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Division I
State of Washington
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NO. 832476-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLY E. SCHMIDT,

Appellant,

v.

SHIRLEY KANKELFRITZ,

Respondent.

**RESPONDENT'S RESPONSE TO PETITION FOR
REVIEW**

A. Grant Lingg, WSBA #24227
Peter C. Nierman, WSBA #44636
FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164
Telephone: (206) 689-8500
Facsimile: (206) 689-8501
Email: glingg@foum.law
Email: pnierman@foum.law
Attorneys for Respondent

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I. INTRODUCTION

Respondent Shirley Kankelfritz requests the Supreme Court deny Appellant's Petition for Review.

1) Appellant's Petition was filed a day after the filing deadline, and counsel has failed to offer a reasonable excuse for the delay. Lacking a showing of "extraordinary circumstances" justifying an extension of time, Appellant's Petition should be denied as untimely.

2) As both the superior court and court of appeals have held, Appellant's case against Respondent is simply without merit. Under Washington law and the RESTATEMENT [SECOND] OF PROPERTY § 17.6, Appellant needs to prove Respondent had a reasonable opportunity to remedy the alleged dangerous condition (mold hidden in the interior wall cavity of the bathroom) after the tenant (Appellant) had notice of it. However, Appellant has no evidence supporting that Respondent had a reasonable opportunity to discover this latent condition that Appellant herself was unable to discover it while living in this

rental unit for approximately 15 years. Without such evidence, the lower court rulings should be affirmed.

II. STATEMENT OF THE CASE

On September 14, 2021, the Honorable Janice E. Ellis dismissed Appellant’s Complaint against Respondent. CP at 1-2. Judge Ellis provided a well-reasoned letter explaining the rationale for her ruling. CP at 3. In pertinent part, Judge Ellis stated the Declaration of Appellant’s property management expert, Karla Tussing, failed to create a material issue of fact because: (1) the declaration failed to adequately qualify the declarant to give the opinions rendered; and (2) the declaration failed to provide a sufficient basis for Ms. Tussing to render expert opinions regarding the standard of care in Snohomish County given that she resides in Arizona. *Id.* Judge Ellis stated she was granting the motion because “plaintiff failed to respond ... with competent evidence.” *Id.*

On November 7, 2022, Division One of the Washington State Court of Appeals issued a written opinion affirming the trial

court order dismissing Appellant’s claims against Respondent. In pertinent part, Division One opined that “Schmidt has presented no admissible evidence that Kankelfritz failed to exercise reasonable care that would have discovered the hidden mold.” Opinion at pp. 7-8. Division One also agreed that “Schmidt has not presented supporting evidence that Kankelfritz had actual knowledge of mold and failed to inform the tenant.” *Id.* at 9.

Pursuant to RAP 13.4(a), Appellant’s Petition for Review was due to be filed within 30 days (by 5:00 p.m. on December 7, 2022). However, Appellants Petition for review was not filed until the following day, on December 8, 2022.

III. AUTHORITY & ARGUMENT

A. Appellant’s Petition Should be Denied as Untimely.

There is no disputing the fact Appellant’s Petition was untimely. Thus, the Court need only determine whether “extraordinary circumstances” exist to justify granting an extension of time. *See* RAP 18.8(b):

- (a) Generally. The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice, subject to the restrictions in sections (b) and (c).
- (b) Restriction on Extension of Time. **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 notice of appeal, a notice for discretionary review, 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.**** The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

...

(Emphasis added).

In absence of (1) sufficient excuse for a party's failure to timely file a notice of appeal or (2) sound reasons to abandon preference for finality of decisions, RAP 18.8(b) mandates

dismissal of an appeal that is not timely perfected. *Schaefco, Inc. v. Columbia River Gorge Com'n*, 121 Wn.2d 366, 849 P.2d 1225 (1993). “Extraordinary circumstances” sufficient to allow an extension of time within which a party must file a notice of appeal are circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control; in such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice, because of the appellant’s reasonably diligent conduct. *Beckman ex rel. Beckman v. State, Dept. of Social and Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000). “Negligence, or the lack of ‘reasonable diligence,’ does not amount to ‘extraordinary circumstances.’” *Id.* at 695. *See also State v. Moon*, 130 Wn. App. 256, 122 P.3d 192 (2005) (The test for an extension of time for filing an appeal is applied “rigorously,” and “**there are very few instances in which Washington appellate courts have found that this test was satisfied.**”) (emphasis added).

Here, Appellant has failed to come forward with evidence supporting the existence of “extraordinary circumstances” justifying an extension of time. Appellant’s counsel has asserted a litany of alleged issues in an attempt to manufacture such an excuse. However, counsel’s claim of technical issues combined with poor weather is unavailing. It is apparent Appellant’s untimely filing simply stems from a failure to properly calendar the deadline, and our courts have held that the mistake of counsel, together with an absence of prejudice to the other party, does not constitute “extraordinary circumstances.” *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988).

Although Mr. Huppert’s declaration states he was unable to meet with his client on November 22, he fails to fully explain why he was unable to meet with Ms. Schmidt in the several weeks that followed or how this prevented him from timely filing a brief. The excuses provided by Appellant ring hollow. As such, the Court should deny the motion for an extension of time to file the Petition for Review.

B. Appellant's Petition Should be Denied Because it Lacks Merit.

In addition to being untimely, Appellant's Petition is lacking in merit. Both Washington case law and the RESTATEMENT [SECOND] OF PROPERTY § 17.6 require Appellant to come forward with evidence supporting that Respondent had notice of the fact there was mold hidden in the interior wall cavity of the bathroom wall in Appellant's rental unit. *See Lian v. Stalick*, 115 Wn. App. 590, 595, 62 P.3d 933 (2003) (citing RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 17.6 (1977)) (emphasis added):

[A party making a claim under the implied warranty of habitability must show:] (1) that the condition was dangerous, (2) that the landlord **was aware of the condition or had a reasonable opportunity to discover the condition** and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation.

At her deposition, Appellant was clear she failed to provide Respondent with any notice of the alleged condition, and

Appellant herself was unaware of the presence of mold until after the wall was opened up:

Q. So it wasn't until the walls were removed that you could see the mold; is that correct?

A. Yeah.

Q. So you hadn't ever made notice to Ms. Kankelfritz that there was mold in your apartment because you didn't even know that until the walls were removed; is that correct?

A. I believe so. This might -- this might not have anything to do with mold. I said something about the toilet had black stuff in it, but that may not even be anything to do with mold. I don't know how the toilet thing works.

Q. And you never lived in this apartment at any time after the flood; is that correct?

A. No.

CP at 34 (Emphasis added).

Lacking evidence of notice, Appellant argues she informed Respondent about the presence of "black stuff" by the toilet in her bathroom. Both of the lower courts properly ruled that this testimony was nowhere near sufficient to establish notice of a clearly unrelated and latent condition that Appellant

herself did not discover during the 15 years she lived in the unit. Appellant's request for review should, therefore, be denied because there is no merit to her claim.

IV. CONCLUSION

Respondent, Shirley Kankelfritz, respectfully requests the Court to deny Appellant's Petition for Review because it is both untimely and lacking in merit.

DATED this 18th day of January 2023.

FORSBERG & UMLAUF, P.S.

s/ Peter C. Nierman

A. Grant Lingg, WSBA #24227
Peter C. Nierman, WSBA #44636
*Attorneys for Respondent Shirley
Kankelfritz*

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***RESPONDENT'S RESPONSE TO PETITION FOR REVIEW*** on the following individuals in the manner indicated:

Shaun I. Huppert
Huppert Law Firm, PLLC
7009 212th Str SW, Ste 203
Edmonds, WA 98026

Attorney for Appellant

- (X) Via Electronic Service Agreement
- (X) Via COA Electronic E-Service

SIGNED this 18th day of January 2023, at Seattle, Washington.

s/Miranda J. Roberts

Miranda J. Roberts

FORSBERG & UMLAUF, P.S.

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Transmittal Information

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Appellate Court Case Title: Kimberly E. Schmidt, Appellant v. Shirley Kankelfritz, Respondents
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- 832476_Answer_Reply_to_Motion_20230118141848D1349607_9925.pdf
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Comments:

Sender Name: Elizabeth Sado - Email: esado@foum.law

Filing on Behalf of: Peter Nierman - Email: pnierman@foum.law (Alternate Email: mroberts@foum.law)

Address:

901 Fifth Avenue

Suite 1400

Seattle, WA, 98164

Phone: (206) 689-8500 EXT 8578

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