NO. 94039-8

SUPREME COURT OF THE
STATE OF WASHINGTON

KALEVA and MART LIIKANE,

Appellants,

v.

CITY OF SEATTLE, DEPARTMENT OF CONSTRUCTION AND LAND USE, DEPARTMENT OF TRANSPORTATION; DALY PARTNERS, LLC; JIM DALY; PAVILION CONSTRUCTION,

Respondents.

RESPONDENT DALY PARTNERS, LLC AND JIM DALY'S ANSWER TO PETITION FOR REVIEW AND RESPONSE TO MOTION TO EXTEND TIME

Nicole E. De Leon, WSBA No. 48139

CAIRNCROSS & HEMPELMANN, P.S.
Attorneys for Respondent Daly Partners, LLC and Jim Daly

524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700

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I. INTRODUCTION

The Petition for Review in this matter should be denied. First, the Appellants Kaleva and Mart Liikane (the "Liikanes") filed their Petition for Review after the thirty day deadline set out in RAP 13.4(a). Second, The Liikanes' Petition for Review (the "Petition") is nothing more than an attempt to substantively re-litigate issues that both the trial court and the Court of Appeals have determined present no genuine issue of material fact. The Liikanes do not claim that the Court of Appeals' decision conflicts with a prior decision of the Supreme Court or the Court of Appeals. Nor is there an allegation that the case involves a significant question of Constitutional law or that there is an issue of substantial public interest that must be determined by this Court. As a result, the Liikanes' Petition should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Should the Supreme Court accept review of this matter when the Liikanes' Petition for Review was filed past the deadline set out in RAP 13.4(a)? **No.**

2. Should the Supreme Court accept review of this matter when the Liikanes have not asserted any of the bases for review required by RAP 13.4(b)? **No.**

3. Are the Daly Parties entitled to summary judgment based on the Liikanes' inability to raise any issue of material fact? **Yes.**

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

Inhabit Dexter, LLC ("Inhabit Dexter") owned a property located at 1701 Dexter Avenue North in Seattle (the "Property"). CP 128; CP 140-185. The Liikanes own a parcel adjacent to the Property (the "Liikane Property"). Inhabit Dexter initially purchased the Property with the intention of constructing a building on the parcel. CP 128. As part of its initial development efforts, Inhabit Dexter negotiated and executed a Soil Nail Easement Agreement (the "Agreement") with the Liikanes. *Id.* The Agreement granted Inhabit Dexter the right to install a portion of a temporary shoring system beneath the Liikane Property. CP 128-129. The shoring system is used to support a temporary retaining wall located on the Property which would support the hillside during construction. *Id.* The Agreement is binding on both parties' successors, transferees, and assigns, and provides that Inhabit Dexter, the Grantee, could assign the Agreement without the consent of the Liikanes, the Grantors. *Id.*

On December 28, 2012, Respondent Daly Partners, LLC purchased the Property from Inhabit Dexter through an entity that it controls called 1701 Dexter, LLC ("1701 Dexter"). CP 128; CP 140-185. 1701 Dexter

assumed Inhabit Dexter's rights under the Agreement as the successor-in-title to the Property. CP 198-202. 1701 Dexter began construction on the Property and installed a shoring system as allowed under the Agreement (the "Shoring System").

The Agreement allows 1701 Dexter to place soil nails, which are part of the Shoring System, subject to three very basic restrictions. CP 128; CP 140-185. First, the soil nails must be placed at least five feet below the existing grade of the Liikane Property. *Id.* Second, the soil nails must not extend more than forty-five feet beyond the eastern boundary of the Liikane Property. *Id.* Third, the soil nails must be placed into a soldier pile wall in the "general configuration" described in the Agreement. *Id.* The Shoring System installed by 1701 Dexter complies with all three requirements contained in the Agreement.

As consideration for the right to place a portion of the Shoring System under the Liikane Property, 1701 Dexter had two obligations. First, 1701 Dexter was required to pay the Liikanes $2,000.00 "prior to any entry" onto the Liikane Property (the "Payment"). CP 129; CP 128; CP 186-197. Second, 1701 Dexter was required to obtain insurance and provide the Liikanes with evidence of the same. CP 129.

1701 Dexter complied with both of these requirements. 1701 Dexter's attorney sent the Payment and proof of insurance to the Liikanes'

notice address via certified mail on January 7, 2015 (the "Notice Letter"). CP 129; CP 203-211. In addition, on February 9, 2015, Respondent James Daly, the Manager of 1701 Dexter, personally attempted to tender the Notice Letter, Payment, and proof of insurance to Appellant Mart Liikane ("Mr. Liikane") during an in-person meeting at the offices of Daly Partners, LLC.[1] CP 129. Mr. Liikane refused to accept them. CP 130.

B. Procedural Background

On March 5, 2015, the Liikanes filed a Complaint in King County Superior Court against the Daly Parties and others, alleging breach of contract, negligence and fraud, criminal trespass, unjust enrichment, pain and suffering, and abuse of process. CP 57-62. The Liikanes filed a motion for summary judgment on April 21, 2015. CP 1-40. The Daly Parties filed a cross-motion for summary judgment on May 1, 2015. CP 309-318; CP 227-248. The King County Superior Court granted the Daly Parties' cross-motion for summary judgment and dismissed the Liikanes' claims with prejudice on May 29, 2015. CP 322-324.

The Liikanes appealed. CP 325-326.[2] The Liikanes claimed that there were genuine issues of material fact as to whether 1701 Dexter breached the Agreement, re-asserted the criminal trespass claim brought in

[1] Daly Partners, LLC is a Member of 1701 Dexter. Mr. Daly is Daly Partners, LLC's Managing Member. CP 126.

[2] The Court of Appeals decision *Kaleva and Mart Liikane v. City of Seattle, et. al.*, 196 Wn. App. 1049 (2016), is attached as **Appendix A**.

the trial court, and alleged multiple constitutional violations. App. A at pp. 7, 10-11. The Washington State Court of Appeals affirmed the trial court's decision in an unpublished opinion, determined without oral argument, on November 7, 2016 (the "Decision"). App. A at p. 1, 3, and 9.

The Liikanes filed a Motion for Reconsideration on November 28, 2016. The Court of Appeals denied the Motion for Reconsideration in an order dated December 7, 2016.[3] Per RAP 13.4(a), any petition for review should have been filed on January 6, 2017. The Liikanes did not file their Petition until January 9, 2017. Per a letter from the Supreme Court Deputy Clerk dated February 13, 2017, the Liikanes were allowed to serve and file a motion for extension of time on or before February 27, 2017.[4] The Liikanes filed their motion for extension of time on February 16, 2017.

IV. ARGUMENT

A. The Liikanes' Petition was untimely filed.

As explained above, the Liikanes filed their Petition on January 9, 2017. Per RAP 13.4(a), the thirty day limit to file their Petition lapsed on January 6, 2017. In their motion for extension of time, the Liikanes state

[3] The Court of Appeals letter and Order Denying Motion for Reconsideration is attached as **Appendix B**.
[4] The letter from the Supreme Court Deputy Clerk is attached as **Appendix C**.

that they filed the Petition late because: (1) they overlooked that December has 31 days, and (2) were apparently told by someone at the Court of Appeals that it was "O.K to file it on Ja. 9, 2017." [sic]

RAP 13.4(a) provides that a petition for review must be filed within thirty days after the Court of Appeals' decision is filed. RAP 1.2(a) generally requires a liberal interpretation of the rules on appeal, and RAP 1.2(c) permits an appellate court to waive the provisions of any court rule "in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c)." However, RAP 18.8(b) contains a specific exception to the rule of liberality. That rule provides:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a ... motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section....

RAP 18.8(b). By limiting the extension of time to file a notice of appeal to those cases involving "extraordinary circumstances and to prevent a gross miscarriage of justice", RAP 18.8(b) expresses a public policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case. *Pybas v. Paolino*, 73 Wn. App. 393, 401, 869 P.2d 427 (1994).

"Extraordinary circumstances" include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. *Shumway v. Payne*, 136 Wn.2d 383, 335, 964 P.2d 349 (1998) (*citing Hoirup v. Empire Airways, Inc.*, 69 Wn. App. 479, 482, 848 P.2d 1337 (1993); *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988)). The standard set forth in the rule is rarely satisfied. *Id.* (*citing Scannell v. State*, 128 Wn.2d 829, 833–34, 912 P.2d 489 (1996); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993)).

In *Reichelt*, the Court of Appeals refused to extend the time for filing a notice of appeal which was filed 10 days late. *Reichelt*, 52 Wn. App. at 764-5. The Court of Appeals rejected the appellant's argument that because one of the two trial attorneys on the case left the firm during the thirty days following entry of judgment, and the firm's appellate attorney had an unusually heavy work load at the time, extraordinary circumstances existed justifying an extension of time to avoid a gross miscarriage of justice. *Id.* The court considered a lack of prejudice to the respondent as irrelevant and noted that the prejudice of granting an extension of time would be "to the appellate system and to litigants generally, who are entitled to an end to their day in court." *Id.* at 766 n. 2.

The Liikanes have not alleged extraordinary circumstances that were beyond their control prevented them from filing their Petition in a timely manner. They simply counted wrong. In the absence of extraordinary circumstances, the Liikanes' Petition should be denied.

B. The Petition is devoid of any basis upon which this Court will accept review.

The Liikanes' Petition does not offer any reason why the Court of Appeals' routine application of the well-established burdens on summary judgment merit review. Per RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> 1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> 2. If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> 3. If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> 4. If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The Petition contains no references to any of the above bases upon which this Court will accept review. Nor could it. This case involves nothing more than the interpretation of an unambiguous written contract. In its Decision, the Court of Appeals specifically determined

that the Agreement was unambiguous and that the evidence submitted in the trial court unequivocally demonstrated that 1701 Dexter had complied with those obligations under the Agreement. App. A. at p. 8.

The Court of Appeals also found that there were no genuine issues of material fact regarding the Liikanes' three claimed breaches of the Agreement. First, the Liikanes claimed that 1701 Dexter violated the Agreement because the Shoring System it installed differed in some respects from the shoring system that the previous owner, Inhabit Dexter, had planned to install. App. A. at p. 8. The Court of Appeals rejected this claim because: (1) the plans for the shoring system Inhabit Dexter had intended to install were not incorporated into the Agreement, and (2) the Shoring System that 1701 actually installed fully complied with the terms of the Agreement. *Id.* Second, the Court of Appeals rejected the Liikanes' claim that 1701 Dexter breached the Agreement by failing to tender the required $2,000 payment, noting that the Liikanes had utterly failed to rebut the evidence that the Payment had been tendered by 1701 Dexter, but refused. *Id.* Third, the Liikanes' contention that 1701 Dexter had to obtain their written approval to use a Shoring System that differed from the shoring system Inhabit Dexter had previously intended to use was meritless because, once again, the construction plans were not part of the Agreement. *Id.*

Last, the Liikanes alleged that 1701 Dexter had violated their rights under the Fourth, Seventh, and Fourteenth Amendments to the United States Constitution. App. A. at p. 10. In a single paragraph, the Court of Appeals dismissed these claims out of hand, stating that they were "without merit." *Id.*

The Liikanes' Petition is nothing more than an attempt to substantively re-litigate issues that both the trial court and the Court of Appeals have determined present no genuine issue of material fact. The Liikanes do not claim that the Decision conflicts with a prior decision of the Supreme Court or the Court of Appeals. Nor is there an allegation that the case involves a significant question of Constitutional law or that there is an issue of substantial public interest that must be determined by this Court. As a result, the Liikanes' Petition for Review should be denied.

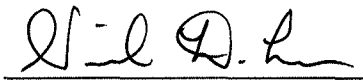
V. CONCLUSION

The Petition in this matter was untimely filed. As a result, it should be dismissed. In the event that the Court does consider the Petition, the Liikanes have not alleged a basis sufficient for this Court to accept review. Both the trial court and the Court of Appeals determined that 1701 Dexter was within its rights to install the Shoring System such that no breach of the Agreement occurred. Furthermore, the Liikanes' constitutional claims are wholly without merit and inapplicable to this

matter. Therefore, the Daly Parties respectfully request that this Court affirm the Court of Appeals' Decision and decline to accept review of this matter.

DATED this 17th day of March, 2017.

CAIRNCROSS & HEMPELMANN, P.S.



Nicole E. De Leon, WSBA No. 48139
Attorney for Respondent Daly Partners, LLC and Jim Daly
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700
Email: ndeleon@cairncross.com

CERTIFICATE OF SERVICE

I, Sue E. Den, certify under penalty of perjury of the laws of the State of Washington that on March 17, 2017, I caused a copy of the document to which this is attached to be served on the following individual(s), as indicated:

Filed via email on March 17, 2017
Washington State Supreme Court
Supreme@courts.wa.gov

Service on Parties as indicated below:

Pro Se Appellants:
Via US first class mail, postage prepaid on
March 17, 2017:

Märt and Kaleva Liikane
Pro Se Plaintiffs
1608 Aurora Avenue North
Seattle, WA 98109

Pro Se Appellants:
Via Federal Express on March 17, 2017 to be delivered
March 20, 2017:
Tracking No. 7786 8246 8560

Märt and Kaleva Liikane
Pro Se Plaintiffs
6318 Hidden Cove Road
Bainbridge Island, WA 98110

Attorneys for Respondent Pavilion Construction:
Via US first class mail, postage prepaid on
March 17, 2017:

Mark Rosencrantz
Watt, Tieder, Hoffar & Fitzgerald, LLP
1215 4th Ave Ste 2210
Seattle, WA 98161-1016

Attorneys for Respondents City of Seattle, Department of Construction & Land Use and Department of Transportation:
Via US first class mail, postage prepaid on
March 17, 2017:

Patrick Downs
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104

DATED this 17th day of March, 2017,

at Seattle, Washington.

Sue E. Den

Sue E. Den, Legal Assistant
CAIRNCROSS & HEMPELMANN, P.S.
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 254-4404
Facsimile: (206) 254-4504
E-mail: sden@cairncross.com

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

November 7, 2016

Mart Liikane
1608 Aurora Ave N.
Seattle, WA 98109

Charles Ennis Newton
Cairncross & Hempelmann PS
524 2nd Ave Ste 500
Seattle, WA 98104-2323
cnewton@cairncross.com

Kaleva Liikane
1608 Aurora Ave N.
Seattle, WA 98109

Mark Rosencrantz
Watt, Tieder, Hoffar & Fitzgerald, LLP
1215 4th Ave Ste 2210
Seattle, WA 98161-1016
mrosen@watttieder.com

Patrick Downs
Seattle City Attorney4s Office
701 Fifth Ave Ste 2050
Seattle, WA 98104-7097
patrick.downs@seattle.gov

CASE #: 73641-8-I
Kaleva and Mark Liikane, Appellants v. City of Seattle, Respondent

King County, Cause No. 15-2-05494-5.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Accordingly, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Honorable Samuel Chung

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KALEVA and MÄRT LIIKANE, Appellants, v. CITY OF SEATTLE, DEPARTMENT OF CONSTRUCTION AND LAND USE, DEPARTMENT OF TRANSPORTATION; DALY PARTNERS, LLC; JIM DALY; and PAVILION CONSTRUCTION, Respondents.	)	No. 73641-8-I DIVISION ONE UNPUBLISHED FILED: November 7, 2016

Cox, J. – Kaleva and Märt Liikane (the "Liikanes") appeal the superior court's order granting summary judgment to Respondents Daly Partners, LLC and Jim Daly (the "Daly Parties") and dismissing the Liikanes' claims with prejudice. There were no material issues of fact because the Daly Parties acted in accordance with a valid easement agreement. The Liikanes' claims of trespass and various constitutional violations are without merit. Accordingly, we affirm.

Inhabit Dexter, LLC (Inhabit) owned property located at 1701 Dexter Avenue North in Seattle (the "Property"). Kaleva and Kai Liikane (the "Liikane owners") own two parcels adjacent to the Property (the "Liikane property"). The Liikane owners acquired this property on November 8, 2005, when their father, Märt Liikane, gave it to them via a quit claim deed.

As part of some initial development efforts, Inhabit negotiated and executed a Soil Nail Easement Agreement (the "Agreement") with the Liikane owners. The Agreement is dated November 6, 2008, and recorded in King County on December 15, 2008. The Agreement grants the Grantee (Inhabit) the right to install a portion of a temporary shoring system beneath the Liikane property. The shoring system is used to support a temporary retaining wall located on the Property which in turn will support the hillside during construction of a permanent structure on the Property.

The Agreement allows the Grantee to place soil nails/tie backs onto the Liikane property and sets out three restrictions governing the placement of the soil nails as follows:

> Grant of Soil Nail Easement. Grantor hereby conveys and grants to Grantee a non-exclusive construction easement ("Soil Nail Easement") for the sole purpose of the construction, installation, use and abandonment in place, of a series of Soil Nails under and across the east one-hundred fifty (150) feet of Grantor's Property (the "Easement Area"), at **depths of five (5) feet or more** below the existing grade of Grantor's Property as shown on the drawing attached hereto as Exhibit C. The Soil Nails shall not **extend more than forty-five (45) feet** west beyond the eastern boundary of Grantor's Property as shown on the drawing attached hereto as Exhibit C. The Soil Nails will be placed into a soldier pile wall **in the general configuration as shown on Exhibit D**. Upon completion of in [sic] the construction and installation of the Soil Nails, detailed as-built drawings showing the locations, elevations, and dimensions of the Soil Nails shall be provided to Grantor.[1]

The Agreement also specifies that before entry onto the Liikane property, the Grantors (Liikane owners) must be paid $2,000, and the Grantee has to have obtained insurance and provided the Grantor with evidence of the same. The

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[1] Clerk's Papers at 188-89 (emphasis added).

Agreement is binding on both parties' successors, transferees, and assigns, and provides that the Grantee could assign the Agreement without the consent of the Grantor.

Attached to the Agreement are Exhibits C, D, and E. Exhibit C shows a cross-section of the supporting wall on the west side of the Property to demonstrate the acceptable depth and length of the soil nails under the terms of the Agreement. Exhibit D shows the general configuration of how the soil nails would be placed into a soldier pile wall. Exhibit E specifies the insurance requirements and the address where proof of insurance is to be sent.

On December 28, 2012, Daly Partners, LLC purchased the Property on behalf of 1701 Dexter, LLC (1701 Dexter) from Inhabit, and 1701 Dexter assumed Inhabit's rights under the Agreement. Daly Partners, LLC is an affiliate of 1701 Dexter, and James Daly is the manager of 1701 Dexter and of Daly Partners, LLC. 1701 Dexter began construction on the Property including installation of a shoring system.

On March 5, 2015, the Liikanes filed a complaint in superior court alleging breach of contract, negligence and fraud, criminal trespass, unjust enrichment, pain and suffering, and abuse of process. They also sought a declaration that the Agreement was void and unenforceable. The complaint named the Daly Parties as well as the City of Seattle and Pavilion Construction as defendants but

did not name 1701 Dexter. The Liikanes filed a motion for summary judgment on April 21, 2015.[2]

The Daly Parties filed a cross motion for summary judgment on May 1, 2015, claiming the Agreement was valid, they were in compliance with its terms, and the remainder of the Liikanes' claims were meritless. Attached to the motion was a declaration of John Byrne. Byrne stated that he is a civil geotechnical engineer, and he created the drawings for Inhabit that were attached as Exhibits C and D to the Agreement. He stated that he designed the shoring system ("Shoring System") used on the Property in a manner that complies with all three requirements of the Agreement. Specifically: (1) The soil nails have been placed at least 15 feet below the grade of the Liikane property, which is three times deeper than required by the Agreement; (2) none of the soil nails extend further than 32 feet onto the Liikane property, which is 13 feet less than what the Agreement allows; and (3) the soil nails are placed in a soldier pile wall in the general configuration shown in Exhibit D to the Agreement.

Byrne attached copies of the plans for the installed Shoring System, as Exhibit 4 and stated that the cross-section shown on Exhibit C to the Agreement and the cross-section in the attached plans are identical. He attached Exhibit 5 which showed the wall that was actually constructed on the Property and stated that it is essentially identical to Exhibit D of the Agreement. He noted that there are minor differences but they are immaterial and the soldier pile wall that was

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[2] The Liikanes' motion for summary judgment is not part of the record. See RAP 9.2; State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (party claiming error on review has the burden of providing an adequate record to establish the error).

constructed was in the same "general configuration" as that shown in Exhibit D. Thus, the Shoring System installed is consistent with respect to the requirements set forth in the Agreement.

The Daly Parties also attached the declaration of James Daly. Daly stated that 1701 Dexter's attorney sent the $2,000 payment and proof of insurance to the Liikane owners' notice address via certified mail on January 7, 2015, but the Liikane owners did not pick up the letter. He attached a copy of the delivery attempt and the letter as Exhibit H.

Although Märt Liikane (Mr. Liikane) was no longer an owner of the Liikane property, he had previously met with Daly when he contacted 1701 Dexter regarding the Property and the project. Mr. Liikane had told Daly that the Agreement was invalid and insisted that 1701 Dexter needed to negotiate a new agreement in order to install the shoring system. In his declaration, Daly stated that he personally attempted to tender the notice letter, payment, and proof of insurance to Mr. Liikane during an in-person meeting on February 9, 2015, but Mr. Liikane refused to accept them. Daly attached a photo of Mr. Liikane taken during the meeting and stated that the envelope in front of Mr. Liikane in the photo contained the notice letter, payment and proof of insurance.

The trial court determined that the Agreement is valid and binding on the Liikane owners and that 1701 Dexter complied with the terms of the Agreement. All of the Liikanes' claims were dismissed with prejudice.

The Liikanes appeal.

"We review summary judgment orders de novo . . ., viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. [S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'"[3] Although the evidence is viewed in the light most favorable to the nonmoving party, if that party is the plaintiff and it fails to make a factual showing sufficient to establish an element essential to its case, summary judgment is warranted.[4] "Conclusory statements and speculation will not preclude a grant of summary judgment."[5]

1701 DEXTER ACTED IN ACCORDANCE WITH A VALID EASEMENT

The Liikanes claim that there were genuine issues of material fact as to whether 1701 Dexter breached the Agreement. We disagree.

In interpreting an easement, we look to the language contained therein.[6] If the language is plain and unambiguous, extrinsic evidence will not be considered.[7] The Agreement is unambiguous as to what is required from 1701 Dexter as the Grantee. The affidavits of Byrne and Daly establish that 1701 Dexter complied with the requirements of the Agreement.

The Liikanes do not argue that 1701 Dexter violated any of the three restrictions contained in the Agreement. Instead, they claim that 1701 Dexter

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[3] Elcon Const., Inc. v. E. Washington Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (quoting CR 56(c)).

[4] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[5] Elcon Const., Inc., 174 Wn.2d at 169.

[6] Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

[7] Id.

breached the Agreement by failing to follow the original building plans developed for Inhabit and by changing the location, angles and dimensions of the soil nails. We reject the Liikanes' contentions because Inhabit's building plans are not incorporated into the Agreement; the only "plans" that are part of the Agreement are the drawings attached as Exhibits C and D to illustrate the depth and extension of the soil nails and the general configuration of the nails once installed. Byrne's declaration and the attachments thereto establish that the Shoring System constructed complies with the requirements of the Agreement. Because the soil nails were installed in accordance with the restrictions contained in the Agreement, any other variances as to location, angles or dimensions do not constitute a breach.

The Liikanes also allege that 1701 Dexter breached the Agreement by failing to tender the $2,000. However, they have failed to rebut Daly's statement that payment was tendered but refused.[8] Although the Liikanes contend that the Agreement was breached because the City of Seattle issued unwarranted building permits, we disagree because any such permits did not apply to the Liikane property and they are not part of the Agreement.

Finally, although the Liikanes allege that no changes could be made without their written approval, that restriction only applies to changes in the Agreement, not to any construction plans that the Grantee might have had.[9]

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[8] Le Tastevin, Inc. v. Seattle First Nat'l Bank, 95 Wn. App. 224, 230, 974 P.2d 896 (1999) (refusal to accept payment is a breach of contract).

[9] Clerk's Papers at 190 ("This Soil Nail Easement shall not be modified, amended or terminated without the prior written approval of the parties hereto.") (emphasis added).

THE LIIKANES' REMAINING CONTENTIONS ARE WITHOUT MERIT

The Liikanes' contention that 1701 Dexter violated their rights under the Fourth, Seventh, and Fourteenth Amendments to the United States Constitution are without merit. First, neither 1701 Dexter nor the Daly Parties are government actors so the Fourth and Fourteenth Amendments do not apply to their actions.[10] In addition, the Liikanes have failed to allege any facts that would constitute a Fourth or Fourteenth Amendment violation.[11] They were never "seized" or "searched" for purposes of the Fourth Amendment,[12] and they have failed to allege that they are members of a suspect class for purposes of an equal protection challenge.[13] Lastly, they have failed to allege a violation of their Seventh Amendment right to a jury trial because "[t]he Seventh Amendment to the United States Constitution does not apply [through the Fourteenth Amendment] to civil cases in state courts."[14]

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[10] U.S. Const. amend. XIV (No State "shall deny to any person within its jurisdiction the equal protection of the laws."); see United States v. Jacobsen, 466 U.S. 109, 113-14, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); Gray v. Univ. of Colorado Hosp. Auth., 672 F.3d 909, 927 (10th Cir. 2012) ("Due Process Clause of the Fourteenth Amendment by its plain language applies only to state action.").

[11] See State v. Johnson, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) (noting that an appellant raising constitutional issues must present considered arguments to this court, and "[n]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion") (quoting State v. Blilie, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997)).

[12] Jacobsen, 466 U.S. at 113.

[13] See State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006).

[14] Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 768, 287 P.3d 551 (2012).

Finally, because 1701 Dexter operated in accordance with the terms of the Agreement, the Liikanes' trespass claim fails.[15]

ATTORNEY FEES

The Daly Parties seek an award of attorney fees incurred on appeal claiming the Liikanes' appeal was frivolous. Because we disagree, we deny this request.

Rule 18.9(a) permits the court to require a party to pay the fees of another party for defending a frivolous appeal. "[A]n appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists."[16] Because doubts about whether the appeal is frivolous are resolved in favor of the appellant,[17] a fee award is not warranted in this case.

We affirm the order granting summary judgment. We deny the request for fees on appeal.

Cox, J.

WE CONCUR:

Leach, J.

Spearman, J.

[15] See Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d 101 (2006); Fradkin v. Northshore Util. Dist., 96 Wn. App. 118, 123, 977 P.2d 1265 (1999).

[16] Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 220, 304 P.3d 914 (2013)).

[17] Id.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

December 7, 2016

Mart Liikane
1608 Aurora Ave N.
Seattle, WA 98109

Charles Ennis Newton
Cairncross & Hempelmann PS
524 2nd Ave Ste 500
Seattle, WA 98104-2323
cnewton@cairncross.com

Kaleva Liikane
1608 Aurora Ave N.
Seattle, WA 98109

Mark Rosencrantz
Watt, Tieder, Hoffar & Fitzgerald, LLP
1215 4th Ave Ste 2210
Seattle, WA 98161-1016
mrosen@watttieder.com

Patrick Downs
Seattle City Attorney4s Office
701 Fifth Ave Ste 2050
Seattle, WA 98104-7097
patrick.downs@seattle.gov

CASE #: 73641-8-I
Kaleva and Mart Liikane, Appellants v. City of Seattle, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure
c: The Hon. Samuel Chung

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KALEVA and MÄRT LIIKANE, Appellants, v. CITY OF SEATTLE, DEPARTMENT OF CONSTRUCTION AND LAND USE, DEPARTMENT OF TRANSPORTATION; DALY PARTNERS, LLC; JIM DALY; and PAVILION CONSTRUCTION, Respondents.	)	No. 73641-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Kaleva and Märt Liikane, have moved for reconsideration of the opinion filed in this case on November 7, 2016. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 7th day of December 2016.

For the Court:

Cox, J.

Judge

APPENDIX C

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

February 13, 2017

LETTER SENT BY E-MAIL

Kaleva Liikane **(sent by U.S. mail only)**
Märt Liikane
1608 Aurora Avenue N.
Seattle, WA 98109

Mark Rosencrantz
Watt, Tieder, Hoffar & Fitzgerald, LLP
1215 4th Avenue, Suite 2210
Seattle, WA 98161-1016

Patrick Downs
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097

Charles Ennis Newton
Cairncross & Hempelmann PS
524 2nd Avenue, Suite 500
Seattle, WA 98104-2323

Re: Supreme Court No. 94039-8 - Kaleva Liikane, et ano. v. Seattle City of Construction & Land Use, et al.
Court of Appeals No. 73641-8-I

Counsel, Mr. Märt Liikane and Mr. Kaleva Liikane:

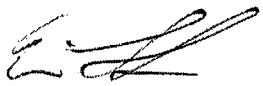
On February 13, 2017, the Court received a letter from the Petitioners indicating that they believe their petition for review was due on January 9, 2017, and thus was timely filed on that date.

The Court of Appeals denied the motion for reconsideration on December 7, 2016. The petition for review "must be filed within 30 days" after such a denial is entered. *See* RAP 13.4. Pursuant to RAP 18.6, the day of the denial (in this case, December 7, 2016) is not included in the period of time. Attached is a chart demonstrating that January 6, 2017, is the 30th day after December 7, 2016 (not including December 7, 2016 itself). Therefore, the petition for review was due January 6, 2017, and was untimely because it was filed on January 9, 2017.

The petition for review will be held without further action until February 27, 2017, to allow the Petitioners time to serve and file a motion for extension of time. Failure to serve and file a motion for extension of time will likely result in the dismissal of this matter. RAP 18.9(b).

At such time as the Petitioners serve and file a motion for extension of time to file a petition for review, a date will be established by which the Respondent may serve and file both an answer to the motion for extension of time and an answer to the petition for review.

Sincerely,



Erin L. Lennon
Supreme Court Deputy Clerk

ELL:bw

Enclosure

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