partnership with others, then it surely must follow that a tenant by the entirety who is seized with his or her spouse of the entire and undivided whole, cannot be convicted of the taking of the same.

Considering the unique elements and characteristics of a tenancy by the entirety as it is recognized in Pennsylvania, and the essential elements of the crimes of theft and burglary as established by the legislature in the Crimes Code, we conclude that the correct rules of law in Pennsylvania are:

1. A tenant by the entirety is licensed and privileged to enter property owned by the actor and his or her spouse as tenants by the entirety.

2. A tenant by the entirety cannot be convicted of the taking of movable property of another when that property is owned by the actor and his or her spouse as tenants by the entirety.

We, therefore, conclude that Peggy D. Wright cannot as a matter of law be convicted of the crime of burglary for entering the home which she owned as a tenant by the entirety with her spouse. We also conclude that Peggy D. Wright as a tenant by the entirety cannot be found guilty of the theft of property owned by herself and her husband as tenants by the entirety in the absence of exceptional curcumstances such as where the other tenant has a special property right to withhold them from the first tenant. No such exceptional circumstances exist in the case at bar and the defendant's demurrer was properly sustained as to the charge of theft of entireties' property.

Parenthetically, and in conclusion, we are constrained to observe that the primary issues here considered are probably unique in the annals of Pennsylvania Criminal Law, because the Criminal Justice System has traditionally refrained from becoming involved in disputes over marital property and has required the battling spouses to resolve their differences in the civil courts rather than expose one or the other to the penalties prescribed by the criminal law. With our Criminal Justice System overburdened as it is today, the two days taken in the trial of this case; the time expended in the research and preparation of this opinion; the time expended or to be expended by the District Attorney and defense attorney in the preparation of appellate briefs; and the time of the appellate

courts in ultimately disposing of these issues represents a very substantial expenditure of funds and time which the Commonwealth of Pennsylvania and the County of Fulton can ill afford. It would seem to us that the District Attorney of Fulton County would have been well advised to have researched with much greater care the law on tenants by the entirety before approving this private prosecution.

KING v. EBERLY, C. P. Franklin County Branch, Eq. Doc. Vol. 7, Page 119

Real Property - Implied Warranty of Habitability - Sale of House by Builder - Basement Flooding - Pleading - Necessity for Pleading Occurrences giving rise to Breach - Assumpsit, not Equity, Action.

1. A builder-vendor warrants, by implication, that a home he builds will be functional and habitable and in accordance with contemporary community standards.

2. Where a basement flooded on two occasions to about four feet rendering the water system inoperable, breach of implied warranty of habitability is properly raised where plaintiffs plead the occurrences giving rise to the breach, such as when and under what conditions the water appeared and the effect the water had on the habitability of the house.

3. Actions will be in law for damages and not equity for a deed recission where breach of an implied warranty of habitability is raised by purchaser of a house from the builder-vendor.

George E. Wenger, Jr., Esq., Attorney for Plaintiffs

David S. Dickey, Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P. J., June 28, 1977:

Robert D. King and Gail I. King, husband and wife, (Kings), filed their complaint against Ronald E. Eberly and Nancy L. Eberly, husband and wife, (Eberlys) in equity to rescind a deed on the ground that Eberlys breached an implied warranty of Habitability. The Kings purchased a house built by Eberlys on a lot in a development and after Kings moved in, on two occasions, water flooded the cellar to a depth of about four feet rendering the water system inoperable. Because of

the periods of high water, Kings say the home has no market value and cannot be sold.

The Eberlys filed preliminary objections; a demurrer and a motion for more specific pleading. Eberlys argue that Kings have failed to state a cause of action in equity and even if a cause of action was stated, the complaint is not specific enough to allege a breach of an implied warrant of habitability. Pennsylvania has recently become one of a number of growing states recognizing an implied warranty of habitability in the sale of a new home by the builder-vendor. In *Elderkin v. Gaster*, 447 Pa. 118, 287 A.2d 771 (1972), our Supreme Court held that where the water supply was not potable, as to the builder-vendor of a new house, the doctrine of caveat emptor should not apply because as a matter of public policy, it is more reasonable for the builder-vendor to bear the risks of defects in the house. The Court found that the lack of good drinking water rendered the house unfit for habitation and therefore there had been a breach of an implied warranty of habitability. While the *Elderkin* doctrine might be limited to the facts in that case, the Court made a significant statement when it said:

> We have concluded that one who purchases a development house . . . justifiably relies on the skill of the developer that the house will be a suitable living unit. Not only does the developer hold himself out as having the necessary expertise with which to produce an adequate dwelling, but he has by far the better opportunity to examine the suitability of the home site to determine what measures should be taken to provide a home fit for habitation. As between the builder-vendor and the vendee, the position of the former, even though he exercises reasonable care, dictates that he bear the risk that a home he has built will be functional and habitable in accordance with contemporary community standards. We thus hold that the builder-vendor impliedly warrants that the home he has built and is selling is constructed in a reasonably workman-like manner and that it is fit for the purpose intended - habitation. *Id.* at 123.

We believe that the Eberlys are builder-vendors as outlined in *Elderkin* and that therefore the Kings could have a cause of action against them based upon the breach of an implied warranty of habitability.

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(a) Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere. Inst. I. i. 3."

— Sir William Blackstone, Commentaries on the Laws of England, "Introduction — Of the Study, Nature, and Extent of the Laws of England," Sec. II, p. 40.

SHERIFF'S SALES, cont.

to an iron pin at the corner of Lot No. 10, Section D; thence by the same north 82 degrees 51 minutes West 159.21 feet to an iron pin on the easterly side of Monta Vista Drive; thence with the same on a curve to the left having a radius of 225.0 feet; an angle of 71 degrees 06 minutes, and a distance of 69.21 feet to a point; thence north 13 degrees 01 minutes west 14.95 feet to an iron pin, the place of beginning. Being Lot No. 9, Section D, on a plan of lots laid out for Monta Vista Realty Company, Inc., by John H. McClellan R.S. dated March 10, 1969 and recorded in Franklin County Plat Volume 288A Page 118.

TRACT NO. 2 BEGINNING at an iron pin on the easterly side of Monta Vista Drive at the southwest corner of Lot No. 9, Section D; thence by the same south 82 degrees 51 minutes East 159.2 feet to an iron pin on line of lands of Baumgardner; thence by the same, South 19 degrees 00 minutes west 120.0 feet to an iron pin at the northwest corner of Lot No. 11, Section D; thence by the same, north 73 degrees 35 minutes west 152.05 feet to an iron pin on the easterly side of Monta Vsita Drive; thence by the same on a curve to the left having a radius of 225.0 feet, an angle of 71 degrees 06 minutes, a curve of 261.65 feet, a distance of 95.0 feet to an iron pin, the place of beginning. Being Lot No. 10, Section D on a plan of lots known as Long Meadow Acres Estates and laid out for Monta Vista Realty Company, Inc., by John H. McClellan, R.S. dated March 10, 1969 and recorded in Franklin County Plat Volume 288A, Page 118.

Being the same real estate conveyed to the said Ernest L. Wells and Bonnie J. Wells, his wife, by deed of George M. B. Gillen, and Barbara J. Gillen, his wife, dated February 21, 1973 and recorded in Franklin County Deed Book Vol. 684, Page 393.

Further, being for Tract No. 1 herein all of the right title and interest in and to Tract No. 1 as conveyed by Deed of Monta Vista Realty Company, Inc., dated February 24, 1973 to the said Ernest L. Wells and Bonnie J. Wells, his wife, said deed being recorded in Franklin County Deed Book Vol. 684, Page 389.

Said real estate is under and subject to certain restrictions of record which appear in the chain of title to said real estate.

And having erected thereon a single family dwelling of Split Foyer design, having a concrete block foundaton. Exterior walls are of frame construction, lower level of brick and uper of bevel sising, roof of asphalt shingles. Interior walls are of dry wall and is heated by Electric, is air conditioned and has a fire place.

Seized and taken in Execution as the real estate of Ernest L. Wells and Bonnie J. Wells, his wife, under Judgement No. A.D 1977-302.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additonal costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay $20.00 for preparation, acknowlegement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on September 7, 1977, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before September 21, 1977, distribution will be made in accord therewith.

July 28, 1977

FRANK H. BENDER, Sheriff of Franklin County, Pennsylvania

(8-5, 8-12, 8-19)

LEGAL NOTICES

Please Note: Legal notices are published in 6-point type, exactly as worded by the advertiser. Neither the Journal nor the printer will assume any responsibility to edit, make spelling corrections, or eliminate errors in grammar. All legal notices must be submitted in typewritten form, and will be printed using the spelling, punctuation and vocabulary of the copy as submitted. The Journal also reserves the right to reject illegible or other inappropriate copy.

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BREACH OF IMPLIED WARRANT OF HABITABILITY

In *Elderkin*, the Court said that the builder-vendor warrants that a home he builds will be functional and habitable and in accordance with contemporary community standards. Our question is whether a basement filling with water up to four feet on two separate occasions constitutes a breach of the warranty? In a case note on *Elderkin* in Vol. 47 *Temple Law Quarterly*, at 172 (1973), the author suggests that Elderkin can be read to extend the coverage of the warranty beyond the structural defects in the house itself.

In *Theis v. Heuer*, , Indiana , 280 N.E. 2d 300 (1972), the court applied the warranty to cover three to four inches of water and sewerage that came into the house during heavy rains. , In *Hanavan v. Dye*, 4 Ill. App. 3rd 576, 281 N.E. 2d 398 (App. Ct. 3rd Dist., 1972), the court permitted a recovery when water covered the first floor of the plaintiffs' home to about ankle depth, about 25 times. In *Elmore v. Blume*, 31 Ind. App. 3rd 643, 344 N.E. 2d 431 (1975), damages were awarded to the plaintiff for his expenses in correcting the defects that cuased water to enter his basement.

In *Waggoner v. Midwestern Development, Inc.*, 83 S.D. 57, 154 N.W. 2d 803 (S.D. 1967), the South Dakota Court said that the test of whether a house is defective, for the purpose of the implied warranty of habitability, is one of reasonableness in the construction of a house. There a lower court dismissed a claim for damages on the theory of breach of implied warranty of habitability, but it was reinstated on appeal, where there was a seepage of water into the house after several heavy rains. It is not unreasonable to say that contemporary standards require that a house be built so that the basement does not flood to about four feet rendering the water system inoperable. On these occasions, at least, the house would not be habitable. The breach of implied warranty of habitability has been properly raised and must be decided at trial.

ALLEGING ACTUAL DEFECTS IN CONSTRUCTION

Remembering that the complaint is based upon an alleged breach of implied warranty of habitability, the Eberlys, nevertheless, contend that before Kings can state a cause of action, they must allege the actual defects in construction. It is Eberlys' contention that the mere allegation that water comes

in the basement is not sufficient. Eberlys cite *Skretvedt v. The Maple Corp.*, 72 D.&C. 2d 637 at 639 (Com. Pl. Del. Co. 1973), for this contention. This is an incorrect reading of that case because the court, in saying that the plaintiff must be more specific, was considering the second of two plaintiffs' causes of action. The first, in assumpsit, was based on an implied warranty; the second, in trespass, was based on the defendant's negligent construction of the home. It was specifically in regard to plaintiffs' allegation in the second count that the court quite naturally required the plaintiffs to allege the defendant's negligent acts.

Requiring a plaintiff to allege specific acts of negligence in a suit brought for the breach of an implied warranty is inconsistent with the principles of pleading in Pennsylvania. The implied warranty of habitability imposes liability without regard to the defendant's fault or negligence.[1]

In *Skretvedt* the court did say though that in alleging a breach of the implied warrant of habitability, the plaintiffs did not set forth with precision the manner in which the defendant breached his warranty or in what way the house was not fit for habitation, and the Court concluded that a mere assertion of a breached warranty does not meet the requirements of good pleading and is too vague and evasive.

The two general principles of pleading must be kept in mind. The plaintiffs must plead the operative facts in any cause of action; that is those facts that give rise to the legal rights asserted. *3 Stand. Pa. Prac.*, Chap. 11, sec. 42 (pp. 142-1245); *Goodrich-Amram, Procedural Rules Service*, sec. 1019.1 (pp. 109-110). Plaintiffs must also adequately inform the defendant as to the issues he will be required to meet. *See Goodrich-Amram, 2d, supra.* We conclude the Kings are required to plead the manner in which the breach occurred, but they are not required to allege the nature of the defects or negligent acts of the defendant which caused the breach. This is true because defendant's liability is strict liability and the breach occurs when the defect appears. Reasonably interpreted, the *Skretvedt* court was saying that a plaintiff must plead the occurrences giving rise to the breach, that is when and under what conditions the water appeared and the effect the

1. See e.g., *Waggoner v. Midwestern Development, Inc., supra.*, and *F7S. Construction Co. v. Bernbe*, 322 F.2d 782 (10th Cir. 1963). Among the commentators, see Prosser, *Torts, 4th ed.*, sec. 95, p. 639: Frumer and Friedman, 2 *Products Liability*, sec. 16A(4) (i), for a discussion of this liability.

water had on the habitability of the house. This should be sufficient. This is supported by the factors that caused the court in *Elderkin* to imply this warranty, the builder's superior knowledge of site and construction of the house.

To illustrate what we said above, that it is important to allege the circumstances surrounding these occurrences, we could envision that an unusually hard rain in the nature of the long to be remembered Agnes, which might fill a basement with water, would not constitute a breach of the implied warranty of habitability.

IS THIS A CASE FOR EQUITABLE RELIEF?

The Eberlys contend that there is an adequate remedy at law. The Kings, on the other hand, allege that the house has no market value and for that reason rescission is the appropriate remedy.

The difficulty with accepting the Kings' view is that if in the trial of an equity action, they did show that there was no value, then rescission seems workable. If, on the other hand, Kings were not able to establish that their property had no value, but that it had some value, then the action in equity for rescission would be inappropriate.

However, in assumpsit, even if the Kings were able to show that the house had no value, there is an adequate remedy at law in the form of money damages. If the proofs showed the house had some value (and it is difficult for us to imagine it has no value at all) then Kings would again be able to recover money damages.

Other jurisdictions have held that the remedy is in damages to cover a plaintiff's losses. Among these are *Glisan v. Smolenske*, 153 Colo. 274, 387 A. 2d 260 (1963), *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P. 2d 698 (1966).

We, therefore, conclude that the proper remedy is an action at law for damages and the case will be transferred to the law side of the court.

IS THE COMPLAINT SUFFICIENTLY SPECIFIC?

The complaint will have to be amended. At one point, the pleading of the mortgage interest, Kings have accepted

defendants' objection and agree to correct by filing an amended complaint. We have discussed before what allegations are necessary to state a cause of action for the breach of an implied warranty of habitability. On these two points, therefore, the defendants' motion for more specific pleading will be granted. We do not think, however, that the Kings must plead the source of the water and the specific defects in workmanship or the acts of negligence.

ORDER OF COURT

NOW, June 28, 1977, the preliminary objections are granted and denied in accordance with the foregoing opinion and the plaintiffs are given twenty (20) days from this date in which to file an amended complaint.

The case is transferred to the law side of the Court for further proceedings.

AMERICAN STATES INSURANCE COMPANY v. BOROUGH OF GREENCASTLE, et al., C. P. Franklin County Branch, Civil Action - Law, No. 125 November Term, 1976

Insurance Policy - Ambiguity - "Occurrence"

1. An insurance policy which defines an occurrence as an accident is ambiguous insofar as the term "occurrence" in its usual and ordinary sense is broader than the term "accident".

2. If an insurance policy is reasonably susceptible to two interpretations, it is to be considered in favor of the insured in order not to defeat, without plain necessity, the claim of indemnity which it was the insured's object to obtain.

3. The term "accident" in a policy of insurance includes negligent acts, unless the actor had knowledge that damage was likely to occur or intended that it should.

Denis M. DiLoreto, Esq. and
Edward I. Steckel, Esq., Attorneys for Respondent,
Donald E. Barnhart, Jr.

James W. Evans, Esq., Attorney for Petitioner

Rudolf M. Wertime, Esq. and
George F. Douglas, Esq., Attorneys for Respondent,
Borough of Greencastle

OPINION AND ORDER

EPPINGER, P.J., June 29, 1977:

American States Insurance Company (Insurance Company), in this declaratory judgment proceeding, asked that it be exonerated from possible liability in an action in which Donald E. Barnhart, Jr. (Barnhart), has sued the Borough of Greencastle (Borough) and three of its police officers. Barnhart was involved in an episode in a hotel, the police were called, they declined to enter the hotel and stop it, and ultimately Barnhart was shot and seriously injured.

The Insurance Company insures the Borough and under the terms of the policy, it is obligated "... to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... bodily injury or ... property damages to which this insurance applied, caused by an occurrence ... " The company has the right and duty to defend any suit against the Borough seeking damages which are covered by the policy. This action was brought preliminarily to the trial of the action brought by Barnhart against the Borough to determine the Insurance Company's obligation to defend the policy. The policy itself defines occurrence as an *accident*, including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (Emphasis ours.)

The Insurance Company's position is that this was not an occurrence because it was not an accident, apparently arguing that accident has a limited meaning which includes only those events which occur and could not be reasonably expected, so that where the police were notified that there was a gun in play, it could reasonably be expected that someone would be shot.

DEFINITION OF ACCIDENT

While occurrence is defined in the policy, accident is not. In *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 192 A.2d 682