repairs to the tenant is not clearly precluded under Pennsylvania law.

Forest N. Myers, Esq., Counsel for Plaintiff

David Woodward, Esq., of Legal Services, Inc., Counsel for Defendants

OPINION AND ORDER

KELLER, J., November 30, 1979:

Defendants' preliminary objections to the answer to new matter and counterclaim are in the nature of demurrers to the answers to new matter and counterclaim counts I, II, III, and V. Defendants request the Court to adjudge the plaintiff's answers insufficient as a matter of law and enter judgment in favor of defendants and against the plaintiff as to defendants' defense of breach of implied warranty of habitability raised in new matter, and for the specific relief prayed for in counterclaim counts I, II, III and V.

Preliminary objections in the nature of a demurrer should be sustained only where it appears with certainty that the law will not permit recovery. *Papieves v. Lawrence*, 437 Pa. 373, 263 A. 2d 118 (1970); *London v. Kingley*, 368 Pa. 109, 81 A. 2d 870 (1951). Defendants assert in new matter that the oral lease agreement between defendants and plaintiff contained an implied warranty of habitability, and that this warranty was breached by the plaintiff's failure to remedy, after notice and reasonable opportunity to repair, specific defects in the dwellings structure and accommodations which rendered the dwelling "unfit for human occupancy throughout defendants' occupancy." (Answer, New Matter, paragraph 17.) Plaintiff's denial of the existence of the implied warranty of habitability cannot operate as a legal defense in view of the recent decisions in *Pugh v. Holmes*, Pa. Super. , 384 A. 2d 1237 (1978), aff'd Pa. , 405 A. 2d 897 (1979); *Fair v. Negley*, Pa. Super. , 390 A. 2d 240 (1978); *Beaseley v. Freedman*, Pa. Super. , 389 A. 2d 1087 (1978). Plaintiff's denials of the breach of the warranty, of the existence of the alleged defects, of the alleged "uninhabitable" condition of the premises, and of notice of any defects raise significant factual questions which may, under current case law, establish a defense to the breach raised by defendants in new matter. Plaintiff also asserts an agreement between the parties which shifted the cost of repairs to defendants. Such an agreement is not clearly precluded under Pennsylvania law, and its existence, if proven, could affect the outcome of this

action. See, *Fair v. Negley*, Pa. Super. , 390 A. 2d 240, 246 (1978) (Spaeth, J., concurring). Therefore, it would not be proper for the Court to sustain defendants' preliminary objection to plaintiff's answer to new matter.

The preliminary objections to plaintiff's answer to counterclaims counts I, II, III and V incorporate by reference the previously stated allegations and raise additional claims based upon the disputed facts of the rental agreement between the parties, the condition of the premises, and, in count V, plaintiff's actions and conduct toward defendants on specific dates in time. The Court cannot sustain defendants' preliminary objections to plaintiff's answer to counterclaims counts I, II, III and V. Plaintiff's denial of the existence of an implied warranty of habitability in the lease agreement between the parties, although in error, does not operate to preclude a defense of denial on the necessary breach of the warranty, and does not preclude a defense to the counterclaims by way of denial of the facts establishing the claims or assertion of additional convenants between the parties.

ORDER OF COURT

NOW, this 30th day of November, 1979, the defendants' preliminary objections are dismissed.

Exceptions are granted the defendants.

COMMONWEALTH v. SCHILDT, C.P. Franklin County Branch, No. 488 of 1978

Criminal Action - Reference to Prior Crime - Motion for Mistrial

1. An isolated and unsolicited remark as to defendant's prior criminal record by a witness for the Commonwealth which is followed by cautionary instructions by the court does not constitute grounds for a mistrial.

District Attorney's Office

Public Defender's Office

OPINION AND ORDER

EPPINGER, P.J., November 28, 1979:

Edwin Schildt, the defendant, was involved in a fight. He and his friend Ronald Green were on one side and

Richard Kuhn, who suffered a broken nose and jaw, was on the other. Schildt and Green were tried and convicted by a jury of simple assault. While several items were included in Schildt's motions for a new trial and in arrest of judgment, only one issue was submitted to the court.

Kuhn said that after the fight he was getting up and trying to look over to Schildt and told him another person was going to call the police. When asked what happened next to the defendant, the witness replied: "Well, then Eddie (Edwin Schildt) said that they are going to press charges and they'll come back and get me on account of my pig wife. If I have to go back to jail -- I just got out of the state penitentiary." Immediately, at side bar, Schildt's counsel objected for the reason that the answer was not responsive and alluded to an earlier crime and moved for a mistrial.

The court refused the motion but admonished the jury not to consider anything said by Kuhn which would suggest that Schildt had a prior record.

Kuhn's statement, as the record indicates, was unresponsive. It was not elicited by the District Attorney in an attempt to establish prior criminal record. It was an isolated remark, and after the incident the trial continued for several hours and through the testimony of several other witnesses.

In *Commonwealth v. Markle*, 245 Pa. Super 108, 369 A. 2d 317 (1976), a witness who was asked how long he knew the defendant responded by saying he had seen the defendant before May 15th when they were in Graterford (a State Correctional Institution), but that he just passed him once or twice. There, too, defendant moved for a new trial. The trial court denied the motion with cautionary instructions, and on appeal it was found the statement did not prejudice defendant's trial. The results were similar in *Commonwealth v. Whitman*, 252 Pa. Super 66, 380 A. 2d 1284 (1977) and *Commonwealth v. Rhodes*, 250 Pa. Super 210, 378 A. 2d 901 (1977). In both of these cases witnesses made unsolicited references to the defendant's prison record. In *Whitman* the defendant rejected the court's offer of cautionary instructions and in *Rhodes* such instructions were given. In both cases the Superior Court affirmed the convictions and, noting that the witnesses' remarks were not solicited by the District Attorney, held that the defendants were not denied fair trials.

ORDER OF COURT

November 28, 1979, the motions for new trial and in

arrest of judgment are denied. It is ordered that the Franklin County Probation Department prepare a pre-sentence investigation report and that the defendant appear before the court for sentencing on January 30, 1979, at 9:00 o'clock a.m., Court Room No. 1, Court House, Chambersburg, Pennsylvania.

COMMONWEALTH v. SHORT, C.P. Franklin County Branch, No. 70 of 1979

Criminal Law - Aggravated Assault - Points for Charge

1. In order to convict of an assault where no injury is sustained, an attempt must be shown and this requires the showing of an intent to cause bodily harm.

2. An inference of an intent to inflict serious bodily injury can be made where a person caused a car to accelerate with a police officer standing in front of it.

3. The Court need not read defendant's points for charge verbatim, so long as the issues raised are adequately, accurately and clearly presented to the jury for their consideration.

John F. Nelson, Esq., Assistant District Attorney, Attorney for the Commonwealth

Richard L. Shoap, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., September 18, 1979:

The defendant, Alan Ray Short, was a fugitive. He was being actively pursued by the Pennsylvania State Police who learned that he might be in the Barclay Village area of Chambersburg. Cpl. Farrell and Tpr. Lingenfelter in going to that area noticed a car approaching them and Tpr. Lingenfelter indentified one of the occupants as Short. Farrell got out of the police car, stood in the center of the lane in which the car was traveling and signaled the car to stop by extending his arm palm outward.

The vehicle was operated by another, but Short was an