WALTER A. DICKMAN,	**)**	
	)	**Putnum County Circuit Court**
Plaintiff/Appellant,	**)**	**No. J-5751**
	)	
VS.	**)**	
	)	
HOMES OF LEGEND, INC. and	**)**	**Civil Appeal No.**
MEADOWS HOMES, INC.,	**)**	**01A01-9605-CV-00210**
	)	
Defendants/Appellees.	**)**	

IN THE CIRCUIT COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF PUTNUM COUNTY
AT COOKEVILLE, TENNESSEE

HONORABLE JOHN TURNBULL, JUDGE

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REVERSED, VACATED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE,

CONCURS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The plaintiff, Walter A. Dickman, has appealed from a summary judgment dismissing his action for his personal injuries sustained by electrical shock while attempting to repair an electric furnace in a mobile home manufactured by the defendant Homes of Legend, Inc. and sold by Meadows Homes, Inc.

The Complaint

The complaint alleged that, before starting to work on the electric furnace, plaintiff placed the electric controls of the furnace in their "off" position; that, when he touched the heating apparatus, he was severely shocked because of the defective, unsafe and hazardous condition of the furnace or its controls; and that the furnace was an "inherently and a imminently dangerous product."

The complaint also alleged that Meadows Homes, Inc. failed to furnish him a reasonably safe working place, negligently failed to adequately inspect and test the furnace; failed to warn of danger, failed to properly label controls; and negligently sold the mobile home in a dangerous condition.

Homes of Legend, Inc. was charged with the same acts of negligence in the manufacture and distribution of the mobile home.

The motions of both defendants rely upon affidavits of Ronnie Holland and Robin Meadows.

In relevant part, the affidavit of Ronnie Holland states:

> Upon examining the furnace, I noticed that there were actually two (2) sets of breakers, that the blower motor had been removed and the thermostat wires were disconnected. The main breaker was in the "off" position, but the other set of breakers for the furnace was in the "on" position.
>
> I noticed that there was blood inside the furnace. Mr. Goolsby cleaned up the blood and I turned off the other set of breakers to the furnace inside the switch box and the breakers inside the furnace unit itself.
>
> After completing the duct work correction, Jerry Goolsby put the blower back inside the furnace and hooked up the thermostat wires.
>
> I then instructed the homeowner to flip the main breaker back on. I then turned the thermostat up and at this time all the power was in the "on" position and the unit automatically came on. Everything appeared to be normal.
>
> After I left the Faulkners, Jerry Goolsby and I returned Mr. Dickman's van to his home. I then talked with Mr. Dickman about what he had done wrong and Mr. Dickman told me that he had relied upon the homeowner to turn the breakers off and had not done so himself.
>
> There was a set of breakers close to Mr. Dickman's knees while he was working on the furnace. He could have even turned them off himself, but failed to do so for some unknown reason.

The affidavit of Robin Meadows in relevant part states:

> I am presently employed by Meadows Homes, Inc. as Lot Manager for Meadows Homes, Inc. on or about July 6, 1994.
>
> On or about June 13, 1994, Mr. Dickman and I entered into a written contractor's Agreement. I was representing Meadows Homes, Inc. at the time. This agreement set forth the manner in which Mr. Dickman was to provide services to Meadows Homes, Inc. See attached Exhibit A.
>
> In addition, Dickman agreed to release Meadows Homes, Inc. from any and all liabilities concerning the contract, jobs and any of our employees and our properties.
>
> With regard to services performed by Mr. Dickman, Mr. Dickman had the sole discretion as to how those services

> would be rendered, when they would be rendered, and how they would be completed.

Exhibit A to the affidavit is not found in the record.

The affidavit of Walter A. Dickman, filed on November 21, 1995, states:

> I then asked the homeowner to turn off the breaker to the furnace while I retrieved some additional tools. As I came back through the mobile home with the tools I personally examined the mobile home's main breaker box to make sure that the homeowner had correctly disconnected the breakers labeled "heat."
>
> I then proceeded to remove the electrical connections from the furnace blower and then removed the blower unit itself. Then I reached around the furnace heat element with my right hand to inspect the loose duct plenum. My right arm contacted the heater element of the electric furnace and I received a severe electrical shock. I could not break free from the contact which resulted in paralysis, immobilization, and my loss of consciousness.
>
> All electrical connections to the blower unit had been removed and were not near the duct work nor heater element so that whether or not this breaker was on or off could not have caused any electrical power to the furnace heating element.
>
> The only explanation for any electrical power being on the heating element was (a) the circuit breaker in the mobile home's main circuit box was mislabeled, or (2) there was other faulty wiring within the mobile home which allowed electrical power to be on the heating element even when the electrical circuit that was supposed to power the unit had its circuit breaker in the "off" position.

On December 5, 1995, the Trial Judge entered summary judgment for both defendants.

Appellant presents four issues on appeal, all of which depend upon the basic issue of whether, under the evidence in the record, the defendants are entitled to judgment as a matter of law.

Meadows Homes, Inc., insists that it is entitled to dismissal because of the exculpatory clause of Exhibit A, which is not in the record. The affidavit of Mr. Meadows is not competent evidence of the written contract. T.R.E. Rules 802, 1002; T.R.C.P. Rule 56.05.

Meadows Homes, Inc., also asserts that the affidavit of plaintiff should not be considered because it was not timely filed. It was filed on November 21, 1995, prior to the summary judgment which was entered on December 5, 1995, following a hearing on December 1, 1995. The affidavit was timely for consideration by the Trial Court and this Court. Rule 4, Rules of this Court.

Meadows Homes also asserts that plaintiff failed to adequately contradict the evidence submitted by defendants. Plaintiff's affidavit does not contradict defendants' evidence of plaintiff's admission that he relied on the homeowner to de-energize the furnace; but it does assert that plaintiff verified that the "breakers were off." This is a denial of the fact allegedly admitted by him. He did not deny that the furnace could have been de-energized by breakers at the furnace, but there is no evidence that plaintiff knew or should have known of the furnace breakers. Other evidence submitted by defendants is not conclusive of their liability.

Plaintiff's affidavit asserts that the only possible causes of his injury were mislabeling of breakers or faulty electrical connections, whereby the breakers did not de-energize the furnace. Defendants' evidence does not conclusively disprove this statement of plaintiff.

Homes of Legend, Inc., insists that plaintiff failed to properly respond to the evidence submitted by defendants as required by *Byrd v. Hall*, Tenn. 1993, 847 S.W.2d 208. However, this defendant does not explain how the affidavits submitted by its co-defendant established facts which were conclusive as to the liability of defendants. Apparently, defendants conceive that the fact that the furnace was successfully repaired by another worker after other breakers were opened is conclusive of their liability, but such is not the case. There is no evidence that the second worker

was not shocked; but, assuming that he was not shocked, there is no evidence that he touched the heater which shocked the plaintiff.

The glaring deficiency in defendants' evidence is the failure of Mr. Holland to perform or have performed tests which would indicate whether the heater was dangerously charged and if so, which breakers effectively removed the charge. So far as this record shows, the heater which shocked Mr. Dickman may shock the next person who touches it.

The evidence presents an incomplete and unsatisfactory picture of the real cause of plaintiff's injury. There is not an iota of expert testimony regarding the nature of electricity and its control. The complaint alleges fault in the furnace or its connections. There is no evidence that the furnace and its connections were properly assembled, labeled and safe; except that, after the accident, it was repaired and operated normally. There is no positive evidence that the heater was de-energized when the second worker finished the repair. On the other hand, there is evidence that plaintiff undertook to perform a repair of the furnace, that he undertook to de-energize it, but that it remained energized.

A motion for summary judgment presents a question of law which is reviewable de novo upon appeal. *Union Carbide Corp. v. Huddleston*, Tenn. 1993, 854 S.W.2d 87.

Summary judgment is appropriate only when there is no genuine issue of material facts and where such facts entitle the movant to judgment as a matter of law. T.R.C.P. Rule 56.03; *Byrd v. Hall*, Tenn. 1993, 847 S.W.2d 208; *Anderson v. Standard Register Co.*, Tenn. 1993, 857 S.W.2d 555.

In ruling upon motions for summary judgment, the courts must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences therefrom in favor of the opponent of the motion. *Byrd v. Hall, Supra.*

Summary judgment is appropriate only when the facts and inferences therefrom are such as to permit a reasonable person to reach only one conclusion. *Brookings v. The Round Table,* Inc., Tenn. 1991, 624 S.W.2d 547.

The material allegations of the complaint have not been sufficiently refuted by the defendants' relevant and competent evidence to justify summary judgment in their favor.

The judgment of the Trial Court is reversed and vacated, and the cause is remanded to the Trial Court for further proceedings. Costs of this appeal are taxed against the defendants, jointly and severally.

REVERSED, VACATED AND REMANDED.

_____
HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____
BEN H. CANTRELL, JUDGE

CONCURS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE