ever, to such limitations and restrictions as shall be established herein or otherwise shall be established by this Township, from time to time.

Bloom's argument is that he is not required to connect because his house, built on a slab with the sewer outlet away from the main, is five and one-half feet below the lateral and therefore is not accessible to the sewer. He discounts the feasibility of a pumping system to elevate his sewage because, he says, they haven't worked in other situations, resulting in back-up of sewage.

While a tenable argument could be made that is is the property which must be accessible to the sewage system and that if it is the main building that must be connected, we will examine the accessibility of the house. In this connection defense counsel cited no cases specifically enumerating factors (e.g. lack of gravity flow) which would render a structure inaccessible to a sewage system, nor have we. However, it seems right to liken this case to those in which property owners challenge the assessment, claiming they are not benefitted by a municipal sewage system because of circumstances peculiar to their situation.

We conclude that Bloom's property is accessible to the sewer system. The fact that he must use a pump to connect does not render it inaccessible. *Ellport Borough v. Hoque*, 34 D & C 2d 439 (C.P. Lawrence, 1964); *Chippewa Township Sanitary Authority v. Burget*, 72 D & C 2d 727 (C.P. Beaver, 1969). See also *Appeal of Jacob*, 13 Chester 55 (1964). In *Chippewa*, as here, the first floor of the owner's home was lower than the sewer line and he had to install a pump to connect to it. The court upheld the assessment saying the property was benefitted even though the owner had to install and maintain a pump himself.

We recognize that this is a criminal case and that the burden of the Commonwealth is to prove the case beyond a reasonable doubt. We find the Commonwealth has met that burden and that the evidence introduced by the defendant is not sufficient to overcome its effect.

As an alternative argument, Bloom seems to contend that even if he is required to hook up to the system the Authority should be required to install and maintain the pump and that until that is done, he cannot be found guilty of a violation of the ordinance.

"Sewer system" is defined in the ordinance to include,

among other things, "all facilities...for...pumping...sanitary sewage... *owned by the Authority.*" See Ordinance 54, Sec. 1.01L.(Emphasis supplied.) The pump required in Bloom's installation will not be owned by the Authority but by Bloom. He is required to see that his sewage is pumped to the Authority system. According to Sec. 3.05 of the Ordinance, all costs and expenses of connection of a building sewer to a sewer are to be borne by the owner of the building.

ORDER OF COURT

August 31, 1981, the Defendant H. Richard Bloom is found guilty of two counts of failing to connect to a sewer as charged and is sentenced to pay the costs of prosecution, the costs of appeal and a fine of $25.00 in each case.

GALLAGHER v. WHITE ROCK, INC. C.P. Franklin County Branch, A.D. 1980 - 323

Tresspass and Assumpsit - New Home - Implied Warranty of Habitability - Damages

1. A builder - vendor impliedly warrants that a home he has built and is selling is constructed in a reasonably workmanlike manner and that it is fit for the purpose intended - habitation.

2. Where plaintiffs allege various defects in the roof of their new home, but do not allege such defects have caused water to come into the house, there is no breach of implied warranty of habitability.

3. A breach of the implied warranty of habitability requires proof of a major impediment to habitation.

4. A defect posing a major threat to health and safety is an impediment to habitation.

5. Plaintiffs are not entitled to recover architects fees incurred in ascertaining the extent of alleged defects.

6. Plaintiffs may claim damages for annoyance, inconvenience and discomfort in trespass, but not in assumpsit.

John F. Nelson, Esq., Attorney for Defendant

Stephen E. Patterson, Esq., Attorney for Plaintiffs

OPINION AND ORDER

EPPINGER, P.J., August 3, 1981:

At a late date in these proceedings the parties stipulated that the plaintiffs, purchasers of a house from defendant builder-developer, could file an amended complaint in a suit arising out of defects in the construction of the house and that the defendant could respond. The defendant filed preliminary objections which are now before us.

The defects include warped and delamenated plywood sheathing on the roof, insufficient roof support, failure to open the ridge vent, undersized rafters and the improper installation of vertical supports contributing to ceiling drywall separation. Besides the roof defects, it is alleged the heat pump operates with a humming noise and burning smell and fails to sufficiently heat and cool the dwelling. There are no allegations that the roof defects have caused water to come into the house. There are allegations of inconvenience, discomfort and annoyance during the period of repair.

Defendant demurrers to that part of plaintiffs' Count 1 which is founded on an implied warranty of habitability. We sustain the demurrer.

In 1972 our Supreme Court held in *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771, that a builder-vendor "impliedly warrants that the home he has built and is selling is constructed in a reasonably workmanlike manner, and that it is fit for the purpose intended--habitation." 447 Pa. at 128, 288 A.2d at 777.

But because the parameters of the implied warranty have not been clearly defined by Pennsylvania courts, what constitutes a breach is uncertain. Implied warranty liability in other jurisdictions has encompassed various non-trivial defects in workmanship and materials: water seepage into basement; foundation damage due to unstable soil and interior discharge of sewage. *See* 47 Temple L.Q. 172, 179 n.50 (1973) (citing cases).

In 1977 an Illinois appellate court outlined the concept of habitability in these words:

> The primary function of a new home is to shelter its inhabitants from the elements. If a new home does not keep out the elements because of a substantial defect of construction, such a home is not habitable within the meaning of the

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EDITOR'S NOTE:

If all goes well, Bound Vol. 4 should be ready for distribution in about six weeks. Anyone within Franklin County, Pennsylvania, who wants a copy and, 1) is not a subscriber to the advance sheets, or 2) wants an extra copy, please place orders with the managing editor, Ken Hankins, at 164 Lincoln Way East, Chambersburg, PA 17201 (Phone 263-9773).

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We are setting an early cutoff date on orders this year, so that we do not have to over-estimate needs. It will be October 30, 1981. If we have some extras after that, of course, they will still be for sale, but I do not want to get in a position of having to destroy copies in order to save storage space. Printing and especially binding expenses, too, must be kept down by conservative measures.

> implied warranty of habitability. Another function of a new home is to provide its inhabitants with a reasonably safe place to live, without fear of injury to person, health, safety or property. If a new home is not structurally sound because of a substantial defect of construction, such a home is not habitable within the meaning of the implied warranty of habitability. If a new home is not aesthetically satisfying because of a defect of construction, such a defect should not be considered as making the home uninhabitable. There are, in our opinion, the basic parameters of habitability."

Goggin v. Fox Valley Construction Corp., 48 Ill. App.3d 103, 365 N.E.2d 509 (First District, 1977) (cites ommitted). [1]

In *Banville v. Huckins*, Me. , 407 A.2d 294 (1979), concerning the implied warranty of habitability, the Supreme Judicial Court of Maine said:

> Habitability is a term difficult of precise definition. Every minor defect in a new home does not necessarily make the structure uninhabitable. On the other hand, the warranty should not be defined in such strict terms as to require that the structure be deemed unlivable. Thus, we are required to look at each situation and to analyze the extent, or magnitude, of the defect and determine whether it resulted in unsuitability for habitation. . . . Whether or not a particular defect renders the dwelling "unsuitable" necessarily requires an inquiry as to whether a reasonable person faced with such a defect would be warranted in concluding that a major impediment to habitation existed.

In *Banville*, the home's basement area, planned and designed for family occupancy, was periodically flooded with ten inches of water. The court found this situation to fall within its concept of uninhabitability.[2]

Our Supreme Court discussed a breach of the implied

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[1] The implied warranty of habitability now recognized in Illinois is less limited in scope. *See Petersen v. Hubschman Construction Co., Inc.*, 76 Ill.2d 45, 389 N.E.2d 1154 (1979). *See also Morrissy, The Implied Warranty of Habitability: A Step Toward Protecting Home Buyers*, 23 Trial Lawyer's Guide, No. 2, p. 137 (1979).

[2] We reached a similar conclusion in *King v. Eberly*, 1 Franklin Co. L.J. 37 (1977), where on occasions water flooded the cellar to a depth of about four feet, rendering the water system inoperable.

warranty of habitability relating to residential leases in *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979), saying that the breach had to be the result of a defect which would prevent the use of the dwelling as a place of habitation. The court said that at a minimum the premises had to be safe and sanitary, but not perfect or aesthetically pleasing.

We do not believe the Gallaghers have set forth a cause of action for breach of warranty of habitability. There are no allegations of a defect which poses a substantial threat to their health and safety; that the home is unsafe or unsanitary and therefore unfit to live in or that the defects in the roof have caused it to function improperly to let the elements in. We find no allegation constituting, if proven, a major impediment to habitation.

The test of whether the house is defective, for the purposes of the implied warranty of habitability, is one of reasonableness in the construction of the house. We conclude those defects alleged are not of such magnitude to give rise to the strict liability which grows out of a breach of this warranty. So we will sustain the demurrer to this count.

Plaintiffs also ask for fees paid to an architect to ascertain the extent of the alleged defects in their dwelling, and defendant has moved to strike this claim. We are referred to two cases. Plaintiffs say they are entitled to recover this expense, relying on *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (3d Cir., 1970). Defendant says they are not, citing *Becker v. Borough of Schuylkill Haven*, 200 Pa. Super. 305, 189 A.2d 764 (1963). The latter holds that plaintiffs cannot recover the trouble and expense of establishing his rights. In *Neville*, a plaintiff was held to be entitled to recover expenses of technical research in determining its liability to customers who had bought a defective product from plaintiff manufactured by defendant. Thus, this expenditure was not one to establish plaintiff's right against defendant. Since the rule in *Neville* has no application in our case, we hold plaintiffs are not entitled to recover the architect's fees. Accordingly paragraph 16(a) is stricken.

Included in the complaint is a claim for damages due to annoyance, inconvenience and discomfort. The claim appears in the assumpsit count, in paragraph 16(e), and by incorporation in the trespass count. The defendant has moved to strike paragraph 16(e), and we grant the motion in the assumpsit count because, in the time impressed upon us to decide these matters and still permit the case to go to trial this month, we could find no authority for the recovery nor were we persuaded

by the argument that the reasoning of *Siegel v. Struble Brothers, Inc.*, 150 Pa. Super. 343, 28 A.2d 352 (1942), may be extended to apply to such a claim in assumpsit. However, there is authority to recover this type of damage in trespass. *Dussell v. Kaufman Construction Co.*, 398 Pa. 369, 157 A.2d 740 (1960).

Defendant's motion for more specific pleading with respect to the claim for negligent installation of the heat pump is overruled.

ORDER OF COURT

July 31, 1981, the defendant's motions to strike paragraph 16(a) and paragraph 16(e), the latter only as to the assumpsit count, are granted and the demurrer is sustained. All other preliminary objections are overruled.

Since the demurrer is sustained on the ground that there are no allegations in the complaint that would bring the plaintiff's claim within the implied warranty of habitability and the court is without knowledge whether such facts exist, the plaintiffs are granted 20 days in which to file a second amended complaint. If plaintiffs desire to proceed without filing a second amended complaint they may file a statement expressing that intention foreshortening the 20 day period and the defendant may then file an answer.

COMMONWEALTH v. SEIDERS, C.P. C.D. Fulton County Branch, No. 53 of 1980

Criminal Law - Post Verdict Motions - Evidence - Out-of-Court Statement

1. Out-of-Court statements of one conspirator are admissible against another conspirator, providing the statements were made during the existance of the conspiracy and in furtherance thereof.

2. A charge of conspiracy need not be alleged in order to admit in evidence out of court statements by a co-conspirator.

3. The commission of a crime generally terminates the conspiracy; however, the conspiracy is deemed to continue until the object of the conspiracy is totally fulfilled.