SUMMARY
July 20, 2023

2023COA71

No. 22CA0122, *Anderson v. Shorter Arms* — Landlords and Tenants — Warranty of Habitability — Notice

A division of the court of appeals decides, as a matter of first impression, that a tenant must strictly comply with the statutory notice requirements to be able to maintain a claim under the warranty of habitability statute, § 38-12-503, C.R.S. 2022. Because the tenant's notice here was not in strict compliance with the statute, the division affirms the district court's dismissal of his claim against the landlord. The dissent concludes that, even under a strict compliance standard, disputed issue of material fact remained regarding whether the pro se plaintiff provided adequate notice of uninhabitable conditions. The dissent also concludes that a lease term expressly granting the landlord permission to enter the

apartment to make needed repairs satisfied the statutory requirement for such permission.

COLORADO COURT OF APPEALS **2023COA71**

Court of Appeals No. 22CA0122
City and County of Denver District Court No. 21CV56
Honorable Stephanie L. Scoville, Judge

Allen Anderson,

Plaintiff-Appellant,

v.

Shorter Arms Investors, LLC, and PK Management, LLC,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE TOW
Navarro, J., concurs
Schutz, J., dissents

Announced July 20, 2023

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¶ 1 Plaintiff, Allen Anderson, appeals the district court's grant of summary judgment in favor of defendants, Shorter Arms Investors, LLC and PK Management, LLC (collectively, Shorter Arms). This appeal requires us to address, as a matter of first impression, whether the notice requirements in the warranty of habitability statute, § 38-12-503, C.R.S. 2022, require strict compliance or merely substantial compliance. Because we conclude that the statute requires strict compliance, and Anderson's notice to Shorter Arms did not strictly comply with the statute, we affirm.

I. Factual Background

¶ 2 The parties' summary judgment briefing reveals the following facts.

¶ 3 Anderson is a tenant at an apartment complex owned by Shorter Arms Investors and managed by PK Management. Over the years, Anderson made oral and written demands that Shorter Arms repair numerous living conditions in his apartment that he considered to be deplorable, including (1) flooding with sewage backups; (2) an unrepaired ceiling collapse from three years earlier; (3) a malfunctioning heater; (4) a malfunctioning stove; (5) falling ceiling lights; (6) a broken shower rod; (7) a cracked entry door;

(8) poor sealing around windows; (9) a gap around the window air conditioner unit; (10) a malfunctioning security door; and (11) mold.

¶ 4 In addition, at various times during Anderson's tenancy, the Colorado Department of Public Health and Environment (CDPHE) conducted inspections of Anderson's apartment and provided Shorter Arms with written notice of the results. In particular, in May 2019, CDPHE reported to Shorter Arms that there was a "possible mold issue."

¶ 5 When Shorter Arms failed to make the needed repairs, Anderson sued Shorter Arms for breach of the warranty of habitability.[1] The district court granted summary judgment in favor of Shorter Arms, finding that Anderson had failed to provide sufficient notice as required by the statute. Anderson appeals that judgment.

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[1] Anderson brought several other claims against Shorter Arms and other defendants. The district court granted a C.R.C.P. 12(b)(5) motion, dismissing all claims against the other defendants and all claims against Shorter Arms other than the warranty of habitability claim. Anderson does not appeal that decision.

II. The Warranty of Habitability Act

¶ 6 In 2008, the Colorado General Assembly adopted a statutory implied warranty of habitability. Ch. 387, sec. 3, §§ 38-12-501 to -511, 2008 Colo. Sess. Laws 1820-28 (the Warranty Act). The Warranty Act provides that "[i]n every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation." § 38-12-503(1), C.R.S. 2022. It also establishes notice requirements before a landlord can be found to have breached that warranty. § 38-12-503(2).

¶ 7 During the time relevant to this dispute, the statutory definitions and notice requirements were amended. At the time Anderson began lodging complaints with Shorter Arms, the Warranty Act established that a landlord breached the warranty of habitability if a residential premises was "uninhabitable" or otherwise unfit for human habitation and "materially dangerous or hazardous to the tenant's life, health, or safety," and the landlord failed to cure the problem within a reasonable time of receiving written notice of the condition. § 38-12-503(2), C.R.S. 2018. Another section of the Warranty Act enumerated several conditions that would make a premises "uninhabitable," including the lack of

properly working windows, doors, plumbing, and heating. § 38-12-505(1), C.R.S. 2018. Absent from this definition (as relevant to Anderson's complaints) was any specific mention of working appliances, fixtures such as shower rods, and mold — though there was a provision that included noncompliance with building, housing, and health codes that "would constitute a condition that is dangerous or hazardous to a tenant's life, health, or safety." § 38-12-505(1)(k), C.R.S. 2018.

¶ 8 In 2019, the General Assembly amended the Warranty Act. Ch. 229, secs. 2-8, §§ 38-12-502 to -509, 2019 Colo. Sess. Laws 2305-14. In particular, while the original section 38-12-503 required a showing of *both* uninhabitability (as defined by section 38-12-505) *and* a dangerous or hazardous condition, section 38-12-503 now requires *either* a showing of uninhabitability *or* "a condition that materially interferes with the tenant's life, health, or safety." § 38-12-503(2)(a)(I), (II).[2]

[2] Because the relevant statutory provisions have not been amended since the 2019 legislation, all subsequent cites to the Warranty Act will be to the current language unless specifically noted.

¶ 9 The General Assembly also changed the notice requirements of section 38-12-503. While the original provision required "written notice," it now requires "reasonably complete written or electronic notice." § 38-12-503(2)(b). For conditions falling within the statutory definition of uninhabitable, however, the tenant now must "include[] with the notice permission to the landlord or to the landlord's authorized agent to enter the residential premises," which then requires the landlord to take remedial action within ninety-six hours. § 38-12-503(2)(b)(II). (In contrast, for more emergent conditions — i.e., those that presently "materially interfere[] with the tenant's life, health, or safety," no such permission is required and remedial action must be taken within twenty-four hours. § 38-12-503(2)(b)(I).)

¶ 10 The General Assembly also expanded the definition of uninhabitable in section 38-12-505 to include nonworking appliances. § 38-12-505(1)(b)(I), C.R.S. 2022. And the General Assembly added detailed provisions specifically related to "mold that is associated with dampness." §§ 38-12-503(2.2), 38-12-505(1)(a).

¶ 11 These amendments were effective August 2, 2019. Sec. 11, 2019 Colo. Sess. Laws at 2315.

III. Standard of Review

¶ 12 We review de novo a district court's order granting summary judgment. *Wainscott v. Centura Health Corp.*, 2014 COA 105, ¶ 23. "Summary judgment is appropriate when the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11. We also review de novo issues of statutory interpretation. *Wainscott*, ¶ 24.

IV. Analysis

¶ 13 In granting summary judgment, the district court focused on the adequacy of the notice provided to Shorter Arms. We agree that the notices failed to satisfy Anderson's obligations under the statute.

A. Anderson's Oral Complaints

¶ 14 The district court began its discussion by noting that Anderson could only prevail on claims related to conditions for which he had provided written notice to Shorter Arms. Anderson argues that this was error because his oral complaints comported

with Shorter Arms' "House Rules," which provide that tenants who needed to request repairs should "[c]all, email or stop in the office to have the office staff write-up your service request."

¶ 15 Relying on *Feldewerth v. Joint School District 28-J*, 3 P.3d 467 (Colo. App. 1999), Anderson argues that the notice required by the statute is not a jurisdictional requirement and, therefore, the court should only require substantial compliance. In *Feldewerth*, a division of this court held that a school district's failure to notify a teacher by *certified* mail of the grounds for termination as required by statute did not deprive the school district of the authority to terminate the teacher's employment. *Id.* at 472. The division observed that, "in the absence of explicit statutory language requiring it, a statute requiring the providing of notice by a specified means need not be strictly applied." *Id.* at 471.

¶ 16 Anderson leans heavily on the following principle from *Feldewerth*: "[I]f the *type* of notice required is not a jurisdictional requirement, actual notice may be substituted for it." *Id.* But the focus on jurisdiction in *Feldewerth* was required by the arguments in that case. The school district that had terminated the teacher's employment was challenging the teacher's argument (with which

the district court had agreed) that the technical noncompliance with the statutory notice requirement deprived the school board of jurisdiction to take action against the teacher. The division observed that the notice requirement was a matter of due process because the teacher (who was non-probationary) had a protected interest in continued employment. *Id.* To terminate that employment, the school board was required to establish "good and just cause," but the provision of statutorily specified notice was not an element of that proof. *Id.* (quoting § 22-63-301, C.R.S. 2022).

¶ 17 Anderson's reliance on the principle articulated in *Feldewerth* is misplaced. Shorter Arms does not — and could not — argue that the district court lacked jurisdiction due to the noncompliant notice. Rather, the warranty of habitability statute explicitly makes such notice *an element* of the cause of action for breach of the warranty. *See* § 38-12-503(2) (providing that a landlord breaches the warranty of habitability "*if* . . . [t]he landlord has received reasonably complete written or electronic notice of the condition" and fails to rectify the condition within the statutory timeframes) (emphasis added). In other words, this language is not merely a notice provision that is a precondition for filing a claim for breach of

warranty; it is an element that must be established before a landlord can be found liable for breaching the warranty.

¶ 18 We are aware of no case — not *Feldewerth*, any of the cases cited in that opinion, or any of the cases that cite it — in which a court has applied a substantial compliance standard to a notice requirement where the General Assembly made the specific notice obligation an element of a claim. We are not at liberty to rewrite the statute and must enforce clear statutory language as written. *Owens v. Carlson*, 2022 CO 33, ¶ 30.[3]

¶ 19 Thus, the district court did not err by concluding that Anderson's oral notices were insufficient as a matter of law.

B. The 2019 Written Notice of Mold

¶ 20 As to CDPHE's written notice regarding the possible existence of mold, the timing of this notice is key to our determination of this

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[3] Anderson's reliance on *Wainscott v. Centura Health Corp.*, 2014 COA 105, is also misplaced. In that case, the division did not address an element of a statutory cause of action but instead the notice prerequisites for perfecting a hospital lien. *See id.* at ¶¶ 1, 10. Therefore, the division's discussion of how to interpret a statutory notice provision — including the "competing interpretive tools" of strict construction of statutes in derogation of the common law and liberal construction of remedial statutes — is inapplicable here. *See id.* at ¶¶ 27, 48.

issue. First, we assume without deciding (as did the district court) that the statutory notice may be provided by a third party. Nevertheless, we conclude that CDPHE's May 2019 notice did not implicate the statute.

¶ 21 This notice pre-dated the statutory amendments adding specific provisions related to mold. So the notice was sufficient only if it demonstrated that the condition resulted in the apartment meeting the statutory definition of "uninhabitable" or otherwise being unfit for human habitation. But, as noted, in the spring of 2019, the statutory definition did not explicitly reference mold. § 38-12-505(1), C.R.S. 2018. Consequently, the notice would only implicate the statutory warranty if it reflected an incident of noncompliance with "applicable building, housing, and health codes" that constituted "a condition that is dangerous or hazardous to a tenant's life, health, or safety." § 38-12-505(1)(k), C.R.S. 2018.

¶ 22 While the notice indicated there was a "possible mold issue," it also checked boxes indicating that the problem was "resolved at the time of inspection" and that there was no "follow-up needed" by CDPHE. When viewed in its entirety, CDPHE's notice, as a matter of law, was insufficient to notify the landlord of a condition that

made the apartment uninhabitable or otherwise unfit for human habitation.[4]

C. The 2020 Written Notice

¶ 23 The only other written notice the landlord received was Anderson's May 2020 itemized list of over a dozen things in need of repair. However, the district court found that only five of the listed items were included in Anderson's complaint for breach of the warranty of habitability: the unrepaired ceiling, the malfunctioning oven, the falling shower rod, the cracked entry door, and the lack of seal around the windows. The court noted, however, that it "remains undisputed that the May 5, 2020, notice did not explicitly include permission for [Shorter Arms] to enter [Anderson's] apartment to make the necessary repairs."[5]

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[4] We recognize that the district court did not analyze the adequacy of the 2019 notice as it related to possible mold. Nevertheless, our review of whether summary judgment is appropriate is de novo. And we may affirm on any ground supported by the record. *Laleh v. Johnson*, 2017 CO 93, ¶ 24.

[5] Neither party suggests that any of these conditions "materially interfere[d] with [Anderson's] life, health, or safety" such that no permission to enter was required. § 38-12-503(2)(a)(II), C.R.S. 2022.

¶ 24 As he did with respect to the written notice requirement, Anderson argues that we should only require substantial compliance with the obligation to provide permission to enter the residence. For the same reasons we rejected his earlier proposition, we reject this one.

¶ 25 Anderson also argues that the lease itself grants the landlord permission to enter the residence to make repairs, and this lease provision satisfied the statutory requirement. But because Anderson did not preserve that argument in the district court, we do not address it. *See Minshall v. Johnston*, 2018 COA 44, ¶ 21 (noting that "liberal construction [of pro se pleadings] does not include inventing arguments not made by the pro se party").

¶ 26 Finally, Anderson points out that the district court overlooked the reference to water damage in his May 2020 notice, which Anderson argues brings that repair request within the newly enacted provisions related to mold — and mold was included in his complaint alleging breach of the warranty of habitability. Shorter Arms counters that the May 2020 notice did not mention "mold," and thus this argument was not preserved. We consider the issue preserved because the statutory language covers not only mold but

also "any other condition causing the residential premises to be damp." § 38-12-505(1)(a). Anderson's written notice that "water has gotten behind the shower wall and pulled it from the wall" was reasonably complete notice of such a condition.

¶ 27 That being said, we reject Anderson's argument that permission to enter the residence is not required when the complaint relates to mold. Anderson relies on the language of section 38-12-503(2.2), which does not specifically include a permission-to-enter requirement. But subsection (2.2) simply lays out with greater specificity what a landlord is required to do upon being notified of a mold problem. Specifically, instead of being required to "commence remedial action by employing reasonable efforts" within ninety-six hours (as is required for any condition making the premises uninhabitable, *see* § 38-12-503(2)(b)(II)), this subsection requires only that the landlord install containment and air filtration systems and eliminate any active sources of water to the mold within that time. § 38-12-503(2.2)(a). The subsection then identifies specific "remedial actions to remove the health risk posed by mold" that must be completed within a reasonable time. § 38-12-503(2.2)(c).

¶ 28 Apart from these mold-specific containment and remediation provisions, the Warranty Act still requires contemporaneous permission to the landlord to enter the premises.

Section 38-12-503(2)(b)(II) applies when "the condition is as described in subsection (2)(a)(I) of this section." Subsection (2)(a)(I), in turn, relates to when the premises are "[u]ninhabitable as described in section 38-12-505." And section 38-12-505, in relevant part, defines such conditions as including where "[t]here is mold that is associated with dampness, or there is any other condition causing the residential premises to be damp, which condition, if not remedied, would materially interfere with the health or safety of the tenant." § 38-12-505(1)(a). In sum, because mold and other dampness-related conditions are included as conditions that make the premises "uninhabitable," the notice requirement — including providing permission to enter — applies.

¶ 29 Admittedly, when it comes to mold, there appears at first glance to be some overlap between section 38-12-503(2)(a)(I) — which describes a condition that makes the premises uninhabitable — and section 38-12-503(2)(a)(II) — which describes a condition that materially interferes with the tenant's life, health, or safety.

But that apparent overlap dissipates upon closer reading. Mold falls into the former category (and thus requires permission to enter) when, "if not remedied," it would reach the level of material interference with the tenant's life, health, or safety. § 38-12-505(1)(a). But it falls into the latter category (and thus no permission to enter is required) when it has reached the point that it is *presently* materially interfering with the tenant's life, health, or safety.

¶ 30 Anderson does not claim that the water behind the shower wall was so emergent that it was presently materially interfering with his life, health, or safety. Thus, permission to enter was required to be given with the notice. Because it was not, there is no basis to disturb the judgment.

V. Disposition

¶ 31 The judgment is affirmed.

JUDGE NAVARRO concurs.

JUDGE SCHUTZ dissents.

JUDGE SCHUTZ, dissenting.

¶ 32 I agree with my colleagues in the majority that a landlord must receive written notice of an uninhabitable condition to trigger the repair obligation under section 38-12-503, C.R.S. 2022. But I respectfully disagree with the majority's conclusion that the undisputed facts of this case establish that the landlord did not receive adequate notice. I also disagree with my colleagues' conclusion that a notice of uninhabitable conditions must include a contemporaneous grant of permission for the landlord to enter the tenant's unit to make the requested repairs when the tenant has previously provided such a written consent.

¶ 33 I begin by providing factual context for the parties' relationship as landlord and tenant, and the habitability issues that triggered this dispute. I then address Colorado's historical treatment of implied warranty of habitability claims in residential leases before turning to the specific factual and legal issues relevant to the district court's summary judgment order. Applying these principles, I conclude that the district court erred by granting summary judgment in favor of the landlord and, accordingly, I dissent.

I. Factual Background and Procedural Setting

¶ 34 Allen Anderson has been a tenant at an apartment complex owned by Shorter Arms Investors, LLC, and managed by PK Management, LLC (collectively, Shorter Arms) since 2016. As a person with a disability, Anderson qualifies for subsidized housing.

¶ 35 Shorter Arms provides low-income housing to its tenants and receives monthly subsidies from the United States Department of Housing and Urban Development (HUD) through the Public Housing Authority. These subsidies allow Shorter Arms the economic ability to operate and maintain the apartment complex while charging rent that is substantially below market rates or charging no rent at all.

¶ 36 Shorter Arms used HUD's model lease for subsidized programs as the basis for its lease with Anderson. By the express terms of the lease, Anderson agreed "to permit the Landlord, his/her agents or other persons, when authorized by the Landlord, to enter the unit for the purpose of making reasonable repairs and periodic inspections."

¶ 37 In addition to the HUD form lease, Shorter Arms adopted a set of written "house rules" that were incorporated into the terms of the

lease, and tenants were required to comply with them. The "house rules" specified how tenants were required to inform the landlord of maintenance requests. Shorter Arms' house rules required tenants to "notify the office immediately when a repair is needed." Tenants were directed to "[c]all, email or stop in the office to have the office staff write-up [a] service request," and the procedure stated that "[a]ll requests for service must be written by our office."

¶ 38 Anderson made many verbal and written requests that Shorter Arms repair numerous conditions in his apartment. Frustrated by what he perceived as a lack of effective response, Anderson sued Shorter Arms for breach of the warranty of habitability.

II. Colorado's Warranty of Habitability for Residential Leases

¶ 39 Historically, Colorado's common law did not recognize an implied warranty of habitability for tenancies. Instead, Colorado applied the doctrine of caveat emptor — loosely translated to "buyer beware" — in the lease context. *Blackwell v. Del Bosco*, 191 Colo. 344, 346, 558 P.2d 563, 564 (1977). Thus, a landlord was not deemed to have made any representations concerning the condition of a leased property, and absent a misrepresentation or the landlord's contractual commitment to make ongoing repairs, the

tenant was responsible for the condition and maintenance of the rented property. *Id.* at 346, 558 P.2d at 564.

¶ 40 In *Blackwell*, the Colorado Supreme Court acknowledged the harshness of applying caveat emptor principles to modern lease relationships but also concluded that the General Assembly, rather than the courts, was the more appropriate body to consider the propriety of abolishing caveat emptor in favor of an implied warranty of habitability. *Id.* at 348, 558 P.2d at 565.

¶ 41 Chief Justice Pringle dissented in *Blackwell*. *Id.* at 350, 558 P.2d at 567 (Pringle, C.J., dissenting). He noted that numerous courts from around the country had rejected the doctrine of caveat emptor in the modern rental context. *Id.* Chief Justice Pringle noted the application of caveat emptor derived from an assumption that the primary benefit of a feudal tenancy was the land and not the improvements, but in contrast, most modern residential tenancies are far removed from our feudal roots:

> When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities,

> secure windows and doors, proper sanitation and proper maintenance.

Id. (quoting *Javins v. 1st Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970)). Nonetheless, Chief Justice Pringle qualified his passionate dissent by noting that "[h]ad the legislature acted in whatever way, I would, of course, recognize and adhere to their power in this area." *Id.* at 348, 558 P.2d at 566.

¶ 42 And here we find ourselves today. In 2008, the Colorado General Assembly formally abolished the doctrine of caveat emptor with respect to Colorado residential leases and adopted a statutory implied warranty of habitability. Ch. 387, sec. 3, §§ 38-12-501 to -507, 2008 Colo. Sess. Laws 1820-25; *see* §§ 38-12-501 to -507, C.R.S. 2022. Section 38-12-503(1) provides as follows: "In every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation."

¶ 43 Critical to the issues presented in this case, the General Assembly also established a formal process by which a tenant must provide notice of such a claim to the landlord. Whether the tenant must give permission to enter and how quickly the landlord must

commence repairs are dictated by the severity of the condition. *See* 38-12-503(2).

A. Uninhabitable Conditions Materially Interfering with a Tenant's Life, Health, or Safety

¶ 44 Except for mold related issues — which are discussed below — a tenant must provide the landlord with written notice of an uninhabitable condition "that materially interferes with the tenant's life, health, or safety." § 38-12-503(2)(a)(II). In such circumstances, the landlord must commence the necessary repairs within twenty-four hours, and if it fails to do so, the tenant may bring a suit for breach of the warranty of habitability. § 38-12-503(2)(b)(I).

B. Conditions Not Interfering with Life, Health, or Safety

¶ 45 With respect to uninhabitable conditions that do not materially interfere with a tenant's life, health, or safety, the notice requirements are slightly different. First, a landlord has ninety-six, as opposed to twenty-four, hours to commence the necessary repairs. § 38-12-503(2)(b)(II). Second, the landlord's obligation to make such repairs is triggered when "the tenant has included with the notice permission to the landlord or to the landlord's authorized agent to enter the residential premises." *Id.*

C. Uninhabitable Conditions Due to Mold

¶ 46 The General Assembly has elected to craft specific notice requirements that relate to mold conditions:

> In a case in which a residential premises has mold that is associated with dampness, or there is any other condition causing the residential premises to be damp, which condition, if not remedied, would materially interfere with the life, health, or safety of a tenant, a landlord breaches the warranty of habitability if the landlord fails:
>
> (a) Within ninety-six hours after receiving reasonably complete written or electronic notice of the condition, to mitigate immediate risk from mold by installing a containment, stopping active sources of water to the mold, and installing a high-efficiency particulate air filtration device to reduce tenants' exposure to mold;
>
> . . . .
>
> (c) Within a reasonable amount of time, to execute [specified additional] remedial actions to remove the health risk posed by mold . . . .

§ 38-12-503(2.2), C.R.S. 2022.

III. Anderson's Tenancy and Complaints

¶ 47 Anderson's verified complaint and the exhibits attached to his response to Shorter Arms' motion for summary judgment make clear that he and other tenants made numerous verbal and written

maintenance requests regarding serious habitability issues over the course of many years. In its summary judgment order, the district court noted that these affidavits "described deplorable conditions perpetuated by [Shorter Arms], including many conditions that directly impact tenant's life, health and safety."

A. Written Notice of the Uninhabitable Conditions

¶ 48 Frustrated by Shorter Arms' lack of response to his requests, Anderson made complaints to the Colorado Department of Public Health and Environment (CDPHE). After inspecting Anderson's apartment, CDPHE provided Shorter Arms with a written notice dated May 3, 2019. The "Observations/Comments" section of the notice specified "Ceiling collapsed — 3 SF ceiling cut . . . Minor Spill." The section entitled "Required Actions" stated, "[W]ill contact mgmt./Also possible mold issue." Shorter Arms failed to follow up on the possible mold issue.

¶ 49 In May 2020, Anderson sent Shorter Arms a letter demanding repairs for the following items that had not been addressed for years:

(1) "Ceiling sanded and painted from collapsed roof";

(2) "Hole in the wall";

(3) "Door was never properly painted and had scratches and marks all over it";

(4) "Shower was never chalked [sic] and water has gotten behind the shower wall";

(5) fallen shower rod;

(6) "Bathroom ceiling fan was never upgraded";

(7) "Front door bottom trim was never screwed in";

(8) "Windows were never chalked [sic]";

(9) Kitchen switch "has a short in it"; and

(10) broken oven door, "rendering the oven unusable."

Anderson's letter said that he expected the repairs to be made within the "next 30 days" but did not expressly say that Shorter Arms could enter his apartment to make the repairs. Shorter Arms took no action in response to the letter.

B. Anderson's Complaint

¶ 50 In February 2021, Anderson filed his verified complaint. Like most tenants involved in litigation with their landlord, Anderson

represented himself.[1] In contrast, the landlord was represented by legal counsel. After the parties exchanged initial disclosures, Shorter Arms moved for summary judgment, arguing that Anderson had not provided written notice for some of the conditions and failed to include express permission to enter his apartment.

C. The District Court's Summary Judgment Order

¶ 51 In entering summary judgment, the district concluded that Anderson had provided written notice of only five of the uninhabitable conditions alleged in the complaint: (1) ceiling in need of repair; (2) oven malfunctioning; (3) fallen shower rod; (4) cracked entry door; and (5) unsealed windows. Therefore, the court concluded, the claim could not be based on any other conditions.

¶ 52 The court then turned to the question of whether Shorter Arms had been provided adequate written notice of the five identified conditions. As a threshold matter, the court concluded that Anderson "may be correct that written notice could be provided from someone other than the tenant." The court also concluded,

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[1] *See generally* Aubrey Hasvold, Colo. Coal. for the Homeless & Jack Regenbogen, Colo. Ctr. on L. & Pol'y, *Facing Eviction Alone* (2017), https://perma.cc/3R6Z-ZCLK.

however, that Shorter Arms had not received notice of any of the five conditions from a governmental agency. In reaching this conclusion, the court determined that CDPHE's May 2019 notice addressed the collapsed ceiling but determined that notice was of no consequence because the complaint merely stated that Shorter Arms "just tossed up drywall and closed the hole." The court failed to address, however, the portion of the May 2019 notice that noted a "possible mold issue" and that portion of Anderson's complaint that addressed water damage and mold issues.

¶ 53 Next, the court noted that Anderson's May 2020 letter did not grant Shorter Arms permission to enter his apartment. A contemporaneous grant of permission, the district court reasoned, was required because none of the five conditions for which notice was provided interfered with Anderson's life, health, or safety. Thus, the court concluded there were no material facts in dispute and entered summary judgment in favor of Shorter Arms.

IV. Analysis

¶ 54 I agree that with the majority that we review the district court's interpretation of a statute do novo. Similarly, we review an order granting summary judgment de novo.

¶ 55 Summary judgment is only appropriate if the material facts are undisputed. C.R.C.P. 56(c); *Moses v. Moses*, 180 Colo. 397, 402, 505 P.2d 1302, 1304 (1973) (a litigant is entitled to have factual disputes resolved by a jury and summary judgment should be limited to the "clearest of cases"). And when assessing whether disputed issues of material facts exist, we view the evidence in the light most favorable to the nonmoving party, and we draw all reasonable inferences from the undisputed evidence and resolve all doubts in that party's favor. *See, e.g.*, *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 465-66 (Colo. 2003).

A. Written or Electronic Notice of the Claimed Defect

¶ 56 I share my colleagues' conclusion that section 38-12-503 requires proof that the landlord received written or electronic notice of the claimed uninhabitable condition.[2] But I part ways with the

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[2] In reaching this conclusion, I am not insensitive to Anderson's argument that it would be desirable to allow a tenant to pursue a warranty of habitability claim when the evidence indicates the tenant has provided verbal notice of the condition to the landlord, particularly when the tenant acts in accordance with a lease provision (or house rules incorporated into a lease) that assures them verbal notice is adequate. Despite these policy considerations, we are obligated to enforce the plain language of the statute, which requires written notice. *See People v. Rau*, 2022 CO 3, ¶ 15.

majority's conclusion that the undisputed facts establish that Shorter Arms did not receive notice of the presence of mold in Anderson's apartment. In reaching that conclusion, I begin by expressly deciding an issue on which the majority made an assumption, but not a decision: Must the tenant personally provide written or electronic notice? Consistent with the district court and the majority's assumption, I conclude that a third party may provide such notice.

B. Third-Party Notice

¶ 57 The plain language of section 38-12-503 does not state that only the tenant can provide the landlord with the required notice. Rather, in a passively phrased clause that does not identify the actor, the General Assembly wrote that a landlord breaches the warranty of habitability if certain conditions exist, and "[t]he landlord has received reasonably complete written or electronic notice of the condition." § 38-12-503(2)(b).

¶ 58 The statute does not command that only the tenant can submit the notice. Indeed, to so interpret the statute would mean that a landlord could only be held liable for breaching the warranty of habitability if, after CDPHE inspected and provided written notice

of an uninhabitable condition, the tenant sent a duplicate notice to the landlord. I conclude the General Assembly did not intend such an illogical and unreasonable result. *Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 11 ("We will not adopt statutory constructions that defeat legislative intent or that lead to unreasonable or absurd results.").

¶ 59 Shorter Arms does not contest that a governmental agency may provide the required notice. It simply argues that CDPHE's notice was inadequate. The majority accepts this argument. In contrast, I conclude that there remain disputed issues of material fact concerning whether Shorter Arms had notice of mold conditions in Anderson's apartment.

C. Written Notice of Mold Issues

¶ 60 As Anderson notes, the district court's summary judgment order failed to acknowledge his claim for mold and water damage. Nor did the court consider whether CDPHE's May 2019 notice provided Shorter Arms with written notice of these issues.

¶ 61 I conclude that the May 2019 notice, coupled with Anderson's May 2020 notice, raised disputed issues of fact as to whether Anderson provided adequate notice of water damage and mold

conditions in his unit. Recall that in May 2019, CDPHE noted that three and a half square feet of Anderson's apartment ceiling had collapsed due to water damage. CDPHE also stated there was a "possible mold problem" that required action. In his May 2020 notice, Anderson wrote that the "[s]hower was never [caulked] and water has gotten behind the shower wall and pulled it from the wall." Anderson made similar allegations in his verified complaint:

> For years my [a]partment has flooded with [h]uman waste . . . .
>
> To date, my apartment and several other are condemnable conditions. My ceiling has caved in . . . . They took [four] years and me calling the health department before they even came to patch the ceiling, they didn't fix anything, they just tossed up drywall and closed the hole . . . .
>
> Water [d]amages . . . . I did what HUD said keep writing letters with everything on it. The last one was August 2020.
>
> Mold, I have now been in the hospital [three] times [due] to the mold in this building.

¶ 62 The majority concludes that the adequacy of the notice provided by CDPHE must be measured against the statutory mold provisions in effect in 2019. At that time, the statute provided that a landlord breached the warranty of habitability if the premises

were "unfit for human habitation," or "dangerous or hazardous to the tenant's life, health, or safety," and the landlord had received written notice of the condition and failed to cure it within a reasonable period. § 38-12-503(2), C.R.S. 2018.

¶ 63 But even assuming that the efficacy of the CDPHE notice should be measured under the version of the statute in effect when CDPHE sent the notice, a reasonable juror could conclude, based on the undisputed facts and reasonable inferences drawn therefrom, that Shorter Arms had notice of mold in Anderson's apartment that posed a danger to his health or safety. It has long been known that certain types of mold pose a danger to humans. Ctrs. for Disease Control & Prevention, *Basic Facts about Mold and Dampness*, https://perma.cc/7BCD-8BN3 (indicating that since 2004, medical experts have known that indoor exposure to mold and dampness is linked to upper respiratory issues in otherwise healthy people).

¶ 64 The majority discounts the impact of the 2019 notice because the checked boxes on the form indicated that "there was no 'follow-up needed'" and that "the problem was 'resolved at the time of inspection.'" *Supra* ¶ _____. But as previously noted, the form also

advised Shorter Arms of "a possible mold issue" that required action. At best, the checked boxes create disputed issues of fact. For example, were all problems resolved at the time of inspection, or was the presenting problem (the hole in the ceiling) addressed but a possible mold issue remained? The other checked box raised similar ambiguities because it responded "no" to the following question: "CDPHE follow-up needed?" This answer indicates CDPHE did not need to follow up, but it does not exclude the conclusion that Shorter Arms did, in fact, need to follow up to address the "possible mold issue." Applying the rules that govern the resolution of motions for summary judgment, these conflicting inferences must be drawn in favor of Anderson, not Shorter Arms.

¶ 65 Moreover, as the majority acknowledges, Anderson's 2020 written notice addressed "water behind the shower wall [that has] pulled it from the wall." These circumstances fall within the current statutory mold provision that is triggered by notice of "dampness, or . . . any other condition causing the residential premises to be damp, which condition, if not remedied, would materially interfere with the health or safety of the tenant." § 38-12-505(1)(a), C.R.S. 2022. Taken together, a reasonable juror could

find that the potential mold and water issues addressed in CDPHE's May 2019 notice and Anderson's May 2020 letter provided Shorter Arms with notice of the mold issues in Anderson's apartment.

¶ 66 Because I conclude that there remained disputed issues of material fact whether Shorter Arms had written notice of the mold and water issues and failed to timely address them as required by section 38-12-503, I conclude that the district court erred by entering summary judgment on this aspect of the warranty of habitability claim.

D. Conditions Not Posing Immediate Danger to Life or Health

¶ 67 Anderson contends that he provided adequate notice for five additional conditions: (1) ceiling in need of repair; (2) oven malfunctioning; (3) cracked entry door; (4) no seal around windows; and (5) shower rod falling. The district court concluded that the falling shower rod did not meet the definition of an uninhabitable condition, and no party challenges that conclusion on appeal. Therefore, I focus on conditions one through four.

¶ 68 The district court concluded that none of these four conditions materially interfered with a tenant's life, health, or safety, and

Anderson does not appeal this conclusion. Thus, Shorter Arms had ninety-six hours within which to commence repairs of these conditions. But, as the majority notes, that obligation was triggered only if Anderson "included with the notice permission to the landlord or to the landlord's authorized agent to enter the residential premises." § 38-12-503(2)(b)(II)); *see supra* ¶ ___. Noting that Anderson's May 2020 notice did not contain a contemporaneous grant of permission to enter, the majority concludes Shorter Arms was not required to address these conditions. In reaching this conclusion, the majority declines to address Anderson's argument that the permission to enter was satisfied by the terms of the lease, concluding that Anderson did not adequately preserve this issue. *Supra* ¶ ____.

¶ 69 Addressing preservation first, I respectfully disagree with my colleagues' decision not to address this issue. Anderson was without the benefit of counsel in the district court. We liberally construe a self-represented party's pleadings and submittals. *Adams Cnty. Hous. Auth. v. Panzlau*, 2022 COA 148, ¶ 8. While a self-represented party has the obligation to preserve issues for appeal, we must analyze the adequacy of their preservation by

viewing their filings liberally "so as to do substantial justice.'" *A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc.*, 622 P.2d 113, 114 (Colo. App. 1980) (citing C.R.C.P. 8(f)). And we must also bear in mind that for all parties, even those who have the benefit of counsel, we do not require talismanic language to preserve an issue for appeal. *In re Estate of Owens*, 2017 COA 53, ¶ 21 ("Where an issue was brought to the district court's attention and the court ruled on it, it is preserved for appellate review; no talismanic language is required . . . ."). Similarly, we do not require a party to cite to the trial court every possible fact that may support the preserved issue. *See, e.g.*, *Pisano v. Manning*, 2022 COA 22, ¶ 34.

¶ 70 Applying these standards, I conclude Anderson adequately preserved this issue. A copy of the parties' lease was included as an exhibit to a prior filing in this case by Shorter Arms in support of its argument that "inspecting an apartment is not a violation of law and is specifically permitted by the terms of Plaintiff's lease agreement." In addition, Anderson attached copies of numerous inspection notices from Shorter Arms by which it exercised its right to enter his unit. One of those notices even quoted the lease term by which Anderson had provided his advance permission for entry

into his apartment for "making reasonable repairs and periodic inspections."

¶ 71 Thus, the district court had the opportunity to examine the legal language Anderson relies on to support his argument that Shorter Arms already had his permission to make necessary repairs. In addition, in his affidavit, Anderson stated that "I have never denied entry of them to come and fix anything, they just never have. I have never denied them any of the numerous inspections they do." And in his response to the motion for summary judgment, Anderson argued that "whether [his] written, legal notice included permission for the landlord to enter the premises as required by statute are all disputed issues of material fact."

¶ 72 Because Anderson was representing himself, permission to enter was one of the two legal issues framed by section 38-12-503, and the exhibits before the district court included the operative lease language, I conclude Anderson provided the parties and the district court with adequate notice of this issue. *See Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶ 21 ("If a party raises an argument to such a degree that the court has the opportunity to

rule on it, that argument is preserved for appeal."). Finally, I also note that whether the lease provided sufficient notice is not dependent on the resolution of any disputed facts. Thus, we are in an equal position to the district court to decide whether the lease provided Shorter Arms with permission to enter Anderson's apartment to make the requested repairs. *See, e.g.*, *Indian Mountain Corp. v. Indian Mountain Metro. Dist.*, 2016 COA 118M, ¶ 34 ("[W]e are not bound by a district court's . . . construction of a document and are in the same position as a district court to interpret it."). Finally, both parties have fully briefed this issue. Thus, review of the adequacy of the permission to enter is not hampered by the absence of developed legal arguments from the parties. For all these reasons, I conclude the issue is preserved.

¶ 73 Turning to the merits, section 38-12-503(2)(b)(II) states that permission to enter must be "included with the notice." Notably, the legislature selected the language "with the notice" versus alternative words such as "in the notice" when crafting the statute. The preposition "with" is "used as a function word to indicate combination, accompaniment, presence, or addition." Merriam-Webster Dictionary, https://perma.cc/2NAB-8MPZ. Conversely,

the word "in," when used as a preposition, is "a function word to indicate inclusion, location, or position within limits." Merriam-Webster Dictionary, https://perma.cc/89A2-DQLW.

¶ 74 The plain meaning of section 38-12-503(2)(b)(II) therefore supports the conclusion that permission to enter must accompany or be provided in combination with the written notice, not necessarily "in" the notice itself. Despite Shorter Arms' contention that this interpretation renders the "with the notice" language superfluous because the legislature could have just written "included permission," I conclude Anderson's interpretation is consistent with the statutory language and avoids frustration of the statute's purpose to simplify and clarify the law governing rental units while encouraging tenants and landlords to maintain and improve tenant housing. § 38-12-501(2)(a)-(b).

¶ 75 The lease between Shorter Arms and Anderson included provisions that granted Shorter Arms permission to enter Anderson's unit to make repairs. Indeed, Shorter Arms repeatedly invoked this provision when it announced its decision to enter Anderson's unit for inspections or to make repairs. Thus, I find unpersuasive Shorter Arms' suggestions that a contemporaneous

grant of permission to enter was necessary to allow it to begin making the repairs or to stave off Anderson "run[ning] to the courthouse" to sue Shorter Arms for not attending to these uninhabitable conditions.

V. Conclusion

¶ 76 Because I conclude disputed issues of material fact remain with respect to whether Anderson complied with the notice requirement, I respectfully dissent.

¶ 77 As this case illustrates, reasonable minds can differ on precisely what type of written notice is required under section 38-12-503. As Chief Justice Pringle noted in *Blackwell*, we are obligated to render our best judgment applying the language that the General Assembly adopted when creating a claim for breach of the warranty of habitability. Both the majority and I have done so. But now, as then, the General Assembly has the authority to amend the statute should it desire to clarify the exact parameters of the notice requirement.