

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 12, 2001 Session

JAMES METZGER, ET AL. v. HERITAGE AUTO OUTLET, LLC, ET AL.

**Appeal from the Circuit Court for Hamilton County
No. OOC281 W. Neil Thomas, III, Judge**

FILED SEPTMEBER 18, 2001

No. E2000-02221-COA-R9-CV

In this Rule 9 interlocutory appeal Heritage Auto Outlet, LLC, insists the Trial Court had authority to enlarge the time for it to file responses to request for admissions, and on appeal that because service of process was defective, its responses were timely. We hold the responses were timely and remand the case for further proceedings.

**Tenn.R.App.P. 9 Interlocutory Appeal; Judgment of the Circuit Court Vacated;
Cause Remanded**

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

Phillip C. Lawrence, Chattanooga, Tennessee, for the Appellant, Heritage Auto Outlet, LLC

William J. Brown, Cleveland, Tennessee, for the Appellees, James Metzger and Carla Metzger

OPINION

In this Rule 9 Interlocutory Appeal, Heritage Auto Outlet, LLC, contends the Trial Judge was in error in his determination that certain requests for admissions must be taken as true because in the Trial Judge's opinion the response of Heritage was not timely, and that he had no authority to enlarge the time for filing such responses.

Heritage's issues, *inter alia*, contend that because the service of process was ineffective, filing of its responses to the request for admissions did not begin to run until it made a general appearance by filing an answer. Heritage also contends that even if its response was untimely the Trial Judge's determination whether to enlarge the time addresses itself to his sound discretion.

We will now state the pertinent facts necessary for our resolution of this appeal.

On February 2, 2000, a summons was issued in this case by the Circuit Court Clerk of Hamilton County. The officer's return, which was filed on February 17, stated that "On 2/7/2000 I delivered a copy of the summons and the complaint to the defendant, by certified mail--see attached affidavit." By appendix to this opinion we are attaching a copy of the summons, return and affidavit.

As already noted, the Trial Judge was of the opinion that he had no authority to enlarge the time for filing responses to the request for admissions, and accordingly denied Heritage's motion that he do so, which, under Rule 36, resulted in the request for admissions being admitted. For all practical purposes, this resulted in liability as to Heritage and the only remaining question was the amount of damages the Plaintiffs were entitled to receive.

It appears the Trial Judge was not firmly convinced of the correctness of his ruling, as he invited Heritage to file a Rule 9 motion, which he granted and this Court also granted.

Although much space in the briefs of the respective parties is directed to whether the Trial Court did have authority to enlarge the time for responding to the request for admission and whether, even if he did, the affidavit of counsel for Heritage would justify an enlargement, we believe disposition of this appeal turns upon the first issue raised by Heritage. This issue, as already noted, contends that because the service of process was ineffective, not having been supported by an affidavit as required by Tenn.R.Civ.P. Rule 4.03(2), time for responding to the request did not begin to run until the date Heritage filed its answer, thus making a general appearance in the case.

The record discloses that this occurred on April 10, 2000, and on the same date the Defendants' response to the request for admissions was likewise filed which, of course, would have been timely.

Counsel for the Metzgers does not contend that the service of process was valid, but, instead, insists that this was not the issue raised below or certified by the Trial Judge in connection with his granting the Rule 9 appeal. Counsel's contention is true. While as a general rule this Court will not entertain issues raised for the first time on appeal, we do note as to the point regarding certifying a question, that this Court under the Tennessee Rules of Appellate Procedure has a right to suspend the requirement of all Rules of Appellate Procedure, except Rules 3, 4, 11 and 12. We believe in this case in the interest of judicial economy it is appropriate to address the issue, notwithstanding it is being raised for the first time on appeal, and also to suspend the requirement relative to the failure of the Trial Court to include this in his grant of the Rule 9 motion.¹ We say this because if we accept the Metzgers' view and decline to address this question it would undoubtedly be back before us on a Rule 3 appeal should the Metzgers ultimately prevail.

¹ We have oftentimes suspended rules when it appears a Rule 3 appeal is not proper because the judgment at the trial level was not a final one.

For the foregoing reasons the order of the Trial Court relative to the responses is vacated and the cause remanded for further proceedings not inconsistent with the dictates of this opinion. Costs of appeal are adjudged against James Metzger and Carla Metzger.

HOUSTON M. GODDARD, PRESIDING JUDGE