

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

**JOYCE NIPPER v. AXTRON INDUSTRIES, INC. ET AL.**

**Appeal from the Circuit Court for Trousdale County  
No. 3525 Clara W. Byrd, Judge**

**No. M2005-00349-COA-R10-CV - Filed May 4, 2005**

This products liability action involves the explosion of a pepper spray product. The purchaser filed suit in the Circuit Court for Trousdale County against the product's manufacturer and the store that sold her the product. After the manufacturer filed an amended answer asserting comparative fault of the manufacturer of one of the product's component parts, the plaintiff filed an amended complaint naming the component's manufacturer as an additional defendant. However, the plaintiff failed to cause a summons to be issued until more than ninety days after the filing of the amended answer. The component's manufacturer moved to dismiss the amended complaint because the summons had not been timely issued in accordance with Tenn. Code Ann. § 20-1-119 (Supp. 2004). After the trial court denied its motion, the component's manufacturer filed an application for a Tenn. R. App. P. 10 appeal. We have determined that the trial court departed from the accepted and usual course of judicial proceedings. Accordingly, we grant the component part's manufacturer's application for an extraordinary appeal and vacate the trial court's order denying its motion to dismiss.

**Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Vacated**

WILLIAM C. KOCH, JR., P.J., M.S., WILLIAM B. CAIN, PATRICIA J. COTTRELL, and FRANK G. CLEMENT, JR., JJ., delivered the opinion of the court.

Richard E. Spicer, Nashville, Tennessee, for the appellant, Avanti USA Ltd.

Betty Lou Taylor and Christi L. Dalton, Hartsville, Tennessee, for the appellee, Joyce Nipper.

**OPINION**

Joyce Nipper was injured on August 22, 2001, while using a pepper spray product manufactured by Axtrom Industries, Inc. ("Axtrom"). On August 22, 2002, she filed a products liability action in the Circuit Court for Trousdale County against Axtrom and Fred's, Inc. ("Fred's"), the store where she had purchased the product. Axtrom filed its answer on October 3, 2003 but later filed an amended answer on June 2, 2004 asserting a comparative fault defense against Avanti USA Ltd. ("Avanti"), the manufacturer of the cap and actuator on the pepper spray dispenser. On June 9, 2004, the trial court entered an order permitting Axtrom to file its

amended answer. On August 31, 2004, Ms. Nipper filed an amended complaint naming Avanti as an additional defendant. On the same day, the trial court entered an order allowing Ms. Nipper to file her amended complaint.

For some unexplained reason, Ms. Nipper did not have the summons issued for Avanti until October 15, 2004 – one hundred and twenty-eight days after the filing of Axtrom’s amended answer. Avanti filed a Tenn. R. Civ. P. 12.02 motion to dismiss based on the running of the statute of limitations and on the fact that Ms. Nipper had failed to have the summons issued within ninety days following the filing of the amended answer as required by Tenn. Code Ann. § 20-1-119. The trial court denied Avanti’s motion and also denied its application for an interlocutory appeal. Accordingly, Avanti filed an application for a Tenn. R. App. P. 10 appeal with this court. We directed Ms. Nipper to file an answer to this application, and we also directed the trial court clerk to file the record. Both the answer and the record have now been filed.<sup>1</sup>

It is undisputed that Ms. Nipper’s amended complaint naming Avanti was not filed within the one-year statute of limitations provided by Tenn. Code Ann. § 28-3-104(2000). Ms. Nipper, however, relies on Tenn. Code Ann. § 20-1-119 which permits an action to be filed outside the statute of limitations where a defendant has asserted comparative fault against a non-party. To take advantage of Tenn. Code Ann. § 20-1-119, a party must either file an amended complaint or file a new lawsuit “within ninety (90) days of the filing of the first answer or first amended answer alleging such person’s fault.” Tenn. Code Ann. § 20-1-119(a).

The trial court disregarded Tenn. Code Ann. § 20-1-119(a) and held that the ninety-day period began to run from August 31, 2004, the date of the agreed order permitting Ms. Nipper to file her amended complaint, rather than June 9, 2004,<sup>2</sup> the date of the entry of the order permitting Axtrom to file its amended answer.<sup>3</sup>

The trial court’s interpretation and application of Tenn. Code Ann. § 20-1-119(a) is erroneous. Indeed, Ms. Nipper candidly concedes the trial court’s holding is “not fully consistent with the statutory language.” Nevertheless, she insists that the trial court’s action was harmless. She argues that Tenn. Code Ann. § 20-1-119 should be read in conjunction with Tenn. R. Civ. P. 3<sup>4</sup> and that she commenced her action the day the amended complaint was filed regardless of whether a summons was issued. We disagree.

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<sup>1</sup> The Tenn. R. App. P. 10 application, the answer, and the record fully set forth the parties’ positions and the material facts. Therefore, pursuant to Tenn. R. App. P. 2, we suspend the application of Tenn. R. App. P. 29, and find oral argument to be unnecessary pursuant to Tenn. R. App. P. 35(c). See *Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct. App. Dec. 5, 1997) (No Tenn. R. App. P. 11 application filed).

<sup>2</sup> We note that Avanti was not a party to the August 31, 2004 agreed order allowing the amended complaint.

<sup>3</sup> Because Axtrom was required to obtain approval to file an amended answer, the ninety-day period began to run on June 9, 2004, the date of the entry of the order permitting the amended answer, rather than June 2, 2004, the date the proposed amended answer was filed with the trial court.

<sup>4</sup> Tenn. R. Civ. P. 3 provides:

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 30 days or is not served within 30 days from issuance, regardless of

The plain language of Tenn. Code Ann. § 20-1-119(a) requires that both the filing of the amended complaint and the issuance of process occur within ninety days of the filing of the amended answer. *See Ward v. AMI SUB (SFH), Inc.*, 149 S.W.3d 35, 38 (Tenn. Ct. App. 2004). A general rule of statutory interpretation is that a special statute or a special provision of a particular statute controls over a general provision in another statute. *Netherland v. Hunter*, 133 S.W.3d 614, 616 (Tenn. Ct. App. 2003). Tenn. R. Civ. P. 3's general provisions regarding the commencement of actions and the time limits for issuing process are simply not applicable to the extent they contradict the specific requirements set forth by the legislature in Tenn. Code Ann. § 20-1-119(a). To hold otherwise would permit a plaintiff to issue process up to a year and ninety (90) days after the amended answer was filed and would be inconsistent with the intent of the legislature as ascertained from the express language of Tenn. Code Ann. § 20-1-119(a).

Accordingly, we hold that Ms. Nipper was required by Tenn. Code Ann. § 20-1-119(a) to issue process for Avanti within ninety days from June 9, 2004, the date of the entry of the order authorizing Axtrom to file its amended answer. Because she did not issue process within that ninety-day period, she cannot rely on Tenn. Code Ann. § 20-1-119(a). It follows, therefore, that the claims in her amended complaint against Avanti are barred by the statute of limitations.

The application for an extraordinary appeal is hereby granted. The trial court's January 13, 2005 order is vacated, and the case is remanded to the trial court for entry of an order dismissing the amended complaint against Avanti and for further proceedings consistent with this opinion. The costs of this appeal are taxed to Joyce Nipper for which execution, if necessary, may issue.

PER CURIAM

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the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.