**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT NASHVILLE**

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| **BILLY JOE DAUGHERTY,** | ) | Macon County Circuit Court No. 3571 |
| Plaintiff/Appellant. | ) | |
| VS. | ) | C. A. NO. 01A01-9607-CV-00334 |
| **TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION**, | ) | |
| Defendant/Appellee. | ) | |

**FILED**

**January 15, 1997**

**Cecil W. Crowson**
**Appellate Court Clerk**

From the Circuit Court of Macon County at Lafayette.
**Honorable Bobby Capers, Judge**

**Thomas H. Bilbrey**, Lafayette, Tennessee
Attorney for Plaintiff/Appellant.

**Ken Witcher**, Lafayette, Tennessee
Attorney for Defendant/Appellee.

OPINION FILED:

**AFFIRMED AND REMANDED**

**FARMER, J.**

**CRAWFORD, P.J., W.S.** : (Concurs)
**HIGHERS, J.** : (Concurs)

The appellant, Billy Joe Daugherty (Daugherty), has appealed from the summary judgment entered by the trial court in favor of the appellee, Tri-County Electric Membership Corporation ("Tri-County" or "the Cooperative"). For reasons set forth below, we affirm.

On February 22, 1993, Daugherty applied for membership and electrical service with Tri-County. His application listed Beth Evitts as a resident at the location where services were sought. Tri-County initially granted membership and Daugherty paid a membership fee and deposit. Later that day, Tri-County employee, Tracy Gregory, notified Daugherty that service would be denied because it had been discovered that Ms. Evitts had a delinquent account with the Cooperative.[1] Daugherty also spoke with Gregory's immediate supervisor, Jackie Woodard. The following day Daugherty returned to the Tri-County office to discuss the matter with Gregory. He was not informed of his right to be heard before the general manager regarding his denial of service. His membership fees were refunded. On February 24, Daugherty filed the present action for damages allegedly resulting from his denial of service. On this same day, Tri-County's general manager reviewed Daugherty's application and ordered that it be approved. Service was provided Daugherty on this date. The affidavit of Ms. Gregory states:

> [On] February 24, 1993, . . . I informed Tri-County's General Manager, Kelly Nuckols, that I had neglected to ask Mr. Daugherty if he and Velma Beth Evitts had resided at the same residence during the time that Ms. Evitts incurred her delinquent account. The General Manager informed me that he was ordering that the Application for Membership and Electric Service be approved. . . .

At the time of Daugherty's application, Tri-County operated under General Policy No. 22, which, as relevant here, reads as follows:

> B. When an applicant for new electric service has resided with a presently delinquent customer of the Cooperative during all or part of the time when the delinquent bill was incurred, and when the delinquent customer will also be residing at the residence to which the new electric service is requested, a new meter will not be installed for the applicant until the account of the delinquent customer is paid in full;

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[1]According to her affidavit, Gregory informed Daugherty that she "had discovered that the other user listed on his application owed a delinquent account to Tri-County that needed to be paid before his meter could be set according to Tri-County's policy."

. . . .

> D. When an application for new electric service is denied based upon the provisions of this rule, the rule having been explained to the applicant, the applicant shall have the right to a hearing before the General Manager or his designated representative in order to present proof that the applicant is not in violation of this rule;
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> E. If the applicant is dissatisfied with the final decision of the General Manager or his designated representative following the hearing, the applicant may file a written request with the Board of Trustees of the Cooperative asking the Board to review the decision. The applicant may also request to appear before the Board and present proof that he is not in violation of this rule. The Board shall decide whether or not to grant any request to appear before the Board and shall also decide whether to affirm, reverse or modify the decision of the General Manager or his designated representative.

In regard to the "appeal process" available under the policy, the affidavit of Tri-County President, Tom Thompson, Jr., states:

> With regard to General Policy No. 22, the Board of Directors recognized the fact that a "front line" employee could make a mistake in denying an application for membership and electric service. In order to set forth a procedure to correct any such mistakes, the policy provides a two step appeal process. . . .
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> At no time did Billy Joe Daugherty or his attorney file a written request with the Board of Directors asking the Board to review the decision of the General Manager or any other employee of the Cooperative with regard to Daugherty's application for membership and electric service.
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> Furthermore, at no time did Billy Joe Daugherty or his attorney request to appear before the Board of Directors with regard to his application for membership and electric service.

In his complaint, Daugherty asserts that although Tri-County had enacted Policy No. 22, it was, in reality, continuing to implement a previously adopted policy found unreasonable and arbitrary by this Court in ***Smith v. Tri-County Electric Membership Corp.***, 689 S.W.2d 181 (Tenn. App. 1985).[2] Tri-County moved for summary judgment on grounds that the policy on which Daugherty relied as the basis for his complaint was rescinded May 3, 1985 and replaced by a new

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[2]Under the old policy, an individual was denied the right to contract for electrical service at any location in the area served by Tri-County under all circumstances and relationships so long as another individual, who owed Tri-County for services, resided on the premises where services were being sought. ***Smith v. Tri-County Elec. Membership Corp.***, 689 S.W.2d 181 (Tenn. App. 1985).

policy which was reasonable and in compliance with ***Smith***; that service was provided Daugherty two days after he made application; and that Daugherty failed to exhaust his administrative remedies. Tri-County submitted supporting affidavits from various employees and that of its counsel, Ken Witcher. In response, Daugherty submitted an affidavit and also relied upon the deposition of Ms. Gregory. The affidavit of Daugherty states, as relevant here:

> [O]n February 22, 1993, and February 23, 1993, I went to the office of [Tri-County] and attempted to obtain electric service, however, [Tri-County] refused to set a meter because the individual that I told them was going to be living with me, owed them a bill. . . .
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> . . . . At no time did I get the benefit of the electric service that had been provided to the individual who was going to be living with me.
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> [Tri-County's] employee did not ask me if I received any benefit of the electric services which were owed for, nor did [Tri-County] inform me that I could have a hearing before the General Manager. . . .

The trial court granted Tri-County's motion upon finding:

> [T]he policy relied upon by [Daugherty] as the basis of his complaint was rescinded by [Tri-County] on May 3, 1985 and replaced by a new policy known as General Policy No. 22, which policy the Court finds to be reasonable, including paragraphs D and E thereof which provide an administrative procedure for resolving a dispute over denial of electric service, and [Daugherty] failed to exhaust his administrative remedies before filing this lawsuit in that he failed to request a hearing before the General Manager even though his attorney was aware that he had a right to request such a hearing, and that the General Manager did, in fact, order that electric service be provided to [Daugherty] as soon as he became aware of the dispute two days after [Daugherty] applied for membership and electric service;

We perceive the issue on appeal as whether the trial court erred in entering a summary judgment for Tri-County. Our standard of review on a motion for summary judgment is to take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in their favor and discard all countervailing evidence. ***E.g., Clifton v. Bass***, 908 S.W.2d 205, 208 (Tenn. App. 1995). It is only when there is no disputed issue of material fact that summary judgment should be granted by the trial court and sustained by the Court of Appeals. ***Rebel Motor Freight v. Malone & Hyde, Inc.***, 813 S.W.2d 470, 473 (Tenn. App. 1991).

The record establishes that Tri-County is a nonprofit cooperative membership corporation operating under the provisions of the Rural Electric Community Services Cooperative Act, T.C.A. §§ 65-25-201, ***et. seq***. ("Act"), which authorizes the Cooperative to "adopt, amend, and repeal by-laws." T.C.A. § 65-25-205(a)(8). T.C.A. § 65-25-211 pertains to member qualification and provides that any person wishing to become a member must be "willing and able to abide by the cooperative's terms and conditions for rendering service." § 65-25-211(a)(1). The Act further provides that "[t]he bylaws may prescribe . . . qualifications, limitations, rights and obligations in respect to membership, and shall prescribe such in respect of membership admission, . . ." T.C.A. § 65-21-211(a)(3).

One of the stated reasons for the trial court's grant of summary judgment was Daugherty's failure to exhaust his administrative remedies prior to filing suit. Tri-County calls our attention to the supreme court case of ***Davis v. Appalachian Electric Cooperative, Inc.***, 373 S.W.2d 450 (Tenn. 1963), wherein suit was filed against that cooperative by some of its members to compel the refund of excess charges. ***Davis*** held that before seeking judicial relief, the plaintiffs must have first exhausted their remedies within the corporation. ***Davis***, 373 S.W.2d at 454. In respect thereto, the court states:

> It is a general rule of law in this State that before a minority stockholder or shareholder may maintain a suit to enforce his rights as such against the corporation and the majority in charge and in control of the corporation, he is required to show that his remedies permitted within the corporate structure have been exhausted, or that such an attempt to exhaust said remedies would be a useless gesture. We have a number of decisions supporting this general statement.
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> The question then is whether or not there is an available avenue for the redress of the grievances of the appellees within the corporate structure which they have not attempted to utilize, or has it been shown that such attempt would be illusory because it was under the control of hostile interests.
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> If the shareholder has not exhausted his remedies within the corporation and has not shown that any attempt along such lines would be blocked by an oppressive majority, or be an idle gesture for some other reason, then he has not brought himself under the general exception of useless attempt and must be denied relief.

***Id***. at 452.

It is undisputed that Daugherty did not seek review of his denial of service by the means afforded under Policy No. 22. Clearly, under ***Davis***, Daugherty would be required to do so in the absence of a showing that such attempt would have proven "illusory."[3] The question thus becomes whether the doctrine of exhaustion of administrative remedies has been rendered inapplicable due to the undisputed failure of Tri-County to notify Daugherty of the appeal process.

Daugherty asserts that Policy No. 22 is "unreasonable" because it does not expressly provide that the applicant be informed of the review process. Tri-County concedes that its employees never explained the appeals procedure to Daugherty personally, but asserts that counsel for Daugherty was made aware of the process, by its own attorney, in previous litigation very similar to the case at bar. The affidavit submitted by Mr. Witcher undisputedly supports this contention. The law on the issue, however, is that "a client is not affected with notice because of knowledge obtained by his attorney from outside sources, and not in the course of his employment, as, for example, where the knowledge is acquired by the attorney in the performance of professional services for another, . . ." 7A C.J.S. ***Attorney and Client*** § 182(b) (1980); ***see also Neilson v. Weber***, 64 S.W. 20 (Tenn. 1901).

18 C.J.S. ***Corporations*** § 117 (1990) provides:

> The members of a corporation are as a general rule conclusively presumed to have knowledge of its by-laws and cannot escape a liability arising thereunder, or otherwise avoid their operation, on a plea of ignorance of them.
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> . . . .
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> Although it has been held that persons dealing with a corporation are affected with notice of the provisions of its constitution and by-laws as well as the provisions of its charter, strangers or third persons are not chargeable with notice of by-laws, and in order that they may be affected thereby knowledge must be proved.

It is uncontroverted that no one with Tri-County informed Daugherty of his rights

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[3]We find ***Davis*** applicable despite the fact that Daugherty, at the time of filing suit, was a nonmember of the Cooperative. The Act expressly provides that the Cooperative's bylaws may prescribe "rights and obligations in respect of . . . membership admission . . ."

regarding the procedure for review and that Daugherty did not inquire. Daugherty became a member of the corporation on February 22, albeit for a short period of time. We find it just as reasonable during the two day period of February 22-24 for Daugherty to have made inquiry regarding any process of review afforded within the corporation as to immediately pursue suit against it. Consequently, we hold that under this particular set of facts, Tri-County's failure to personally notice Daugherty of its appeal process is insufficient to render the doctrine inapplicable. As it is undisputed that Daugherty failed to first exhaust his administrative remedies, he must be denied relief.

It results that the summary judgment entered in favor of Tri-County is affirmed and this cause dismissed. Costs are assessed to the appellant, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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HIGHERS, J. (Concurs)