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Division I
State of Washington
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COURT OF APPEALS, OF THE STATE OF WASHINGTON
DIVISION I

KIMBERLY E. SCHMIDT,
Appellant,

vs.

SHIRLEY KANKELFRITZ, et al.,
Respondent

PETITION FOR REVIEW RAP 13.4

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A. IDENTITY OF THE PETITIONER:

The Petitioner is Kimberly E. Schmidt asking the Court for review.

B. Citation to Court of Appeals Decision.

A reference to the Court of Appeals decision which petitioner wants reviewed:

Review of Appellate Opinion and Decision at No. 83247-6-I/6-9

Court of Appeals decided affirmed the decision on November 7, 2022.

C. Issues Presented for Review

The finding that it is reasonable for a landlord to do no inspections for 15 years, have a previous flood, notified of black substances in the unit and find that it does not create an issue of fact that the property owner should have known that mold was present or could be at the Summary Judgment level?

Should the Court find or extend the law that failing to reasonably inspect premises for consumers living spaces for an unreasonable time, such as 15 years is per se negligence since it rewards inaction by the property owner to not be proactive to detect latent issues?

D. STATEMENT OF THE CASE

This is a dispute between a Landlord/Property Owner, Shirley Kankelfritz and tenant/renter Schmidt over personal injuries sustained by Schmidt by exposure to mold in her rental space. **The relevant facts on reconsideration are:** (1) **Ms. Schmidt did tell Kankelfritz that “black stuff” by the toilet which is next to the shower. That is Notice.**

Moreover, it was discovered that in 1995, the basement unit flooded due to a large snow accumulation while Kankelfritz’s daughter resided in the unit. An insurance claim, remediation and repairs were necessary. CP 16. This was never disclosed to Schmidt until discovery in the lawsuit.

1. Substantive Overview:

Kankelfritz maintains in her declaration This is motion for reconsideration on a CR 56 motion without oral argument decided on September 15, 2021. This is a dispute between a Landlord/Property Owner, Shirley Kankelfritz

and tenant/renter Schmidt over personal injuries sustained by Schmidt by exposure to mold in her rental space. **The relevant facts are:**

Ms. Schmidt did tell Kankelfritz that “black stuff” by the toilet which is next to the shower. That is Notice. Nothing was done by Kankelfritz then. Therefore, she did notice Kankelfritz about a condition, that mold would have been discovered then. No plumber or expert hired. No mention of resolution of situation. (Also, contradicts below testimony under oath per declaration that she fixed issues in her apartment immediately, see below)

Per her declaration dated: **July 20, 2021**, Kankelfritz mentions she keeps her home in pristine condition, yet does not maintenance or have any repairs done in 15 years in her basement during her April 15, 2021 deposition. She stated the on the rare occasion (Schmidt) notified her of an issue in her unit, I remedied her concern immediately. CP 12, 14.

However, Kankelfritz testified in her deposition that she never inspected the basement unit Schmidt was in for the entire 15 years and no professionals were hired to replace or repair anything in 15 years. (See Deposition – Kankelfritz, Dec of Counsel). CP 16

Q. Okay. And so did you -- when they were -- when

4 Kimberly was a tenant did you ever inspect the unit?

5 A. No.

6 Q. She was there for about 15 years; right?

7 A. Yes.

8 Q. And the unit was never inspected for anything?

9 A. No.

Moreover, Kankelfritz confirms in her deposition that no one was hired to inspect or repair anything in 15 years.

Q. Okay. And did you guys -- during Kimberly's

**23 tenancy did you guys ever hire any
outside professionals to**

**24 perform any maintenance or repairs on the
unit?**

25 A. No.

shirley Kankelfritz April 15, 2021 NDT Assgn #
50406 Page 16

**1 Q. Okay. Did you ever get any complaints
from her**

2 about things in the unit?

3 A. No.

4 Q. Okay. Nothing ever?

5 A. Never. No.

Defendant's Motion for MSJ page 5, line

11 below Schmidt stating the following:

general. Kankelfritz rented the basement of her home to
Schmidt from October 2001 to March 2016. In Defendant's
A. I believe so. This might -- this might not have anything to do
motion, it mentions during Schmidt's deposition that she had
it, but that may not even be anything to do with mold. I don't
tell Mrs. Kankelfritz about black or c (2)
know how the toilet thing works.

(3) Per her declaration dated: **July 20,
2021**, Kankelfritz mentions she keeps her home
in pristine condition, yet does not maintenance
or have any repairs done in 15 years in her
basement during her April 15, 2021 deposition.
She stated that on the rare occasion (Schmidt)

notified her of an issue in her unit, I remedied her concern immediately.

(4) However, Kankelfritz testified in her deposition that she never inspected the basement unit Schmidt was in for the entire 15 years and no professionals were hired to replace or repair anything in 15 years. (See Deposition – Kankelfritz, Dec of Counsel).

Q. Okay. And so did you -- when they were -- when

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Moreover, Kankelfritz confirms in her deposition that no one was hired to inspect or repair anything in 15 years.

Q. Okay. And did you guys -- during Kimberly's

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shirley Kankelfritz April 15, 2021 NDT Assgn #
50406 Page 16

1 **Q. Okay. Did you ever get any complaints
from her**

2 **about things in the unit?**

3 A. No.

4 **Q. Okay. Nothing ever?**

CP 16

D. ARGUMENT

(b) Considerations Governing Acceptance of Review. 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.

If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Supreme Court should review this petition since the rights of tenants and other status of people in regards to use of property and being able to do so without concern for unreasonable risk of harm is a substantial public interest. As in this matter, allowing a Landlord/Property Owner to abscond and keep their head in the sand about conditions of their property that could be harmful to others and hide behind the “notice” requirements is inopposite of the public's interests to keep them safe from unreasonable harms. It promotes inaction and prevention of harmful conditions.

In State v. Watson, 155 Wn.2d 574, 122 P.3d 903 (2005). ¶7 We may grant review and consider a Court of Appeals opinion if it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). This case presents a prime example of an issue of substantial public interest.

The RAPs are intended to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Moreover, we may choose to disregard the RAPs if the interests of justice require. RAP 1.2(c). Review is appropriate in this rare situation where an incorrect holding will have sweeping implications but does not actually render a party "aggrieved" within RAP 3.1.

¶9 Similarly, even traditional standing to bring a lawsuit is not an absolute bar to a court's review

where an important issue is at stake. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, [150 Wn.2d 791, 803](#), [83 P.3d 419](#) (2004) (holding that when an issue "is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture," we will "take a 'less rigid and more liberal' approach to standing." (quoting *Wash. Natural Gas Co. u. Pub. Util. Dist. No. 1 of Snohomish County*, [77 Wn.2d 94, 96](#), [459 P.2d 633](#) (1969))). Likewise, courts may hear cases that have been rendered completely moot if an issue is of substantial public interest. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, [96 Wn.2d 201, 208](#), [634 P.2d 853](#) (1981) ("A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is

desirable to provide an authoritative determination for the future guidance of public officials."); *see also State v. Ross*, [152 Wn.2d 220, 228](#), [95 P.3d 1225](#) (2004).

The Law Supports Action and Prevention

Tincani v. Inland Empire Zoological Soc'y, 124 Wash.2d 121, 139, 875 P.2d 621 (1994); Restatement (Second) of Torts § 343A (1965). In such cases, a duty arises if the landlord “*should anticipate the harm despite such knowledge or obviousness.*” *Tincani*, 124 Wash.2d at 139, 875 P.2d 621 (quoting Restatement (Second) of Torts § 343A(1)).

This duty of reasonable care includes an “affirmative duty to discover dangerous conditions.” *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980) (citing Restatement (Second) of Torts § 343,

comment b); *Jarr v. Seeco Const. Co.*, 35
Wn.App. 324, 326, 666 P.2d 392 (1983).

Lian vs. Stalik, 115 Wn.App 590, 62 P.3d 933
(2003), summarizes the law of
RESTATEMENT (SECOND) PROPERTY on
Landlord and Tenant law, section 17.6.

RESTATEMENT (SECOND) OF PROPERTY
(Landlord & Tenant) § 17.6 (1977) states:

In contrast, a landlord is subject to liability
under § 17.6 only for those conditions he is
aware of **or for those conditions he could have
known about in the exercise of ordinary care.**
RESTATEMENT, *supra*, cmt. c.

Therefore, It is an substantial public
interest that affects millions of citizens that a
landlord can unreasonably not inspect their
rental property to reasonably insure that is safe
for living spaces of citizens of this State. The
existing law places an affirmative duty on the
landlord/property owner to be pro-active and
thus unreasonable neglect and not insuring
safety of the living spaces of tentants/occupants
by failing to inspect for 15 years should be
deemed unreasonable and negligent.

I. CONCLUSION

The Court affirming the Defendant's motion for Summary Judgment should be reversed and remanded to proceed to trial since this involves a substantial public interest.

If the proper diligence would have been done the injuries would not have occurred. 15 years without an inspection, coupled with the prior flooding in the basement unit, it was quite foreseeable that mold was present or should have been discovered. It is an substantial public interest that affects millions of citizens that a landlord can unreasonably not inspect their rental property to reasonably insure that is safe for living spaces of citizens of this State.

I certify that this document contains 2,116 words pursuant to RAP 18.17.

Respectfully submitted,

DATED this 8 day of December, 2022

/S/ Shaun Huppert
Shaun Huppert #35018
Attorney for Appellant Kimberly Schmidt

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HUPPERT LAW FIRM, PLLC

December 08, 2022 - 4:44 PM

Transmittal Information

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIMBERLEY E. SCHMIDT,

Appellant,

v.

SHIRLEY KANKELFRITZ,

Respondent,

SERVPRO INDUSTRIES, INC., a
foreign corporation, SERVPRO OF
LYNNWOOD,

Defendant.

No. 83247-6-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Kimberley Schmidt sued her landlord, Shirley Kankelfritz, after Schmidt discovered mold in the interior cavity of her bathroom wall following a repair. Schmidt claimed that Kankelfritz was negligent in the management of the unit and breached the common law implied warranty of habitability. Schmidt appeals the summary judgment dismissal of her claims. Because there is no genuine issue of material fact, we affirm.

FACTS

Schmidt rented a basement apartment unit in Kankelfritz' Lynnwood home from October 2001 to March 2016. The two had no written lease agreement, but

Citations and pincites are based on the Westlaw online version of the cited material

No. 83247-6-1/2

Schmidt paid \$500 each month in rent, which was raised to \$530 in March 2016. During this period, Kankelfritz did not conduct detailed inspections of the unit, but did conduct visual inspections, in part, to inspect the general condition whenever she collected rent or was otherwise invited in.

Just after midnight on March 21, 2016, Schmidt woke up to a “loud noise” and water “gushing” over the floor. Schmidt discovered the water was coming from near her kitchen sink. The water was coming from a broken dishwasher hose. Schmidt ran to the front door of the home and alerted Kankelfritz to the flooding. Kankelfritz immediately turned off the main water line. Water had seeped from the unit’s kitchen into the bedroom, bathroom, and living room.

Later that morning, Kankelfritz contacted her insurance company and ServPro Lynnwood, who arrived about 10 a.m. to repair the damage from the flood. While conducting repairs, ServPro removed sheet rock from the wall behind the toilet. At that time, mold was discovered on the interior cavity of the wall behind the sheetrock. Schmidt only saw the mold after the walls were removed and had not previously notified Kankelfritz of any mold issue.

Schmidt recalled telling Kankelfritz prior to the 2016 flood incident, “something about the toilet had black stuff in it, but that may not even be anything to do with mold.” Schmidt also recalled previously telling Kankelfritz that Schmidt noticed “the walls were bulging a little in the bathroom.” Schmidt did not say when or how she informed Kankelfritz of these issues or how Kankelfritz responded. Kankelfritz, however, explained that “[o]n the rare occasion [Schmidt] would alert me to an issue in her unit, I would always remedy her

concern immediately.”

As to the mold found inside the walls, Kankelfritz declared she had no prior knowledge as it was completely hidden within the walls and she had no idea when it began to develop or what caused it.

Following the flood, Kankelfritz replaced the shower and toilet, but there was no damage to the cabinets or drywall that required replacement. Schmidt moved out of the unit immediately following the flood and never returned.

The unit had flooded once previously in 1995 after snowmelt caused water to leak into the bedroom. That leak did not impact any other room. The bedroom does not share a wall with the bathroom where mold was found in 2016. After the 1995 incident, Kankelfritz had drains installed and did not experience any flooding issues until the broken hose in 2016, more than 20 years later.

In March 2016, Schmidt filed suit against Kankelfritz, claiming negligence, premises liability, and a breach of the implied warranty of habitability.¹ Kankelfritz filed a motion for summary judgment on all claims. The trial court granted this motion. Schmidt appeals.

DISCUSSION

Standard of Review

We review summary judgments de novo. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is

¹ Schmidt’s suit included a claim of negligence against ServPro Industries, Inc. and ServPro of Lynnwood. That claim is not part of this appeal.

entitled to a judgment as a matter of law. Strauss, 194 Wn.2d 300; CR 56(c). We must construe all facts and inferences in favor of the nonmoving party. Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). “A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation.” Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Negligence

Schmidt asserts that Kankelfritz was negligent. In a negligence case, the plaintiff is required to prove (1) duty; (2) breach; (3) the causation; and (4) damages. Saralegui Blanco v. Gonzalez Sandoval, 197 Wn.2d 553, 557, 485 P.3d 326 (2021). A tenant may premise an action against a landlord under any of three legal theories: the Residential Landlord-Tenant Act (RLTA), the rental agreement, or the common law. Landis & Landis Const., LLC v. Nation, 171 Wn. App. 157, 162, 286 P.3d 979 (2012) (citing Dexheimer v. CDS, Inc., 104 Wn. App. 464, 467, 470, 17 P.3d 641 (2001)). Here, the parties did not have a rental agreement, precluding an action based on such an agreement.

A. Residential Landlord-Tenant Act

Under the RLTA, landlords have a duty to “keep the premises fit for human habitation” at all times. RCW 59.18.060. Alongside that general duty, the act outlines several specific requirements for keeping the premises fit. RCW 59.18.060(1)-(15). Under the RLTA, the duty does not extend beyond specific duties statutorily enumerated. Aspon v. Loomis, 62 Wn. App. 818, 825, 816 P.2d 751 (1991).

In her brief, Schmidt simply provides the enumerated list of requirements included in the statute but fails to allege specifically which section Kankelfritz violated. None of the enumerated requirements address mold in particular, though subsection (2) requires landlords to maintain structural components including walls, subsection (5) requires landlords to “make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy,” and subsection (8) requires landlords to maintain all plumbing supplied by the landlord in reasonably good working order. RCW 59.18.060 (2), (5), (8). “Upon notice, the landlord is obliged to take swift action—between 1 and 10 days, based on the type of risk to the tenant—to remedy the defective condition.” Landis, 171 Wn. App. at 161 (citing RCW 59.18.070)).

Schmidt alleges in her complaint that “Kankelfritz knew or should have known of the presence of toxic mold existing in and contaminating the leased premises.” Schmidt, herself, despite living in the unit for 15 years, only discovered the mold after the sheetrock was removed in the bathroom due to flooding caused by the broken dishwasher hose. Schmidt did not establish that Kankelfritz knew of the mold prior to Schmidt’s own discovery. Further, Kankelfritz commenced remedial action by calling professionals the same morning the flooding occurred. Schmidt did not raise a genuine issue of material fact as to whether Kankelfritz breached her duty under the RLTA.

B. Premises Liability

Under a premises liability theory, a landowner owes an individual a duty of

care based on the individual's status upon the land. Curtis v. Lein, 169 Wn.2d 884, 890, 239 P.3d 1078 (2010) (citing Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 128, 875 P.2d 621 (1994)). A tenant is an invitee. Curtis, 169 Wn.2d at 890 (citing Musci v. Graoch Assocs. Ltd. P'ship. No. 12, 144 Wn.2d 847, 855, 31 P.3d 684 (2001)). The Washington State Supreme Court has adopted the Restatement (Second) of torts § 343 (1965) view of a landowner's duty of care to an invitee:

[A] landowner is subject to liability for harm caused to his tenants by a condition on the land, if the landowner (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to tenants; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect the tenant against danger.

Curtis, 169 Wn.2d at 890 (alteration in original) (citing Musci, 144 Wn.2d at 855-56)). Reasonable care requires the landowner to inspect for dangerous conditions, "followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant's] protection under the circumstances." Id.

Schmidt alleges that Kankelfritz had a duty to inspect the unit and breached that duty. Schmidt attempts to establish this duty and breach by presenting the declaration of Karla Tussing as evidence. Tussing has been a "property manager for 15 years" and signed her declaration in Surprise, Arizona.² She submitted a declaration based her "personal knowledge, education, and experience in the field of property management." She is "knowledgeable of the

² Schmidt asserts that Tussing did the majority of her property management in the Puget Sound area, but where Tussing managed property is not stated in Tussing's declaration or anywhere else in the record.

industries customs, legal compliance, practices and responsibilities that landlords or property owners have to tenants or individuals residing in the landlords' property in exchange for rent money." Tussing concludes that "[i]f inspections would have been done regularly the presence of mold or the problem area causing the mold would have been rooted out on a more probable than not basis." While Tussing has experience in managing properties, Tussing does not provide the foundation to opine on mold detection generally or establish that she has any knowledge of where the mold was located in Schmidt's unit or how it was detected.

"An expert must stay within the area of his expertise." Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 102, 882 P.2d 703 (1994). "In the absence of evidence that the witness has the specialized training or experience necessary to draw the inference offered, the opinion lacks a proper foundation and is not admissible under ER 702." Simmons v. City of Othello, 199 Wn. App. 384, 392-93, 399 P.3d 546 (2017) (citing State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999)). An opinion must also be supported by sufficient foundational facts. Queen City, 126 Wn.2d at 104. "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." *Id.* at 103. Tussing offers nothing more than theoretical speculation that some sort of regular inspection would have detected the mold or the cause of the mold that was not otherwise observable until walls were removed. Accordingly, we disregard her unsupported opinion.

Schmidt has presented no admissible supporting evidence that Kankelfritz

failed to exercise reasonable care that would have discovered the hidden mold.

Implied Warranty of Habitability

Schmidt next contends that Kankelfritz breached the common law implied warranty of habitability by failing to inspect the unit, which Schmidt argues would have uncovered the mold.

Under the common law, a landlord generally has no duty to repair noncommon areas without an express covenant to repair. Martini v. Post, 178 Wn. App. 153, 167, 313 P.3d 473 (2013) (citing Aspon v. Loomis, 62 Wn. App. at 826)). Landlords, however, are subject to liability for harm to the tenant that is caused by latent or hidden defects in the leasehold that existed at the commencement of the leasehold of which the landlord had actual knowledge and failed to inform the tenant of. Id.

Here, Schmidt has presented no evidence that the mold hidden behind the bathroom wall existed at the time she began renting the basement apartment. Schmidt conceded in her deposition that she herself only became aware of the mold after the sheetrock had been removed, allowing a view inside the cavity of the wall.

Though Schmidt informed Kankelfritz of “black stuff” inside the toilet bowl, Schmidt herself stated it “may not even be anything to do with mold” and did not explain when she told Kankelfritz or how Kankelfritz responded. Also, while Schmidt told Kankelfritz about a little bulge on a bathroom wall, Schmidt provides little detail as to the location of the bulge, what the bulge looked like, when she noticed it and told Kankelfritz, or how Kankelfritz responded. Kankelfritz,

however, declared that on the rare occasion Schmitz would alert Kankelfritz to an issue in the unit, Kankelfritz would always remedy her concern immediately.


Schmidt also argues that the 1995 leak into the bedroom could have been when the mold began and that it was unreasonable for Kankelfritz to not inspect the unit for mold regularly after that event. However, Schmidt's suggestion that the 1995 leak that did not impact any rooms other than the bedroom was related to the mold discovered in 2016 is nothing more than pure speculation.

Schmidt has not presented supporting evidence that Kankelfritz had actual knowledge of mold and failed to inform the tenant.

CONCLUSION

The trial court did not err in granting the defendant's motion for summary judgment.

We affirm.



WE CONCUR:

