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THE OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

RONALD EDWARD REGIER,)
SANDRA REGIER,)
)
Plaintiffs/Appellants,)
)
vs.) Case No. 122,914
)
THE CITY OF ENID, A Municipal)
Corporation,)
)
Defendant/Appellee,)
)
and)
)
GARNEY COMPANIES, INC., d/b/a)
GARNEY CONSTRUCTION,)
)
Defendant.)

APPEAL FROM THE DISTRICT COURT OF
GARFIELD COUNTY, OKLAHOMA

HONORABLE TOM NEWBY, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Stephen Jones
William Jewell
Blake Trekell
JONES, OTJEN & JEWELL
Enid, Oklahoma

For Plaintiffs/Appellants

Joshua J. Conaway
CONAWAY LAW FIRM
Enid, Oklahoma

For Defendant/Appellee

OPINION BY STACIE L. HIXON, CHIEF JUDGE:

¶1 Ronald Edward Regier and Sandra Regier (Plaintiffs) appeal a February 4, 2025, Order granting summary judgment to the City of Enid (City) on Plaintiffs' claims arising from construction of and/or use of various utility and water line easements across Plaintiffs' property. Plaintiffs sought to terminate or modify these easements and asserted tort claims for negligence, nuisance and conversion. City moved to dismiss for lack of jurisdiction due to failure to give notice under the Governmental Tort Claims Act (GTCA), 51 O.S.2021, § 151 *et seq.*, and for failure to state a claim upon which relief may be granted. At Plaintiffs' request, the trial court treated City's Motion as a motion for summary judgment and directed Plaintiffs to respond with evidentiary materials. The Court deemed the Motion confessed after Plaintiffs failed to do so.

¶2 The appeal was assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. 2021, ch.15, app.1, without further briefing. On review of the record presented, we find that Plaintiffs complied with the GTCA, and that Defendants failed to meet their burden on the record presented that Plaintiffs' claims were time-barred or that they are otherwise entitled to summary judgment on

those claims. We reverse the trial court's grant of summary judgment in its entirety, and remand for further proceedings.

BACKGROUND

¶3 Plaintiffs own real property in Enid, near Kaw Lake. They allege that in the summer of 2015, City began a project to bring water from Kaw Lake to be used as part of City's water supply. They claim City employed a construction contractor, Garney Construction, Inc., to act as its agent and procure various easements for the project and that Plaintiffs granted four easements across their property. However, Plaintiffs claim that the construction done on the property exceeded the scope and purpose of the easements. They allege that construction damaged the topsoil on the property, affecting its agricultural use; that equipment and structures were left permanently on the property, leaving them unable to mow grass in certain areas, creating a hazard for drivers and pedestrians; and that the construction contractor removed valuable topsoil during the construction and took it from the site.[1] Thus, Plaintiffs filed suit to terminate or modify the easements, and asserted tort claims for negligence, nuisance, and conversion.

¶4 City filed a Motion to Dismiss Plaintiffs' claims on September 26, 2024. It argued that Plaintiffs failed to comply with notice and filing requirements under the

[1] The contractor, Garney Companies, Inc. d/b/a Garney Construction, has been dismissed without prejudice.

GTCA, and that the trial court did not have subject matter jurisdiction over Plaintiffs' tort claims. It also argued that Garney Construction was an independent contractor for whom City could not be liable under the GTCA. Finally, it argued that the Uniform Conservation Easement Act (UCEA), 60 O.S.2021, § 49.1 *et seq.* that Plaintiffs relied upon to cancel or modify the easements did not apply.

¶5 Plaintiffs responded to this Motion to Dismiss on October 21, 2024. That response is not included in the record.[2] However, it is apparent from Defendants' Reply that Plaintiffs argued they had substantially complied with notice provisions of the GTCA by sending a complaint letter to City's legal department in February 2024, which was attached to City's Reply. It also appears that Plaintiffs requested the trial court convert City's Motion to a motion for summary judgment and claimed they should be allowed time to gather and provide materials in response. The trial court converted the motion to dismiss to one for summary judgment and granted Plaintiffs thirty days to respond. Plaintiffs failed to do so. The trial court deemed the Motion confessed under Rule 4 of the Rules for District Courts, 12 O.S. 2021, Ch. 2, app., and granted summary judgment to City.

¶6 Plaintiffs appeal.[3]

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[2] While the response is identified on the index to the record Plaintiffs compiled, it is omitted from the record.

[3] This appeal was assigned to the author's docket on January 30, 2026.

STANDARD OF REVIEW

¶7 Plaintiffs assert the trial court erred by granting summary judgment on Plaintiffs' claims when City was not legally entitled to it and by deeming the motion confessed when Plaintiffs failed to further respond.[4] Plaintiffs also assert the trial court erred by granting the motion for summary judgment, "because Appellants' petition could be amended and the trial court did not allow Appellants leave to amend their petition." We recast this proposition to raise the issue of whether the trial court properly considered Defendants' Motion as a motion for summary judgment, or alternatively, should have treated the motion as one to dismiss and should have allowed amendment of the pleadings under 12 O.S.2021, § 2012(G).

¶8 As a preliminary matter, the trial court should not have converted this matter to one for summary judgment. No extraneous materials were attached to the Motion to Dismiss in support of City's arguments.[5] Any mention of extraneous facts in

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[4] Plaintiffs assert the trial court erred by granting the motion for summary judgment because the easements were subject to the UCEA; by granting summary judgment on statute of limitations grounds because its damages were continuing or recurring; because it had substantially complied with the GTCA; because City can be liable for the acts of its contractors; because Plaintiffs' petition could be amended to state cognizable claims; and because the trial court deemed the motion for summary judgment confessed after Plaintiffs did not respond.

[5] Under 12 O.S.2021, § 2012(B), if on a motion to dismiss for failure to state a claim, matters outside the pleading are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment. . . ." *See also Doyle Springs v. Braum's*, 2022 OK CIV APP 11, ¶ 11, 510 P.3d 864 (quoting *Wagoner County Rural Water Dist. No. 2 v. Grand River Dam Authority*, 2010 OK CIV APP 95, ¶ 3, 241 P.3d 1132 ("Where, as here, evidentiary materials are attached to a section 2012(B)(6) motion or response, a court must convert the motion into one for summary judgment.") While Defendants alleged various facts in their Motion in support of its

City's Motion, unsupported by evidence, should have simply been disregarded. However, the trial court's order that the motion be converted states that *Plaintiffs* requested the motion be treated as one of summary judgment. Plaintiffs invited the error. *See generally Samedan Oil Corp. v. Corporation Comm'n of State of Oklahoma*, 1988 OK 56, ¶ 7, 755 P.2d 664. However, we find this invited error is not an impediment to our review of the substantive legal questions presented by City's motion, whether for a dismissal or summary judgment.

¶9 Notably, a trial court cannot simply deem a motion for summary judgment confessed under Rule 4 of the Rules for District Courts. "Summary judgment on the merits pursuant to Rule 13 where no response is filed is . . . unlike a default judgment granted pursuant to Rule 4. The former is based upon the merits of the motion presented, while the latter is simply for a failure to respond." *Union Oil Co. of California v. Bd. of Equalization of Beckham Cnty.*, 1996 OK 40, ¶ 13, 913 P.2d 1330. However, a trial court cannot grant summary judgment simply because it is unopposed; it must examine whether the materials offered substantiated granting judgment for the moving party as a matter of law. *Id.* Even if the opposing party

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arguments on failure to state a claim, they were unsupported by evidence and did not convert the matter to a motion for summary judgment.

City *did* attach the February 1, 2024, letter to City's legal department that Plaintiffs argue is a tort claim notice. That material was presented in support of Defendants' Motion to Dismiss pursuant to section 2012(B)(1) for lack of subject matter jurisdiction. Generally, a party may attach materials outside the pleadings to move to dismiss on jurisdictional grounds without converting the motion to one for summary judgment. *See Osage Nation v. Bd. of Commissioners of Osage Cnty.*, 2017 OK 34, ¶ 66 n.8, 394 P.3d 1224.

has failed to respond, summary judgment is not proper "if the movant has not addressed all material facts, or if one or more such facts is not supported by admissible evidence." *Id.* *See also Stout v. Cleveland Cnty. Sheriff's Dept.*, 2018 OK CIV APP 11, ¶ 23, 419 P.3d 382 (for material facts not controverted by opponent to be deemed admitted, they must be supported by admissible evidence, and movant must establish it is entitled to judgment under those facts as a matter of law).

¶10 Thus, we consider whether the record demonstrated that, regardless of Plaintiffs' alleged failure to respond, City was entitled to judgment as a matter of law or a ruling in its favor based on the record provided. "Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions." *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051. "Therefore, as the decision involves purely legal determinations the appellate standard of review of a trial court's grant of summary judgment is de novo." *Id.* The Court will "examine the pleadings and evidentiary materials to determine what facts are material to plaintiff's cause of action," and to determine if the evidentiary materials introduced indicate there is no substantial controversy as to one material fact and that this fact is in the movant's favor. *Ross by and through Ross v. City of*

Shawnee, 1984 OK 43, ¶ 7, 683 P.2d 535. All inferences and conclusions to be drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id.*

1. Plaintiffs' tort claims

¶11 City asserted that Plaintiffs had not provided proper notice under the GTCA, that Plaintiffs' Petition did not allege they provided notice, and that the trial court lacked subject matter jurisdiction. Plaintiffs do not dispute their tort claims are subject to the GTCA but claim they did provide notice.

¶12 A person who has a claim against a state or political subdivision is required to present a claim to the state or political subdivision within one year of the date of loss pursuant to the requirements of 51 O.S. Supp. 2022, § 156. Thereafter, "[a] person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days." 51 O.S.2021, § 157(A). "No action for any cause arising under this act, Section 151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section." *Id.* at § 157(B). Only upon compliance with the time-limited requirements in sections 156 and 157 is "the state's consent to be sued . . . manifest and the court may exercise judicial power to remedy the alleged tortious wrong by the government." *Cruse v. Board of County Comm'rs of Atoka Cty.*, 1995 OK 143,

¶ 16, 910 P.2d 998. "Compliance with the statutory notice provisions of the GTCA is a jurisdictional requirement to be completed prior to the filing of any pleadings." *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 13, 324 P.3d 399.

¶13 Section 156(E) sets forth the specific requirements for written notice of a claim:

> *The written notice of claim to the state or a political subdivision shall state the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, the amount of compensation or other relief demanded, the name, address and telephone number of the claimant, the name, address and telephone number of any agent authorized to settle the claim,* and any and all other information required to meet the reporting requirements of the Medicare Secondary Payer Mandatory Reporting Provisions in Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) through the Centers for Medicare & Medicaid Services (CMS). *Failure to state either the date, time, place and circumstances and amount of compensation demanded*, or any information requested to comply with the reporting claims to CMS under MMSEA *shall not invalidate the notice unless the claimant declines or refuses to furnish such information after demand by the state or political subdivision*. The time for giving written notice of claim pursuant to the provisions of this section does not include the time during which the person injured is unable due to incapacitation from the injury to give such notice, not exceeding ninety (90) days of incapacity.

(Emphasis added). Further, section 156(H) provides that, when relief is demanded for loss of real or personal property, the claimant shall provide the amount claimed, the method used to calculate the amount of loss, documentation relied upon and

proof of ownership. Failure to provide that information does not invalidate the notice unless the claimant refuses to provide it on demand. *Id.*[6]

¶14 Plaintiffs claim that a February 1, 2024, complaint letter they sent to City's legal department substantially complied with the notice provisions of the Act. City contends the letter fails to make a monetary demand from Plaintiffs and was not presented in time.

¶15 The letter asserts, in detail, that City acted outside its easement in various ways, including building an above-ground structure, compacting soil, creating a safety hazard by preventing mowing, thus allowing weeds to obstruct view of the roadway, and by removing topsoil. The letter demanded compensation for crop loss and threatened to file suit in the district court. Attached to that letter as an exhibit is a prior letter from Plaintiff Ronald Regier to the City of Enid, dated October 23, 2023, which specifically identifies at least some of the monetary damage Plaintiffs claim to have sustained as a result, in particular for damage to crops and removal of topsoil. Thus, we need not address whether City established or even alleged that it requested that information and Plaintiffs refused to provide it, as required by the current statute. This notice was sufficient, and City's argument on this point is without merit. It was not entitled to summary judgment on this basis.

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[6] City acknowledged in its Reply that Plaintiffs' submission of the letter to the City's legal department substantially complied with requirements that the notice should be filed with the clerk of the governing body.

¶16 City also asserts that Plaintiffs' February 1, 2024, letter was not submitted within one year from the date of loss as required. City acknowledges the letter would be timely as to the conversion claim. However, they alleged Plaintiffs' negligence and nuisance claims arose at the date of completion of the pipeline in August 2022 and any claim was thus untimely.

¶17 A cause of action accrues when a litigant could first have maintained his action to a successful conclusion. *Marshall v. Fenton, Fenton, Smith, Reneau & Moon, P.C.*, 1995 OK 66, ¶ 10, 899 P.2d 621. Tort claims generally accrue when the plaintiff can successfully prove the elements of that claim. *Lee v. Phillips & Lomax Agency, Inc.*, 2000 OK 65, ¶ 9, 11 P.3d 632. "In order to maintain an action for negligence to a successful conclusion, the litigant must be able to allege injury or damages." *Marshall*, 1995 OK 66, at ¶ 10.

¶18 Thus, the statute of limitations for a nuisance or negligent injury to property that is not abatable, i.e., is permanent, begins to run when it becomes obvious and apparent that the land in question has been permanently damaged. *See Skelly Oil Co. v. Humphrey*, 1945 OK 115, 58 P.2d 175; *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 1996 OK CIV APP 92, ¶ 15, 929 P.2d 288; *Moneypenney v. Dawson*, 2006 OK 53, ¶ 11, 141 P.3d 54. However, "[w]hen a cause of an injury is abatable either by an expenditure of labor or money, it will not be held permanent." *Id.* at ¶ 9. In that instance, the statute of limitations does not begin to run until the injury

is suffered. *Id.* at ¶ 10. A plaintiff may bring successive actions for such temporary damage each time the wrong occurs, and the statute of limitations bars recovery only for damage occurring more than two years prior to filing suit. *Id. See also City of Ardmore v. Orr*, 1913 OK 50, ¶ 0 (syllabus 4), 129 P. 867.

¶19 Plaintiffs' negligence claim asserts that City and Garney breached their duty to prevent damage to Plaintiffs' property when constructing pipeline easements. They allege that the property was damaged by soil compaction and by building an above-ground structure that Plaintiffs cannot farm around, that the structure and the compacted soil are also nuisances, and that they have suffered crop loss in excess of $75,000.

¶20 Plaintiffs alleged in their Petition that the construction on the Kaw Lake project began in May of 2021, but did not allege when pipeline construction was completed, though they did allege that Garney was still working on the easement in September of 2023. City stated in its Motion to Dismiss and its Reply that the project was completed in August 2022, but it provided no evidence in support and that allegation cannot be considered on summary judgment or a motion to dismiss. Therefore, City failed to demonstrate that Plaintiffs' tort claim notice was untimely, even if Plaintiffs' claim accrued on or before the date the pipeline was completed.

¶21 Likewise, when Plaintiffs' claims for negligence or nuisance accrued would depend on whether the injury to Plaintiffs' real property is permanent or capable of

abatement. City did not present evidence or authority demonstrating Plaintiffs' claimed injuries were permanent or even address the issue of when Plaintiffs' claims accrued under applicable law. Thus, even if City had established the date the pipeline was completed, it failed to adequately meet its burden to demonstrate the entirety of Plaintiffs' claims accrued before the one-year period preceding its notice of tort claim.[7]

¶22 For these reasons, there was not sufficient information of record for the trial court to determine if the statute of limitations has run on Plaintiffs' nuisance or negligence claims, and therefore it erred by granting summary judgment. We reverse the trial court's summary judgment in favor of City on the negligence and nuisance claims, as well as the conversion claim City conceded was timely, and remand for further proceedings.

2. City's immunity for the acts of an independent contractor

¶23 City also moved for summary judgment on Plaintiffs' tort claims, as the acts of an alleged independent contract, Garney, pursuant to 51 O.S. Supp. 2022, § 155(18),[8] which states:

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[7] Plaintiffs' February 2024 tort claim notice attaches as an exhibit a 2023 letter from Ronald Regier to the City of Enid. (City does not claim this earlier letter met the requirements to serve as notice under the GTCA). In that letter, Regier refers to crop loss in the year or two prior to the letter, as well as anticipated future crop losses, but he also appears to contend the soil issue could be corrected.

[8] The language of section 155(18) in 2021, when the project began, was the same as the current version.

> An act or omission of an independent contractor or consultant or his or her employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred; . . .

It is generally recognized that an independent contractor is:

> one who engages to perform a certain service for another, according to his own manner and method, free from control or direction of his employer in all matters connected with the performance of service, except as to the result or product of the work.

Perma-Stone Oklahoma City Co. v. Oklahoma Emp. Sec. Comm'n, 1954 OK 322, ¶ 0 (syllabus 3), 278 P.2d 543. Meanwhile, under the GTCA, employee can mean:

> 7. "Employee" means any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis. . . .
>
> a. Employee also includes:
>
> (1) all elected or appointed officers, members of governing bodies and other persons designated to act for an agency or political subdivision, but the term does not mean a person or other legal entity while acting in the capacity of an independent contractor or an employee of an independent contractor,

51 O.S. Supp. 2025, § 152.[9]

¶24 City presented no evidence supporting its assertion that Garney is an independent contractor, i.e., acts under its own direction and control. Meanwhile,

[9] Section 152 has been amended numerous times since construction began on the Kaw Lake project, but this language has remained the same.

though Plaintiffs' Petition does not specifically allege Garney was acting as an employee, the Petition alleges that Garney was acting "as an agent for Defendant City of Enid," in removing their topsoil; acted "under the authority of the City of Enid" while compacting their soil and negotiated easements on City's behalf. Whether or not Plaintiffs can supply evidence to support their assertions is not before us. However, Plaintiffs' allegations that Garney was acting on behalf of City arguably fit within the GTCA definition of "employee," for which City *could* be held liable. Because City did not provide evidence to support its assertion that Garney was an independent contractor, the trial court erred by granting summary judgment on this issue from the record presented.

3. Modification or termination of easements

¶25 Plaintiffs specifically petitioned to terminate or modify the City's easements under the UCEA, 60 O.S.2021, § 49.1 *et seq.* They contend that the trial court erred by granting summary judgment on this claim, because they are entitled to modify or terminate the conservation easements under the provisions of that Act.

¶26 Under the Act, a "conservation easement" is defined as:

> a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include, but are not limited to, retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

60 O.S.2021, § 49.2. A "holder" under the Act means a governmental body empowered to hold an interest in real property, or certain charitable corporations, associations or trusts. *Id.* Section 49.4(B) provides that the UCEA "does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity." It is this provision Plaintiffs rely upon, in part, as their authority to modify the easement. Meanwhile, City argues the Act does not apply because the easements at issue are not non-possessory conservation easements, but rather are simple utility and water line easements.

¶27 We agree with City that the Act does not appear to apply to the utility and water line easements attached to Plaintiffs' Petition, and it is unclear why Plaintiffs rely upon it. The easements are not non-possessory. Based on the language of the easements and their alleged purpose to facilitate water service, they do not appear to address the purposes set forth in the UCEA. However, we nonetheless agree with Plaintiffs that the trial court erred by granting summary judgment on this claim.

¶28 Section 49.4(B) does not create a new or special ground to modify or terminate an easement. Rather, it provides that nothing in the Act prohibits modification or termination of easements under other principles of law or equity. As cited in Plaintiffs' Petition, cancellation of a deed under Oklahoma law is a matter of equitable cognizance, though it may only be exercised in a "clear and exceptional case." *Easterling v. Ferris*, 1982 OK 99, 651 P.2d 677 (citing 12A C.J.S.

Cancellation of Instruments, § 28 (1980); *Chapman v. Chapman*, 1965 OK 48, 400 P.2d 831); *Elizabeth Lorene Stambaugh Irrevocable Trust v. Nature Conservancy*, 2020 WL 4606850 (N.D. Okla. May 14, 2020). *See also Watkins v. Grady Soil and Water Conservation District*, 1968 OK 24, 438 P.2d 491 (cancelling easement as a matter of equity).

¶29 City argued in favor of dismissal or summary judgment on the basis that the UCEA does not apply to this case.[10] While that argument was correct, the Petition also asserted that the easements could be equitably cancelled. City did not address that argument or argue that ordinary, possessory easements cannot be modified or cancelled under existing law or equitable principles. They presented no evidence negating any element of that claim to establish City's entitlement to summary judgment.[11] We express no opinion whether Plaintiffs are entitled to relief. However, we reverse the trial court's summary judgment on this claim, and remand for further proceedings.

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[10] City also argued, without further explanation, that it was entitled to dismissal or summary judgment because Plaintiffs did not allege in the Petition that City constructed anything outside the described easement. Among other more specific factual allegations, Plaintiffs' Petition alleges "construction done on land held by these easements has exceeded the scope and purpose of the easements. . .." Petition, ¶ 18. We do not further consider this argument.

[11] "One who defends against a claim and who does not bear the burden of proof is not required to negate the plaintiff's claims or theories in order to prevail on motion for summary judgment." *King v. Modern Music Co.*, 2001 OK CIV APP 126, ¶ 13, 33 P.3d 947 (citing *Akin v. Missouri Pac. R. Co.*, 1998 OK 102, ¶ 9, 977 P.2d 1040). "When, as here, a defendant moves for summary judgment without relying upon an affirmative defense the defendant must show: 1) that no substantial factual controversy exists as to at least one fact essential to plaintiff's theory of the cause of action; and 2) that the fact is in defendant's favor." *Id.*

CONCLUSION

¶30 The trial court erred by deeming City's purported summary judgment motion confessed. While we may affirm the trial court on other grounds, City failed to establish undisputed facts, supported by evidence, that entitled it to summary judgment on Plaintiffs' claims. *Hall*, 2014 OK 22, at ¶ 17. We reverse the trial court's Order of February 4, 2025 and remand for further proceedings.

¶31 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

WISEMAN, P.J., and FISCHER, J., concur.

April 14, 2026