer of the lodge had waxed the floor with a powdered wax which left the floor slippery in spots, including the place where Mrs. Tanner fell.

[3] Tanner v. Columbus Lodge No. 11, Loyal Order of Moose, Docket No. 72 CV-05-1557 (C. P. Franklin County, April 23, 1974).

The Lodge moved for summary judgment,[4] pleading that an unincorporated association was not amenable to suit by one of its members. The trial court granted the motion,[5] ruling that the Ohio Supreme Court's decision in *Koogler v. Koogler*[6] precluded a member of an unincorporated association from suing the association as an entity. The court of appeals recognized that the enactment of Chapter 1745 of the Ohio Revised Code, as well as several Ohio Supreme Court decisions, have cast doubt upon the validity of *Koogler*. However, the court of appeals declined to overrule *Koogler,* maintaining that such a decision was the sole prerogative of the Ohio Supreme Court.[7]

The Ohio Supreme Court, in reversing the judgment of the court of appeals and overruling *Koogler,*[8] specifically relied upon the provisions of Chapter 1745 of the Ohio Revised Code[9] and subsequent judicial decisions which have interpreted those provisions.[10] The provisions of Chapter 1745 plainly state that *any* unincorporated association may sue or be sued as an entity,[11] that its assets, rather than the assets of its members, are subject to judgments,[12] and that an action against an unincorporated association would not be affected by a change in officers or membership.[13] The Ohio Supreme

[4] The Lodge, in its motion for summary judgment, recited the following fact: "Further, an affadavit is attached indicating that the Columbus Lodge 11, Loyal Order of Moose is a non-profit fraternal organization . . . ." For a summary of the trial court's findings, see Tanner v. Loyal Order of Moose, Civil No. 74 AP 185 (Ohio Ct. App. Franklin County 1974).

[5] Tanner v. Loyal Order of Moose, 44 Ohio St. 2d 49, 337 N.E.2d 625 (1975).

[6] 127 Ohio St. 57, 186 N.E. 725 (1933). In *Koogler,* a member of an unincorporated fraternal association sued the association for injuries sustained when a fire escape negligently maintained by the lodge fell upon him. In denying the plaintiff the right to sue the lodge, the court held that a member of an unincorporated association is engaged in a common enterprise with his fellow members, and the acts of one member are equally imputable to every other member.

[7] Civil No. 74 AP 185, at 2237 (Ohio Ct. App. Franklin County 1974).

[8] 44 Ohio St. 2d at 52, 337 N.E.2d at 627.

[9] OHIO REV. CODE ANN. §§ 1745.01, 1745.02, 1745.04 (Page 1964).

[10] *See* Miazga v. Int'l Union of Operating Eng'rs, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); Marsh v. General Grievance Comm., 1 Ohio St. 2d 165, 205 N.E.2d 571 (1965); Lyons v. American Legion Post Realty Co., 172 Ohio St. 331, 175 N.E.2d 733 (1961).

[11] *See* OHIO REV. CODE ANN. § 1745.01 (Page 1964), which provides that:

> Any unincorporated association may contract or sue in behalf of those who are members and, in its own behalf, be sued as an entity under the name by which it is commonly known and called.

[12] *See* OHIO REV. CODE ANN. § 1745.02 (Page 1964), which provides that:

> All assets, property, funds, and any right or interest, at law or in equity, of such unincorporated association shall be subject to judgment, execution and other process. A money judgment against such unincorporated association shall be enforced only against the association as an entity and shall not be enforceable against the property of an individual member of such association.

[13] *See* OHIO REV. CODE ANN. § 1745.04 (Page 1964), which provides that:

> No cause of action by or against any such unincorporated association shall abate by reason of the death, removal, or resignation of any officer, or by the death or legal

Court concluded that the provisions of Chapter 1745 conferred upon unincorporated associations a legal identity separate from that of its individual members for all purposes of law.[14]

Historically, under common law, unincorporated associations were considered aggregations of individuals pursuing a common purpose,[15] and thus, in the absence of an enabling statute,[16] could not sue or be sued as a separate entity. Each member of an unincorporated association was considered a co-principal of every other member. An act of one member of the association committed in pursuit of the association's business was imputed to all the other members. Thus, any member who brought suit against his association was in effect suing himself and, therefore, was barred from recovering against the association for a wrongful act of another member or a common agent.[17]

Ohio first attempted to modify the common law rule as to unincorporated associations by the enactment of Section 10060 of the General Code,[18] which enabled an unincorporated religious or benevolent society to sue or be sued in its common name. This statute was merely a procedural convenience, which permitted a non-member to name an unincorporated association by its common name in his complaint, saving the litigant the burden of identifying and listing all the association members individually.[19] The General Code

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incapacity of any member, or by reason of any change in membership of the association during the pendency of the cause.

[14] 44 Ohio St. 2d at 51, 337 N.E.2d at 626. *See also* Miazga v. Int'l. Union of Operating Eng'rs, 2 Ohio App. 2d 158, 196 N.E.2d 327 (1964).

[15] *See, e.g.,* Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S.E. 905 (1887). *See also* H. Oleck, NON-PROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS 71-75 (3rd ed. 1974); Crane, *Liability of Unincorporated Associations for Tortious Injury to a Member,* 16 VAND. L. REV. 319 (1963) [hereinafter cited as Crane]; Annot. 14 A.L.R. 2d 473 (1950).

[16] *See, e.g.,* OHIO REV. CODE ANN. § 1715.42 (Page 1964). *But see* United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922), where the court held that even in the absence of an enabling statute, a labor union could be sued as an entity in federal court.

[17] *Compare* Goins v. Missouri Pac. Sys. Fed'n Maintenance of Way Employees Union, 272 F.2d 458 (8th Cir. 1959); Marchitto v. Central R. R. of N.J., 9 N.J. 456, 88 A.2d 851 (1952), *overruled by* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941) in which the common law rule barred recovery against a labor union, *with* DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Roschmann v. Sanborn, 315 Pa. 188, 172 A. 657 (1934); Mastrini v. Nuova Loggia Monte Grappa, 1 Pa. D. & C.2d 245 (1954); Duplis v. Rutland Aerie, No. 1001, Fraternal Order of Eagles, 118 Vt. 438, 111 A.2d 727 (1955); Carr v. Northern Pac. Beneficial Ass'n, 128 Wash. 40, 221 P. 979 (1924), in which the common law rule barred recovery against fraternal organizations.

[18] Section 10060 was later incorporated into the Ohio Revised Code as OHIO REV. CODE ANN. § 1715.42 (Page 1964), which provides, in part, that: "Such an association or society may sue or be sued, answer or be answered unto, plead or be impleaded in any court in this state." *See also,* N.Y. CIV. PRAC. § 1025 (McKinney 1973); OKLA. STAT. ANN. tit. 12 § 182 (Supp. 1975). *See generally* Annot., 92 A.L.R. 2d 499 (1963).

[19] The *Koogler* court noted that the General Code Provision merely confers upon an unincor-

provision did not, however, identify these associations as legal entities and, thus, did not change the common law relationship between an unincorporated association and its individual members.[20]

The *Tanner* decision, relying upon the broad language of Chapter 1745, has effectively laid to rest the common law rule in Ohio. By holding that an unincorporated association is a legal entity separate from its members, the court has removed the obstacles which previously denied a member recovery from his own asociation.[21] In rejecting the common law rule, the court also rejected *Koogler*, finding that the rationale in that case no longer governs the liability of an unincorporated association to one of its members.[22]

The Ohio Supreme Court in *Tanner* has expanded significantly the scope of its earlier decisions in *Lyons v. American Legion Post Realty Co.*[23] and *Miazga v. International Union of Operating Engineers.*[24] In *Lyons* a non-member brought a wrongful death action against the eighty-one members of the American Legion Post, which was an unincorporated association.[25] The court ruled that the non-member plaintiff could sue the members of the association severably, rather than the association as an entity.[26] The court thereby concluded that the statutory remedy provided by Chapter 1745 did not supersede the remedies already available to a non-member under common law.[27] However, the court rejected the view that mere membership in an unincorporated association would render each member liable for the act of another member, absent a showing that each member participated in the act

porated association a statutory name or classification. The court added: "We get no help from these statutes on the question of liability." 127 Ohio St. at 60, 186 N.E. at 727.

[20] *See* OHIO REV. CODE ANN. § 1715.42 (Page 1964).

[21] For Ohio cases recognizing the common law rule, see O'Neil v. Sea Bee Club, 69 Ohio L. Abs. 442, 118 N.E.2d 175 (Ohio Ct. App. 1954); Hay v. Norwalk Lodge, 92 Ohio App. 14, 109 N.E.2d 481 (1951); McClees v. Grand Int'l. Bhd. of Locomotive Eng'rs, 59 Ohio App. 447, 18 N.E.2d 812 (1938); McCann v. Local 476, 28 Ohio L. Abs. 385 (1938). *But see* Scanlon v. Duffield, 103 F.2d 572 (6th Cir. 1939) (distinguishing *Koogler*). *See also* Aeronca Independent Union v. Aeronca Mfg. Co., 80 Ohio L. Abs. 342, 153 N.E.2d 718 (C.P. Butler County 1958).

[22] 44 Ohio St. 2d at 52, 337 N.E.2d at 627, where the court held:

> . . . a member of an unincorporated association may maintain an action against the association for personal injuries resulting from the negligent acts of its agents, committed while in the scope of their authority.

[23] 172 Ohio St. 331, 175 N.E.2d 733 (1961); *accord.*, Marsh v. General Grievance Comm., 1 Ohio St. 2d 165, 205 N.E.2d 571 (1965). *See also* Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

[24] 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965).

[25] The plaintiff did not name the American Legion Post, an unincorporated association, in her complaint. She named the American Legion Post Realty Company, a corporation, and the individual members of the unincorporated association. 172 Ohio St. at 332, 175 N.E.2d at 734.

[26] 172 Ohio St. at 334, 175 N.E.2d at 736.

[27] *Id.*

creating liability.[28] In limiting its consideration to remedies available to a non-member against an unincorporated association and its members under Chapter 1745, the *Lyons* court left unanswered the question of whether a member, under any circumstance, can sue his association or his fellow members individually.

The Ohio Supreme Court reached this question in *Miazga* by establishing the right of a member of an unincorporated labor union to sue his union as an entity.[29] Relying upon the provisions of Chapter 1745,[30] the court held that the *Koogler* rationale, which denied a member of an unincorporated association recovery from his own association, did not apply to labor unions.[31] In justifying its decision, the court noted that strong precedent has recognized the essential differences between the small, loosely organized voluntary asociation of the *Koogler* era and the large modern labor unions existing today.[32] However, the court by its own language limited it's decision to labor unions.[33]

While the Ohio Supreme Court relied heavily upon Chapter 1745 in deciding *Miazga,*[34] the court of appeals in *Miazga,*[35] as well as the California Supreme Court in *Marshall v. International Longshoremen's & Warehousemen's Union,*[36] reached a similar result based upon a conceptual analysis of an unincorporated association. The court in *Marshall* established two factors which identify an unincorporated association as a legal entity: the existence of a group within the unincorporated association responsible for its daily management; and, the non-participation of the individual member in the decisions and acts of the group which give rise to liability.[37] Based upon these factors the court in *Marshall* reasoned that since the organizational structure of a small unincorporated association, such as social clubs or church groups,

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[28] *Id.* at 337, 175 N.E.2d at 737.

[29] 2 Ohio St. 2d at 49, 205 N.E.2d at 884.

[30] *See* notes 11-13 and accompanying text *supra.*

[31] 2 Ohio St. at 53, 205 N.E.2d at 887. *Contra,* Boozer v. United Auto Workers, 4 Ill. App. 3d 611, 279 N.E.2d 428 (1972).

[32] 2 Ohio St. at 52, 205 N.E.2d at 886.

[33] Specifically limiting its holding to labor unions, the Ohio Supreme Court affirmed the court of appeals without discussing the policy considerations raised by the lower court and without applying Chapter 1745 to any other types of unincorporated associations. 2 Ohio St. 2d at 53, 205 N.E.2d 887.

[34] *See* notes 29-32 and accompanying text *supra.*

[35] 2 Ohio App. 2d 153, 196 N.E.2d 324 (1964).

[36] 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); *accord,* Inglis v. Operating Eng'rs, 58 Cal. 2d 269, 373 P.2d 467, 23 Cal. Rptr. 403 (1962); White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971). *See also* International Ass'n. of Machinists v. Gonzales, 356 U.S. 617 (1958); United Ass'n of Journeymen v. Borden, 160 Tex. 203, 328 S.W.2d 739 (1959); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

[37] 57 Cal. 2d at 783, 371 P.2d at 990, 22 Cal. Rptr. at 214.

facilitates individual participation in management, there is a greater opportunity for a member of such a group to have either participated in or authorized the acts which have created the liability. Therefore, such a small unincorporated association should not be considered a legal entity. In comparison, the size and structure of a labor union or large fraternal organization usually precludes membership participation in its daily operations. Since the majority of the members of a large unincorporated association neither participate in, nor authorize the acts which have caused the injury, there is no basis for the application of the common law rule. Therefore, the California court concluded that a large unincorporated association should be considered a separate legal entity.[38]

In contrast to the limitations implied in *Miazga*[39] and *Marshall*,[40] the *Tanner* decision appears to encompass not only labor unions, but any and all unincorporated associations.[41] The *Tanner* court did not consider the distinctions among different types of unincorporated associations which concerned the *Marshall* court, but found the basis of its holding in the language of Chapter 1745:

> The import of R. C. 1745.01 . . . is clear—the *Koogler* conclusion, that members of an unincorporated association are unable to sue the association, is no longer tenable . . . . [B]y providing that *any* unincorporated association may be sued as an entity, it chose not to exclude those groups maintained for fraternal, benevolent or social purposes.[42]

By its decision that any unincorporated association may sue or be sued as an entity, the *Tanner* court has given the broadest possible interpretation to the language of Chapter 1745. While the court could have limited its decision to large unincorporated associations, such as the California court did in *Marshall*, it did not choose to do so. Instead, the court relied upon the literal meaning of the statute which fails to distinguish between different forms of unincorporated associations.

By failing to differentiate between large and small unincorporated associations the *Tanner* court has perhaps achieved a result that is over-

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[38] *Compare* 57 Cal. 2d at 783-84, 371 P.2d at 989, 22 Cal. Rptr. at 213, *with* 2 Ohio App. 2d at 158-59, 196 N.E.2d at 327 [*and*] Crane, *supra* note 15, at 321.

[39] *See* note 33 and accompanying text *supra*.

[40] By refusing to apply the common law rule to labor unions, the *Marshall* Court did not discredit its possible validity for other types of unincorporated associations. 57 Cal. 2d at 787 n. 1, 371 P.2d at 991 n. 1, 22 Cal. Rptr. at 215 n. 1, where the court held: "We limit our holding to labor unions only, leaving to future development the rules to be applied in the case of other types of unincorporated associations." *See generally* note 38 and accompanying text *supra*.

[41] 44 Ohio St. 2d at 52, 337 N.E.2d at 627.

[42] *Id.*

inclusive. *Koogler* may still provide a useful rationale for determining the liability of the members of a small unincorporated association in which management and decision-making are shared by all the members of the organization.

For example, a recent California decision, *Steuer v. Phelps,*[43] has held that a church group, consisting of nine members, was not a legal entity. In that case, a member of the church group was involved in an automobile accident while negligently operating a car owned by the group. The plaintiffs, who were not members of the church group, brought an action against the nine individual members and the group as an entity. Relying upon *Marshall,* the church members claimed their association was a legal entity and that liability for their acts attached to the association rather than its individual members. The court held that the principles of *Marshall* were inapplicable to this particular group since it had no centralized management acting apart from its individual members.[44] The court noted that each member had implicitly authorized the use of the car by the member who had the accident. Such authorization, the court found, was sufficient to impute liability for the negligent acts of one member to every other member.[45]

When asked to apply the rule established in *Tanner* to small unincorporated associations in which the individual members participate in the management and control of the group, the Ohio court will undoubtedly consider the reasoning in *Steuer.* It is doubtful that the court will treat an unincorporated association, such as the church group in *Steuer,* as a legal entity, but the *Tanner* decision, as it now stands, certainly points to such a result. Faced with a factual situation similar to that presented in *Steuer,* the court may be required to clarify its holding in *Tanner* and limit its applicability to unincorporated associations which conform to criteria established in *Marshall.*[46]

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[43] 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974).

[44] *Id.* at 472, 116 Cal. Rptr. at 63.

[45] *Id.*

[46] In *Lyons,* the court noted that § 1745.01 does not necessarily require that a litigant limit his cause of action to the unincorporated association as an entity, citing the language, "any unincorporated association *may* sue or be sued as an entity" as an indication that a litigant has an option of suing the unincorporated association or its individual members. 172 Ohio St. at 334, 175 N.E.2d at 736. In future cases, the court may rely upon the permissive language of the statute where, as in *Steuer,* it would be proper to treat a small group as an aggregation rather than an entity.