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**POPULAR CONSTRUCTION v. SCISSOR-TAIL CONSTRUCTION, et
al.**

2026 OK CIV APP 2

Case Number: 122843

Decided: 08/18/2025

Mandate Issued: 02/12/2026

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III



Cite as: 2026 OK CIV APP 2, __ P.3d __

POPULAR CONSTRUCTION, LLC, Plaintiff/Appellant,

vs.

SCISSOR-TAIL CONSTRUCTION, LLC and MID-CONTINENT CASUALTY COMPANY, Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE WILLIAM D. LAFORTUNE, JUDGE

REVERSED AND REMANDED

Shannon Davis, PROSPECTIVE LEGAL, PLLC, Tulsa, Oklahoma, For Plaintiff/Appellant,

Anne S. Maguire, John E. Harper, Jr., BARROW & GRIMM, P.C., Tulsa, Oklahoma, For Defendant/Appellee Scissor-Tail Construction, LLC.

Stephen R. Clouser, Tulsa, Oklahoma, For Defendant/Appellee, Mid-Continent Casualty Company.

E. BAY MITCHELL, III, JUDGE:

¶1 Plaintiff/Appellant Popular Construction, LLC ("Popular") filed a mechanic's or materialmen's lien in May 2019. Defendant/Appellee Scissor-Tail Construction, LLC ("Scissor-Tail") discharged the lien by posting a surety bond guaranteed by Defendant/Appellee Mid-Continent Casualty Company ("Mid-Continent"). Popular sued Scissor-Tail on the underlying debt, but its initial petition did not name Mid-Continent as a party or seek to foreclose the bond. When Popular sought leave to amend its petition, Scissor-Tail and Mid-Continent argued a foreclosure claim was time-barred as a matter of law because Popular's motion for leave to amend was filed more than a year after the lien's filing. Popular, on the other hand, contended the Oklahoma Supreme Court's emergency administrative orders, which were entered during the pendency of this case as a result of the Covid-19 pandemic, tolled all rules, procedures, and deadlines from March 16, 2020 through May 15, 2020, rendering its motion timely. The trial court initially agreed with Popular and granted its motion for leave to amend. It later, however, reconsidered and vacated its prior ruling. According to the court, 42 O.S. §§172 and 177 are statutes of repose; the Supreme Court's emergency orders did not toll statutes of repose; and, as a result, both the lien and the lien discharge bond expired as a matter of law prior to Popular's motion for leave to amend. We reverse and remand.

¶2 Popular and Scissor-Tail had an oral contract in which Scissor-Tail agreed to pay Popular for subcontracting work on a construction project. Popular alleges Scissor-Tail refused to pay the full amount it was owed. To secure its right to payment, Popular filed a mechanic's or materialmen's lien on May 22, 2019. Scissor-Tail filed a corporate surety bond, executed by Scissor-Tail as principal and Mid-Continent as surety, which discharged the lien and stood in its place. See 42 O.S. §147.1. Popular then filed suit against Scissor-Tail asserting claims for breach of contract, unjust enrichment, and open account. The petition noted that Popular had filed a lien and that Scissor-Tail had posted a bond discharging the lien, but it did not directly plead a cause of action to foreclose the bond. The petition also did not name Mid-Continent as a party.

¶3 On June 12, 2020, Scissor-Tail filed a motion for exoneration of the bond. Scissor-Tail argued that Popular had not asserted a claim against the bond. It also claimed that Popular's failure to name Mid-Continent was fatal to any claim concerning the bond because the surety is a necessary party in an action involving substituted security. See §147.1. Scissor-Tail noted that an action upon a lien must be filed within one year of the lien's filing. See 42 O.S. §149. According to Scissor-Tail, Popular had until May 22, 2020 to seek enforcement of the bond, and because it had not done so, it could no longer amend its petition to add a claim or party. Scissor-Tail further noted that the party who filed the bond may file an application and a ten-dollar fee if the lien claimant fails to timely file a foreclosure action, and upon submission of those items the county clerk must "appropriately note on the bond that the same has been released." See §147.1. Therefore, according to Scissor-Tail, it was entitled to a court order finding that the bond discharging the lien should be exonerated.

¶4 On July 21, 2020, Popular filed an objection to Scissor-Tail's motion and a motion for leave to amend its petition. Popular acknowledged that Mid-Continent was a necessary party, but it also noted that Scissor-Tail had not asserted failure to join a necessary party as a defense in its answer. It accused Scissor-Tail of "lying behind the log" by waiting to point out the defect until after the expiration of the one-year period. Counsel for Popular submitted an affidavit in which he stated that his design and purpose in drafting the initial petition was to assert a claim against the substituted security and that his failure to name Mid-Continent was due to good faith error or mistake. He agreed the petition could set forth Popular's claim against the bond more clearly, but, citing Oklahoma's "notice pleading" standard, he did not agree that he had entirely failed to plead a cause of action against the bond. Counsel requested the court deny Scissor-Tail's motion to exonerate the bond and grant Popular leave to amend.

¶5 Popular initially argued that its amended petition seeking to add Mid-Continent as a party would relate back to the date of the initial filing under the terms of 12 O.S. 2021 §2015(C)(3). Soon after, however, Popular filed a notice of supplemental authority to bring the Supreme Court's *Third Emergency Joint Order Regarding the Covid-19 State of Disaster*, SCAD No. 2020-36, to the trial court's attention. Popular contended that its deadline to file an action against the bond was extended by the SCAD order and it was therefore *not* necessary to meet the relation-back requirements of §2015(C)(3). Instead, Popular argued, the court was required to "freely give" the leave to amend called for by §2015(A).

¶6 The court initially agreed with Popular. Specifically, the court noted that paragraph 5 of SCAD No. 2020-36 expressly provides that "all rules and procedures, and deadlines, whether prescribed by statute, rule or order" were suspended from March 16, 2020 to May 15, 2020. The court noted that the Supreme Court specifically referred to that time as a "tolling period." Pursuant to paragraph 6 of the order, the court found Popular's deadline to file an action against the bond was tolled until July 21, 2020 and Popular's motion for leave to amend, filed on July 21, 2020, was therefore timely. Accordingly, the court denied Scissor-Tail's motion to exonerate the lien release bond, granted Popular's motion for leave to amend, and ordered Popular to file its amended petition within ten days.

¶7 Scissor-Tail and Mid-Continent, unsurprisingly, did not agree that the SCAD order extended Popular's one-year deadline to file a claim against the bond. Mid-Continent filed a motion to dismiss upon being joined to the lawsuit, and Mid-Continent and Scissor-Tail each filed motions asking the court to reconsider its decision to allow Popular to amend its petition. The court denied all three motions. However, at a subsequent unrelated hearing, the court decided upon its own motion to reconsider its order denying Mid-Continent and Scissor-Tail's motions to

reconsider. It scheduled the matter for future hearing and ordered the parties to submit additional arguments. After that hearing, the court ordered the parties to submit briefing to address the question of whether 42 O.S. §§172 and 177 are statutes of repose or statutes of limitation, as well as what effect, if any, the statutes' categorization had on whether SCAD No. 2020-36 tolled the statutes' one-year time limit.

¶8 After another hearing, the court vacated its prior interlocutory orders and entered a new Final Order as to Certain Claims/Counterclaims. The order includes the following findings of fact, conclusions of law, and rulings:

(2) Section 172 and 177 of Title 42, pursuant to which a lien claimant must enforce a lien by filing a civil action within one year of the filing of the same with the county clerk, constitute statutes of repose and, therefore, are not subject to being tolled.

(3) The Oklahoma Supreme Court's First, Second, and Third Joint Emergency Orders, SCAD Nos. 2020-24, 2020-29, and 2020-36, do not toll statutes of repose.

(4) Popular failed to enforce its May 22, 2019 lien ("the Lien") within one year of the date of the same being filed. As a result, both the Lien and the lien discharge bond, executed by [Scissor-Tail], as principal, and [Mid-Continent], as surety (the "Lien Discharge Bond"), were extinguished as a matter of law prior to Popular seeking on July 21, 2020 to amend its original October 15, 2019 Petition.

(5) As a result, [Scissor-Tail's] June 12, 2020 Motion for Exoneration of Lien Release Bond should be granted.

(6) Popular's July 21, 2020 Motion for Leave to Amend Petition should, therefore, be denied. Popular's Amended Petition filed June 18, 2021 should be stricken.

(7) Final relief should be granted to both [Scissor-Tail] as to its June 12, 2020 Motion for Exoneration of Lien Release Bond and to [Mid-Continent] as to its August 17, 2021 Motion to Dismiss.

Popular filed a timely motion to reconsider, which the court denied. Popular appeals. 1

¶9 The questions raised in this appeal were squarely addressed by the Court in *McBee v. Shanahan Home Design, LLC*, 2021 OK 60, 499 P.3d 1. First, as to the constitutionality of the SCAD orders, the Court stated as follows:

The tolling of time limitations was just one in a litany of safety measures implemented by the emergency orders to better protect courthouse employees and the public from further spread of Covid-19. The restrictions and directives prescribed by the Supreme Court in the March/April SCAD orders were analogous to orders closing state judicial facilities due to inclement weather or some other catastrophic event. Like ice, snow and severe weather, the conditions caused by Covid-19 drastically limited access to courthouses across the state and affected litigants' ability to meet required deadlines. *Cf.* 12 O.S. 2011, § 2006(A) (extending deadlines which fall on a holiday or other day when a courthouse is closed or closes early).

Beginning March 16, 2020, and continuing through May 15, 2020, courthouses across the State of Oklahoma were closed to the general public, with the exception of emergency matters. By limiting access to courthouses and by tolling time limits during the Covid-19 outbreak, this Court facilitated the overarching goal of protecting society as a whole from the pandemic. The orders were entered as part of the administrative role bestowed on this Court via the Oklahoma Constitution, and were only executed in furtherance of these administrative duties. The constitutionally authorized orders were temporary in nature and corresponded directly to the time frame in which the Governor required government offices, businesses, and churches to remain closed to the public.

Id., ¶15, 499 P.3d at 7 (emphasis added) (paragraph break added for clarity).

¶10 The Supreme Court also specifically addressed the terms of SCAD No. 2020-36:

In all cases, the period from March 16, 2020 to May 15, 2020, during which all rules and procedures, and deadlines, whether prescribed by statute, rule or order in any civil, juvenile or criminal case were suspended, will be treated as a tolling period. May 16th shall be the first day counted in in determining the remaining time to act.

Id., ¶3, 499 P.3d at 4. (emphasis added). According to the court:

Under the terms of the third SCAD order, all deadlines between March 16, 2020, and May 15, 2020, were treated as being tolled due to the emergency health crisis. . . . Importantly, the suspension period was crafted to conform to long-standing law dealing with situations where actors are prevented from performing statutorily imposed duties. It is a well-settled rule of law that whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right. . . .

Id., ¶18, 499 P.3d at 8 (internal quotation marks and citations omitted). The Court noted that statutes of limitation are typically tolled like any other "deadline" because "both require that a party perform some conduct within a specific time frame." *Id.*

In the present case, there are a number of factors that constitute disability on the part of the plaintiff, including, but not limited to, the fact that society was in the midst of a global pandemic. Most courthouses were closed to the public because of Covid-19. Additionally, the third SCAD order expressly stated that the statute of limitations in any civil case would be extended. Consequently, [the plaintiff's] potential reliance on this Court's orders clearly stating that the statute of limitations on all civil cases pending would toll further establishes a disability for purposes of tolling.

Id.

¶11 Mid-Continent and Scissor-Tail contend that 42 O.S. §§172 and 177 must be treated differently because they are statutes of repose. We do not agree. Popular had a disability to filing a claim against the lien between the period of March 16, 2020 and May 15, 2020 regardless of whether §§172 and 177 are categorized as statutes of repose or as statutes of limitation. Pursuant to SCAD No. 2020-36, "*In all cases, the period from March 16, 2020 to May 15, 2020 . . . will be treated as a tolling period.*" (emphasis added). *McBee* leaves little doubt as to this result.

¶12 From May 22, 2019 to March 15, 2020, a total of 298 days had expired, leaving Popular with 67 days to properly file a claim against the bond. When statutory deadlines resumed on May 16, 2020, Popular had until Wednesday, July 22, 2020 to bring an action against Mid-Continent and the bond. Popular sought to amend its petition to clarify its claim against the bond and to join Mid-Continent as a party on July 21, 2020. Therefore, Popular's motion to amend its petition was filed in a timely, manner. The court erred by granting Mid-Continent's motion to dismiss based on a failure to bring an action within one year. Accordingly, we reverse and remand for additional proceedings.

¶13 REVERSED AND REMANDED.

BELL, C.J., and DOWNING, P.J., concur.

FOOTNOTES

E. BAY MITCHELL, III, JUDGE:

¹ The April 9, 2024 Final Order as to Certain Claims/Counterclaims found there was no just reason for delay and expressly directed the filing of a final order pursuant to 12 O.S. §994(A).

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name	Level	
Oklahoma Supreme Court Cases		
Cite	Name	Level
<u>2021 OK 60, 499 P.3d 1,</u>	<u>MCBEE v. SHANAHAN HOME DESIGN</u>	Discussed
Title 12. Civil Procedure		
Cite	Name	Level
<u>12 O.S. 994,</u>	<u>Procedure When There is More Than One Claim or Party - Final Judgment</u>	Cited
<u>12 O.S. 2015,</u>	<u>Amended and Supplemental Pleadings</u>	Cited
Title 42. Liens		
Cite	Name	Level
<u>42 O.S. 147.1,</u>	<u>Discharge of Lien</u>	Cited
<u>42 O.S. 149,</u>	<u>Lien - Suit within One Year</u>	Cited
<u>42 O.S. 172,</u>	<u>Enforcement by Civil Actions - Limitations - Practice, Pleading and Proceeding - Amendment of Lien Statement</u>	Discussed at Length