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PLJ

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Opinions

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James C. Clifton, Charles and Lorrie Cranor, husband and wife, and Roy Simmons and Mary Lisa Meier, husband and wife v. Allegheny County

Kenneth Pierce and Stephanie Beechaum v. Allegheny County, Pennsylvania, Daniel Onorato and Deborah Bunn

Property Assessment—Multi-District Reassessment Plan

1. On remand from the Pennsylvania Supreme Court, trial court was directed to determine Allegheny County's progress in executing a countywide property reassessment program and to set a realistic timeframe for its completion.

2. Trial court declined to order temporary assessment pending implementation of final assessment as the interests of justice would not be served by implementing an assessment that does not meet the standards of the International Association of Assessing Officers ("IAAO").

3. The court lacks confidence that a reassessment will be completed by 2011 for use in 2012 if it simply orders Allegheny County to complete a comprehensive reassessment of all properties within that timeframe where the County fails to present evidence (1) that its Chief Assessment Officer is developing a detailed comprehensive reassessment plan showing the work that will be done month-by-month; (2) that the money is available to pay for the reassessment proposed by the Chief Assessment Officer; and (3) that the reassessment will be completed no later than a specific date.

4. The court will devise and adopt a reassessment plan where the County fails to present evidence (1) that its Chief Assessment Officer is developing a detailed comprehensive reassessment plan showing the work that will be done month-by-month; (2) that the money is available to pay for the reassessment proposed by the Chief Assessment Officer; and (3) that the reassessment will be completed no later than a specific date.

5. Under the Court-devised reassessment plan, Allegheny County shall be divided into four Assessment Districts. An entire school district and entire municipality must be placed in the same Assessment District.

6. Each Assessment District shall have the same number of taxable properties except that the requirement that each district shall include 100% of the properties of a municipality or school district trumps the requirement that each district have approximately the same number of properties.

7. The reassessment of all properties within Allegheny County shall be completed over a 4 year period under the court-devised reassessment plan, with roughly 25% of the properties within the county being reassessed each year.

8. The assessment of properties within each of the four Assessment Districts shall be completed in accordance with the schedule established by the Court for each district and shall include sales through specified dates or later, if feasible. For purposes of school district and municipal real property taxes, the assessment for each district shall be the base year assessment for the period specified by the Court.

9. Until 2014, Allegheny County real estate taxes shall be based on existing 2002 base year assessment with one exception: prior to 2014 Allegheny County real estate taxes shall be based on any new assessment in which the assessed value of the property is less than the 2002 base year assessment.

10. For 2014, all taxable properties within Allegheny County shall be assessed at 2014 fair market values and Allegheny County taxes shall be based on these 2014 assessed values.

11. Allegheny County's Chief Assessment Officer shall be required to certify the assessment rolls for each Assessment District pursuant to the court-ordered schedule established for each Assessment District.

12. Before certifying the assessment rolls, the Chief Assessment Officer shall verify that the assessment for each school district and each municipality meets a coefficient of dispersion (COD), which is a widely accepted statistical indicator of inequality in tax assessments, of 15 or less, and a price related differential (PRD), which is a widely accepted indicator of inequity between high-volume and low-value properties, of between .98 and 1.03.

13. The Allegheny County Chief Assessment Officer and other officials within the Department of Assessment shall attend monthly meetings with the court and counsel for the parties to review the progress of the reassessment. The meetings shall be in open court with a court reporter present.

14. There are several advantages to implementing a reassessment program that reassesses approximately 25% of Allegheny County properties each year for four years, including enhancing the court's ability to discover any glitches earlier in the process; requiring fewer employees to be hired and trained than if all properties were to be reassessed at the same time; spreading the costs of a county-wide reassessment over four years; and providing stability by avoiding year-to-year assessment fluctuations.

15. A reassessment plan for remedying constitutional violations which temporarily provides for old values to be used for County taxes for any Assessment District that will be reassessed at a later date and new values for each Assessment District where the new assessment has taken place, does not necessarily offend the Pennsylvania Constitution.

16. The Pennsylvania Supreme Court has stated that the Constitution requires only "rough" substantial uniformity and that some practical inequalities are anticipated in assessment programs.

17. Pennsylvania courts have never ruled on the constitutionality of a reassessment program that extends over more than one year and a good faith challenge can be made to any assessment plan that, for County taxes, would use both new values and 2002 base year values. For this reason, the court's Four-District Reassessment plan provides for County taxes for all properties to be based on 2002 base year values until all Allegheny County properties have been reassessed.

(Laura A. Meaden)

Ira Weiss for the Plaintiffs in No. GD 05-028638.
Donald Driscoll for the Plaintiffs in No. GD 05-028355.
Michael H. Wojcik for the Defendants.

No. GD 05-028638 and No. GD 05-028355. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

BACKGROUND

Wettick, J., November 10, 2009—This lawsuit was instituted by property owners residing within Allegheny County seeking to compel Allegheny County to conduct a countywide reassessment. The property owners contended that Allegheny County's use of a 2002 base year market value for an indefinite number of years violates the Uniformity Clause of the Pennsylvania Constitution because over time base year assessments inherently cause significant disparities in the ratio of assessed value to market value.

I ruled in favor of the property owners in a June 6, 2001 Decision/Opinion and Order of Court, Summary, 155 P.L.J. 224 (2007).[1] I entered a court order declaring that the provisions in Pennsylvania's assessment laws which allow counties to set assessed values by using base year market values without the requirement of periodic reassessments violate the Uniformity Clause.

At the time I was considering plaintiffs' challenge to Allegheny County's use of a 2002 base year assessment system, every county in Pennsylvania was valuing property through a base year system. Consequently, I did not require Allegheny County to immediately conduct a reassessment:

> Because my ruling involves a statewide issue—the constitutionality of the use of a base year method of assessment that every county in the Commonwealth uses—and because Allegheny County's assessments are more uniform than the assessments of most other counties, Allegheny County should not be governed by reassessment standards that do not apply to Pennsylvania's other 66 counties. Thus, the interests of justice are served by permitting Allegheny County to continue to assess property in the same manner as all other counties while the anticipated appeal from my ruling is pending in the Pennsylvania Supreme Court. Also, this will permit the General Assembly to consider whether to enact assessment laws similar to those of other states. *Id.* at 226.

Through an April 29, 2009 Opinion, the Pennsylvania Supreme Court rejected my ruling that legislation permitting property to be assessed through a base year system that never provides for a reassessment is facially unconstitutional because it is not designed to achieve current fair market value. 969 A.2d 1197 (Pa. 2009). However, the Court ruled. that "for many of the same reasons cited by" the trial court, we hold that the base year method of property valuation, as applied in Allegheny County, violates the Uniformity Clause." *Id.* at 1201.

In the final sentence of its Opinion, the Pennsylvania Supreme Court remanded the matter to the trial court "to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion." *Id.* at 1231.[2]

At a September 14, 2009 conference, the parties were unable to agree as to a realistic timeframe for completion of a countywide reassessment. Plaintiffs proposed an immediate reassessment through computer-based trending that would govern year 2010. Allegheny County contended that the 2010 reassessment that plaintiffs proposed would not meet accepted standards of fairness; this would not occur without a reassessment that included the visual inspection of all properties within Allegheny County (hereinafter referred to as a "comprehensive reassessment"). Consequently, at this conference, I entered a case management order setting dates by which discovery will be furnished and expert reports will be filed and providing for an October 19, 2009 trial.

Prior to trial, each party filed one expert report. At the October 19, 2009 trial, each party offered the testimony of the expert who authored the report. Neither party called any other witness.

Robert C. Denne is the witness whom the property owners presented. Mr. Denne has been employed in the assessment field for his entire career, including employment with the International Association of Assessing Officers ("IAAO") from 1974-1993. He served as the IAAO's Deputy Executive Director from 1985-1993. His areas of expertise include statistical aspects of property taxation, equalization and quality control, valuation model building, performance audits, and information technology.

Deborah K. Bunn was the witness whom Allegheny County presented. Ms. Bunn has also been employed in the assessment field for her entire career, beginning with her employment with the Assessors Office of the City of Norfolk, VA, in 1969. She served as the Chief Assessment Officer of Allegheny County from October 2004 to December 2007. She has had no connection with the Allegheny County assessments after December 2007.

PRIOR COUNTYWIDE ASSESSMENTS

Pursuant to a consented to court order, a countywide assessment was completed in 2000 and used for the year 2001. As of 2001, the Administrative Code of Allegheny County provided for annual reassessments. Consequently, in 2001 the County Assessment Office performed a reassessment for use in year 2002.[3]

In 2002, Allegheny County amended the Administrative Code (Legislative File 0733-02) to provide that the 2002 assessment would serve as a base year for years 2003-2005. The ordinance also provided that the assessments for 2006 would be established and furnished to the property owners by April 1, 2005, with an immediate right of appeal.

Pursuant to the 2002 Assessment Ordinance, beginning in 2004 the Assessment Office conducted a computer-assisted reassessment for use in the 2006 tax year. As of early 2005, this reassessment, as to the County, met the uniformity standards of a COD of 15 or Less and a PRD between .98 and 1.03 prescribed by the County Code and the IAAO.[4] However, it was never certified.

Ms. Bunn testified that when she assumed the position of Chief Assessment Officer, the Assessment Office was still establishing values, meaning that its employees were massaging the early values based on the models and the cost tables of the Assessment Office. She was prepared to continue to work on adjustments prior to certification. She was told to stop working because the County decided to use the 2002 assessment as a base year for 2006 and subsequent years. She testified that if given the opportunity to work on adjustments, she believes that the numbers would have been appropriate for finalization. (T. 102-103).

DESCRIPTION OF PROPERTY OWNERS' PROPOSED REASSESSMENT FOR USE IN 2010 AND COUNTY'S RESPONSE

The Property Owners request that I order a countywide reassessment for year 2010 through the use of a trending analysis which relies on the database of the 2005 reassessment. The Property owners state that an assessment using a computer-based trending analysis can be completed within two months at a cost of no more than $900,000. Such an assessment will substantially reduce the

lack of uniformity which exists through the continued use of the 2002 base year assessment.

The Property Owners state that this countywide reassessment based on trending is only an interim measure. This court must also require the County to conduct a comprehensive reassessment that includes the inspection of each property within the County in order for the properties in Allegheny County to be assessed in accordance with accepted uniformity standards.

The Property Owners offered the testimony of Robert Denne to support their request that this court order an immediate reassessment based on trending as an interim measure and a comprehensive reassessment to be completed thereafter.

Mr. Denne described a reassessment based on trending. In simplistic terms, trending works as follows: Through the prior reassessment, the Assessment office has created neighborhoods in which properties will purportedly increase or decrease in value by approximately the same percentage.[5] Consequently, the relationship between the sale price and the assessed value for those properties within the neighborhood that were sold through an arms-length sale is used to value the other properties within the neighborhood.

Neighborhood One		
Seven Sales	Total Sales Price of the Seven Sales	$700,000
	Total Assessed Value for Seven Sales	$350,000

The new assessed value for each property in the neighborhood will double.

Neighborhood Two		
Sixteen Sales	Total Sales Price	$2 million
	Total Assessed Value	$1.8 million

The new assessment value for each property in the neighborhood will increase by 11%.

Neighborhood Three		
Eleven Sales	Total Sales Price	$484,040
	Total Assessed Value	$520,000

The assessed value for each property in the neighborhood will decrease by approximately 7%.

Assume that a property owner owns in each neighborhood a property assessed at $100,000 under the prior assessment. For the new assessment based on a trending analysis, the property in Neighborhood One will be assessed at $200,000; the property in Neighborhood Two will be assessed at $111,000; and the property in Neighborhood Three will be assessed at $93,000. However, under a 2002 base year, the properties continue to be assessed at $100,000.

Mr. Denne could only say that the trending analysis which he proposes will substantially reduce the 2002 base year assessment's lack of uniformity. He did not claim that this reassessment, will meet IAAO uniformity standards. In response to the question of the property owners' counsel as to whether he was able to form an opinion within a reasonable degree of professional certainty as to the improvement that would be brought about as a result of the trending analysis that he described, he testified as follows:

> Q. Now, were you able to form an opinion within a reasonable degree of professional certainty as to the improvement that would be brought about as a result of this trending exercise that you described?
>
> A. Well, I would hesitate to say that it could be brought into conformity with the IAAO standard, namely 20 percent, but I would think that it would be improved substantially. My understanding of the current ratio is that it's more on the order of 30 percent, and I would expect it to be diminished a lot by application of these trending procedures. (T. 27-28)[6]

It is Allegheny County's position that a complete countywide reassessment based on a visual inspection of each property is required and that an interim assessment based on trending should not be ordered.[7] The County offered the testimony of Ms. Bunn to support its position.

Mr. Denne and Ms. Bunn agree on most matters.

Ms. Bunn agrees with Mr. Denne that trending, which uses an existing database, can be done quickly and cheaply. She testified that you can trend anything in a month (T. 90).

Both agree that there is a place for trending. At T. 102, Ms. Bunn testified:

> A. I'm a fan of trending if it's between general reassessments that have been conducted properly, you have a good database and trust the values that have been generated during that reassessment.

Both agree that an assessment based on trending will not meet IAAO standards where the database has not been updated through inspections of properties. This is the reason why Mr. Denne describes the assessment based on trending which he is proposing as an interim measure that will improve the existing base year assessments until a comprehensive reassessment is completed. Both refer to 3.3.4 of the IAAO Standard on Mass Appraisal of Real Property, approved February 2002, which provides that properties should be periodically revisited to ascertain that assessment records are accurate and current and, assuming that most new construction activity is identified, a physical review at least every four to six years should be conducted, including an onsite verification of property characteristics.[8] (Under 3.3.5, it may be possible to replace field inspections with higher-resolution street-view images.)

Both agree that trending only addresses inequities from neighborhood to neighborhood. It does not address inequities within the neighborhood.

I return to my Neighborhood One and Neighborhood Two illustrations.

For Neighborhood One, assume that the purchase price for each of the seven sales was approximately twice the assessed value of the property. In this instance, it appears that the computer-assisted neighborhood boundary lines include only properties whose values would be expected to increase or decrease at about the same percentage.

For Neighborhood Two, assume that four of the sixteen properties sold at less than their assessed values and that four sold for 40% or more of their assessed values. In this instance, the properties that the computer is treating as expected to increase or decrease in value at the same percentage have not done so. An assessment based on trending will not address this situation.

The only significant difference between the testimony of Mr. Denne and Ms. Bunn is over the use of a reassessment based on

trending as an interim measure.

Ms. Bunn testified that she agreed with Mr. Denne that the interim assessment based on trending that he is proposing would improve the COD across neighborhood lines (T. 91, 93). However, she testified that the COD across neighborhood lines "is not a relevant COD as far as I'm concerned. In my opinion the relevant COD is within the neighborhood. What is your COD within a specific neighborhood, and does it meet acceptable IAAO standards?" (T. 93)

With respect to the 2005 assessment, she testified that she had problems with the neighborhoods that needed to be addressed that were not, and they still exist. There were extreme CODs that were unacceptable under IAAO standards (T. 93).

On cross-examination (T. 99), Ms. Bunn testified that it is also important to achieve uniformity from neighborhood to neighborhood:

> Q. Would you agree that reducing the COD from 30 to almost 20 would be a desirable thing?
>
> A. Within the neighborhood, yes, property to property; but it achieves only–it doesn't achieve the desired results as far as equity is concerned by achieving a COD across neighborhoods.
>
> Q. So it's your belief I take it that if you can't have these neighborhood adjustments that you've described, it's better to keep what we have; is that right?
>
> A. In my opinion, yes, because you're only exaggerating the inequities that exist today by trending them.

RULING ON WHETHER TO REQUIRE AN INTERIM ASSESSMENT BASED ON TRENDING

In deciding whether to require the interim assessment described by Mr. Denne, I initially consider whether this is relief provided for in the Pennsylvania Supreme Court's April 29, 2009 Opinion. Paragraph 3 of my June 6, 2007 court order, which the Pennsylvania Supreme Court reviewed, provided:

> 3. By March 31, 2009, the Chief Assessment Officer of Allegheny County shall complete a computer-assisted reassessment for use in 2010 similar to the reassessment she prepared in February 2005 for use in 2006. She shall determine that this reassessment, as to the County, meets IAAO standards and she shall obtain independent verification that the following IAAO standards have been met as to the County: a COD of 15 or less for the County and a PRD of between .98 and 1.03 for the County;

The Pennsylvania Supreme Court's Opinion did not question the requirement within paragraph 3 of my June 6, 2007 order that the reassessment, as to the County, meet IAAO standards of a COD of 15 or less and a PRD of between .98 and 1.03. Furthermore, at the October 19, 2009 hearing, the County never requested this court to revisit this requirement. To the contrary, it is the position of the County that I should not require an interim assessment because it will not meet IAAO standards.

Because the last complete visual inspection of the properties within Allegheny County occurred on or prior to 2000, for use in 2001, and because of appeals (particularly appeals of taxing bodies based on sales prices) and changes not reflected in the database, the use of a computer-assisted reassessment similar to the computer-assisted reassessment prepared in 2005 will not meet IAAO standards. The Pennsylvania Supreme Court recognized that this was a possibility in the last paragraph of its April 29, 2009 Opinion:

> Ultimately, our task is decisional, and Allegheny County is currently left with a broken system of property taxation. In its effort to fashion a remedy, the trial court directed the Chief Assessment Officer of Allegheny County to conduct a reassessment no later than March 31, 2009, for use in the 2010 tax year, even if this Court had not yet issued a final order. We agree that reassessment is required. *However, recognizing that the passage of time may require adjustment by the trial court, we will remand this matter to the trial court to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion.* 969 A.2d at 1231 (emphasis added).

Since the Pennsylvania Supreme Court did not question paragraph 3 of my June 6, 2007 court order set forth on page 10 of this Opinion, the countywide reassessment to which the Pennsylvania Supreme Court referred would have been a reassessment achieving, as to the County, a COD of 15 or less and a PRD of between .98 and 1.03.[9] The Pennsylvania Supreme Court directed me to adjust the times in my June 8, 2007 court order if the times in this court order were not realistic for the completion of a countywide reassessment that met the IAAO standards described in paragraph 3 of my June 6, 2007 court order. Thus, the Pennsylvania Supreme Court was not expecting this court to provide interim relief pending completion of a countywide reassessment that met the IAAO standards described in paragraph 3 of my June 6, 2007 court order.

The Property Owners contend that this court has inherent equitable powers that would permit court-ordered interim relief.[10] Assuming that this is so, for several reasons, I cannot conclude that the interests of justice would be served through a temporary reassessment that does not meet the IAAO standards described in my June 6, 2007 court order.

First, this interim reassessment would in, all likelihood result in tens of thousands of different property owners paying more than their fair share of real property taxes through an assessment that is expected to produce this result. In the situation in which current values will begin to replace 2002 base year values in 2011, I cannot offer a reasonable explanation as to how the interests of justice will be served by temporarily substituting one unacceptable assessment for another unacceptable assessment even if the new group of property owners who are overassessed are likely to be smaller than the group of property owners who are now overassessed.

Second, an interim assessment that does not meet IAAO standards will interfere with the comprehensive countywide reassessment because resources, otherwise available for the comprehensive reassessment, will be devoted to resolving the appeals that the interim reassessment would generate. Both the 2001 reassessment for use in 2002 and the 2002 reassessment for use in 2003 met COD standards. However, in each year, approximately 90,000 appeals were taken. Based on this past experience, it is likely that 100,000 or more appeals will be taken from any interim countywide reassessment that does not meet IAAO standards.

At the December 2006 hearing, Mr. James M. Flynn, Jr., Allegheny County Manager, testified that the County contracted with Sabre Systems to perform a comprehensive countywide assessment that involved a visual inspection of each property. Sabre was paid approximately $25 million. The process from the initial contract until completion of the reassessment took approximately four years (12/06, T. 193-194).

Mr. Flynn testified that approximately 90,000 formal appeals were filed for the 2001 reassessment and an additional 90,000 for-

mal appeals were filed for the 2002 reassessment. In addition to the expense of hiring 50 hearing officers to hear the appeals, this number of appeals put a tremendous operative strain on the County Assessment Office. This Office had to develop a database to track each appeal and it had to coordinate the appeals for hearing (12/06, T. 196-198). In 2004, the County received a $2.7 million grant from the state to assist the Office of Property Assessment in working through the backlog accumulated as a result of the resources required for the appeals (12/06, T. 213-216).

Third, Allegheny County's assessment program will be in a state of flux until it is perceived by the property owners of Allegheny County as setting assessed values that are closely related to actual fair market values. At this time, there is no belief that any reassessment, based primarily on prior assessments, will produce accurate values.[11] Thus, the use of a temporary reassessment that does not meet IAAO standards, based on data derived from prior assessments, will reinforce public perception that the County's assessments are not accurate.[12]

As I discuss in greater detail at pages 16 and 25 of this Opinion, at the October 19, 2009 trial I received assurances from the Allegheny County Solicitor that when I tell the County what needs to be done, the County will get it done. Consequently, my rejection of the interim assessment is based on the assumption that the County will either complete a comprehensive reassessment for use in 2012 or that the County will meet the timetables set forth in the Four-District Plan described at pages 17-21 of this Opinion. It is possible that I would order an interim reassessment based on trending if the only other option is a comprehensive reassessment that is not likely to occur in the near future.

LACK OF ANY REASSESSMENT PLAN OFFERED BY ALLEGHENY COUNTY

While the County offered evidence, which I found to be persuasive, that a comprehensive reassessment is required, it never offered any testimony from its Chief Assessment Officer or any other person employed by the County or who could otherwise speak for the County as to the County's progress in executing a comprehensive reassessment and as to a realistic timeframe for its completion.

At trial, Mr. Denne testified that a comprehensive reassessment would also be required (T. 28). However, since he has had no involvement with Allegheny County's assessment program, he offered no testimony as to when such an assessment could be completed.

The only testimony concerning the time to complete a comprehensive reassessment was offered by Ms. Bunn who, in response to the question of how long the process of a house-to-house review would take, stated it depends how many people you put on the project (T. 62).[13]

In other words, I held a hearing to consider the parties' positions as to a realistic timeframe for the completion of a reassessment and received no evidence from the County relevant to the setting of a realistic timeframe for the completion of the comprehensive reassessment proposed by the County.

It appears to be the position of the County that it is waiting for the court to develop a reassessment plan. See the following discussion during the closing argument of Michael H. Wojcik, Esquire (Allegheny County Solicitor):

> MR. WOJCIK: We're already beyond what the IAAO standard says we should be at for conducting a parcel-by-parcel review, which is four to six years.
>
> Admittedly, there was some parcel-by-parcel review in 2005, but the evidence shows that the 2005 evaluation was a hybrid; and if we're going to do reassessment, which is what the Supreme Court has mandated this Court to determine what the time table should be, a full reassessment is required, not just some–
>
> THE COURT: But what I haven't seen from the County, is a plan saying this is what we'll do. We guarantee we will do it, and it's not up to the Court to go find the money.
>
> MR. WOJCIK: Well, Your Honor, this Court is–
>
> THE COURT: I haven't seen that; have I?
>
> MR. WOJCIK: No, you haven't. And what will happen, if the Court says, okay, it's time to do this reassessment, whether it takes three years or two years, you know, it will be done–
>
> THE COURT: Well, it has something to do with the money being available.
>
> MR. WOJCIK: It does.
>
> THE COURT: And I haven't heard anything from the County saying that it will happen.
>
> MR. WOJCIK: Your Honor, at this point the County's position is that when we're told what we need to get done we'll get it done. (T. 130-131 (emphasis added).)

What I never heard from the County was any statement to the effect that (1) our Chief Assessment Officer is developing a detailed comprehensive reassessment plan showing the work that will be done month-by-month, (2) the money is available to pay for the reassessment proposed by the Chief Assessment Officer, and (3) the reassessment will be completed no later than…. Thus, I have no confidence that a reassessment will be completed by 2011 for use in 2012 if I simply enter a court order requiring the County to complete a comprehensive reassessment of all properties by 2011 for use in 2012. Furthermore, I question whether judicial monitoring will identify lack of resources, glitches, and the like in sufficient time to ensure that a complete reassessment is completed for use in 2012 (or even for use in 2013).

Consequently, I am left with two choices: I can order the County to develop a plan that requires court approval through proceedings in which the Property Owners will participate. Or I can devise a reassessment plan that is easier to implement and easier to monitor. The problem with the first choice is the time involved before there is a plan for the County to implement.

For this reason, as a result of the County's failure to offer a reassessment plan. I am adopting the following reassessment plan.

FOUR-DISTRICT REASSESSMENT PLAN

The comprehensive reassessment of the taxable real property in Allegheny County will be conducted in accordance with the following Reassessment Plan:[14]

(1) The County shall be divided into four Assessment Districts. An entire school district and an entire municipality must be

placed in the same Assessment District (i.e., these taxing districts may not be divided).

(2) Each district shall have approximately the same number of taxable properties except that the requirement that each district shall include 100% of the properties of a municipality or school district trumps the requirement that each district have approximately the same number of properties. This means that the properties within the Pittsburgh School District (which includes the City of Pittsburgh and Mt. Oliver) must be within the same district.[15]

(3)(a) The assessment of properties within the First Assessment District shall be completed on or before October 1, 2010 for use in 2011. The assessment shall include sales through June 30, 2009 or later, if feasible. For purposes of school district and municipal real property taxes, this shall be a base year assessment for properties within the First Assessment District for years 2011-2014.

(b) The assessment of properties within the Second Assessment District shall be completed on or before October 1, 2011 for use in 2012. The assessment shall include sales through June 30, 2010 or later, if feasible. For purposes of school district and municipal real property taxes, this shall be a base year assessment for properties within the Second Assessment District for years 2012-2015.

(c) The assessment of properties within the Third Assessment District shall be completed on or before October 1, 2012 for use in 2013. The assessment shall include sales through June 30, 2011 or later, if feasible. For purposes of school district and municipal real property taxes; this shall be a base year assessment for properties within the Third Assessment District for years 2013-2016.

(d) The assessment of properties within the Fourth Assessment District, shall be completed on or before October 1, 2013 for use in 2014. The assessment shall include sales through June 30, 2012 or later, if feasible. For purposes of school district and municipal real property taxes, this shall be a base year assessment for properties within the Fourth Assessment District for years 2014-2017.

(4)(a) Until 2014 Allegheny County real estate taxes shall be based on existing 2002 base year assessments with one exception: prior to 2014 Allegheny County real estate taxes shall be based on any new assessment in which the assessed value of the property is less than the 2002 base year assessment.

(b) For 2014, all taxable properties within Allegheny County shall be assessed at 2014 fair market values and Allegheny County taxes shall be based on these 2014 assessed values. The values for 2014 for First, Second, and Third Assessment Districts shall be based on a trending analysis which uses the recently developed database for the properties within Allegheny County.

(c) For the First, Second, and Third Assessment Districts, the 2014 assessment shall have no impact on the assessed values that were previously established for school district and municipal taxes. This means that school district and municipal taxes for properties within 'the First, Second, and Third Assessment Districts will be based on the 2011 (First District), 2012 (Second District), and 2013 (Third District) base year values.

(d) The notices of the 2014 assessment changes that will be furnished to owners of properties within Assessment Districts One, Two, and Three shall fully explain that this assessment will be used only for taxes imposed by Allegheny County and that for purposes of school district and municipal taxes, the assessed value continues to be the base year value of $______ that will remain in effect through ____.

(5)(a) On or before November 10, 2010, the Chief Assessment Officer shall certify the assessment rolls for Assessment District One after first verifying that this assessment, as to each school district and each municipality, meets the following standards: a COD of 15 or less for each school district and municipality and a PRD of between .98 and 1.03 for each school district and municipality.[16]

(b) On or before November 10, 2011, the Chief Assessment Officer shall certify the assessment rolls for Assessment District Two after first verifying that this assessment, as to each school district and each municipality, meets the standards described in paragraph (5)(a).

(c) On or before November 10, 2012, the Chief Assessment Officer shall certify the assessment rolls for Assessment District Three after first verifying that this assessment, as to each school district and each municipality, meets the standards described in paragraph (5)(a).

(d) On or before November 10, 2013, the Chief Assessment Officer shall certify the assessment rolls for Assessment District Four after first verifying that this assessment, as to each school district and each municipality, meets the standards described in paragraph (5)(a).

(e) On or before November 10, 2013, the Chief Assessment Officer shall certify the assessment rolls for the countywide assessment described in (4)(b) after first verifying that this assessment, as to the County, meets the following standards: a COD of 15 or less and a PRD of between .98 and 1.43.

(f) Upon completion of the certifications described in 5(a)-5(e), the Chief Assessment Officer shall promptly provide copies of the certifications to the Chief Executive and to County Council.

(g) Notices and other information that shall be furnished to the taxing bodies and property owners following the certification and appeal procedures shall be governed by the County Code.

(6) The Chief Assessment Officer of Allegheny County and other officials within the Department of Assessment shall attend monthly meetings with the court and counsel, for the parties to review the progress of the reassessment. These meetings shall be in open court with a court reporter present. Prior to the initial meeting, the Chief Assessment Officer shall prepare and furnish to the court and other counsel a detailed plan for the timely completion of the reassessment of the First Assessment District. The plan shall include a budget associated with the reassessment.[17]

(7) Ideally, the First Assessment District would include those school districts and municipalities with the greatest assessment disparities. However, feasibility is also a factor. Thus, subject to the requirements in paragraphs (1) and (2) of this Assessment Plan, the Chief Assessment Officer shall determine what school districts and municipalities shall, be included in each Assessment District.[18]

WHAT ARE THE STRENGTHS OF THE FOUR-DISTRICT REASSESSMENT PLAN?

First, by limiting the initial reassessment to twenty-five percent of the properties within the County, I am more capable of evaluating the progress of the reassessment. Any glitches are more likely to be discovered earlier in the process and experience gained from the initial reassessment will result in the timely and accurate completion of the three remaining reassessments.

Second, when the County is conducting a reassessment of all properties within the County at the same time, the Assessment

Department must hire and train large numbers of temporary employees who are no longer needed at about the time they have fully learned the job. For a reassessment over a four-year period, far fewer employees will be hired, the County can be more selective in the hiring process, and the training and experience will result in a more sophisticated workforce.

Third, there will be a more manageable appeals process because the reassessments involve only twenty-five percent of the County's properties.

Fourth, since the assessments involve only twenty-five percent of the County's properties, the remaining property owners (and elected officials representing these property owners) who are not affected by the reassessment are in a position to objectively consider whether complaints about the reassessment are mostly made by property owners who do not want to pay their fair share or by property owners with legitimate concerns. Furthermore, where there are legitimate concerns, these can be addressed during the reassessment of properties in the Second, Third, and Fourth Assessment Districts.

Fifth, implementation of this assessment plan should be cheaper than the implementation of a reassessment of all properties at the same time, and the costs for reassessing the County are spread out over four years.

Sixth, it will be easier for Allegheny County (if it chooses to do so) to enforce the anti-windfall legislation because of the reduced number of municipalities and school districts that are reassessed at the same time.

Seventh, school district and municipal property taxes makeup more than 85% of the total amount of property taxes for most property owners. The use of a four-year base system provides stability by avoiding year-to-year assessment fluctuations.

WHAT ARE THE WEAKNESSES OF THE FOUR-DISTRICT REASSESSMENT PLAN?

First, until 2011, all real estate taxes will be based on 2002 base year values; Allegheny County real estate taxes will be based on 2002 base year values until 2014; and for approximately one-quarter of the County's properties, municipal and school taxes will continue to be based on 2002 base year values until 2014. However, unless a complete assessment of all properties within the County would be completed by 2011 for use in 2012, more property owners will pay school district and municipal taxes based on actual value through this Four-District Reassessment Plan.

Second, as of 2014, property owners in the First, Second, and Third Districts will have one assessed value, based on 2014 actual values, for Allegheny County taxes and another assessed value, based on earlier base year values, for school district and municipal taxes. This will create confusion in the absence of explanations, that can be understood, on the notices of the 2014 assessment values.

IS THIS FOUR-DISTRICT REASSESSMENT PLAN ETCHED IN STONE? NO.

I have created this Four-District Reassessment Plan because, by default, the task was left to me to develop a plan that will replace the existing base year assessments with assessments based on actual values.

If the County would, in the near future, come to this court with a detailed plan under which each property within the County would be reassessed for use in 2012, I would replace the Four-District Reassessment Plan with the County's comprehensive reassessment plan.[19]

IMPORTANCE OF KEEPING THE ENTIRE SCHOOL DISTRICT AND MUNICIPALITY IN THE SAME ASSESSMENT DISTRICT

In Pennsylvania, property taxes are imposed by school districts, municipalities, and counties. The primary impact of an inaccurate assessment is the overpayment or underpayment of school district and municipal taxes. This is so because for most of Allegheny County taxpayers, the amount of the County property tax is between 10% and 15% of the total property taxes that are paid.

For purposes of school district and municipal taxes, property owners care only about the accuracy of the assessments of properties within their school district and municipality because the uniformity or lack thereof of assessments of properties located in one municipality or school district has no impact on the amount of school district and municipal taxes that the owners of properties in another municipality or school district will pay. In other words, the amount of school district and municipal property taxes that a property owner in Assessment District One will pay will be the same regardless of whether only District One has been reassessed or whether properties within the other Assessment Districts have also been reassessed.

FUNDING OF THE REASSESSMENT

In order to ensure that there is compliance with the Pennsylvania Supreme Court's directive that Allegheny County complete a reassessment that meets the uniformity standards set forth in my June 6, 2007 order within the shortest time in which this can realistically be accomplished, funding for the reassessment is an issue that I would ordinarily need to address.[20]

However, at the closing argument at the end of the October 19, 2009 trial, I received assurances from the Solicitor of Allegheny County that money would not be an issue. I stated that the time needed to conduct a reassessment "has something to do with the money being available." Mr. Wojcik (Allegheny County Solicitor) agreed: "It does." I said that "I haven't heard anything from the County saying that it would happen." Mr. Wojcik assured me that money will not be an issue: "Your Honor, at this point the County's position is that when we're told what we need to get done, we'll get it done" (T. 131)

Obviously, as a result of these assurances made by the Allegheny County Solicitor, there is no need for this court to address funding. Furthermore, the Four-District Assessment Plan spreads the costs over a four-year period—something that the two to three-year reassessment described by the County Solicitor does not accomplish.

DISCUSSION OF ALLEGHENY COUNTY REAL ESTATE TAXES

Allegheny County differs from the other taxing bodies within the County (school districts and municipalities) because the properties that are subject to Allegheny County taxes are located in all of the Assessment Districts. Thus, if, for example, the total property values within each Assessment District have increased by approximately 30% since 2002 and if for year 2011 Allegheny County taxes will be based on 2010 actual values for Assessment District One and on 2002 base year values for the Second, Third, and Fourth Assessment Districts, the property owners in Assessment District One will be paying more than their share of the County taxes in 2011.[21]

However, a reassessment plan for remedying constitutional violations which temporarily provides for old values to be used for County taxes for any Assessment District that will be reassessed at a later date, and new values for each Assessment District where the new assessment has taken place, does not necessarily offend the Pennsylvania Constitution. In *Clifton v. Allegheny County, supra*, 969 A.2d at 1210-11, the Supreme Court stated that the Constitution requires only "rough" substantial uniformity and that

some practical inequalities are anticipated.

Courts of other jurisdictions have uniformly upheld assessment programs which divided a county into assessment districts. In *Revenue Cabinet, Commonwealth of Kentucky v. Leary*, 880 S.W.2d 878 (Ky. Ct. App. 1994), the county was divided into four geographic sections and under the assessment plan each section would be examined every fourth year. A property owner in a section that had been examined raised the claim of a lack of uniformity because his assessment was increased before two other sections were re-evaluated. The Court upheld the assessment plan, stating "because of the time factor involved in assessing property, there must be some allowance given for a lack of total and up-to-date uniformity of assessments, so long as the differences are not from an attempt to discriminate against any group." *Id.* at 882 (internal citation omitted),

The Court cited more than a dozen opinions from other jurisdictions which reached the same result and stated "we have not been cited to, nor have we located, a contrary decision." *Id.* at 881.

In addition, the Court relied on an annotation at 76 A.L.R.2d 1077 where the author states:

> Thus far all claims of violation of constitutional right by reason of the element of time above indicated have been rejected, including those made in cases in which the result of temporary noncompletion of the program was to cause some lands of the tax area to be for the time being assessed at new and higher valuations, … while other lands not yet reached were assessed at old and glaringly contrasting values.

There is considerable merit to an assessment program in which County taxes are based on a new assessment in the year of the new assessment for two reasons: First, it may provide more immediate relief to taxpayers harmed by the use of the 2002 base year system. Second, it avoids the situation in which the property owners in the First, Second, and Third Assessment Districts will have one assessed value for County taxes and another assessed value for school district and municipal taxes.

However, the Pennsylvania Courts have never ruled on the constitutionality of a reassessment program that extends over more than one year and a good faith challenge can be made to any assessment plan that, for County taxes, would use both new values and 2002 base year values.[22] For this reason, the court's Four-District Reassessment Plan provides for County taxes for all properties to be based on 2002 base year values until the entire County has been reassessed.

EXAMPLE

Ms. Jones owns property in Assessment District Two. Her 2002 base year value is $100,000. Through 2011, her school district, municipal, and County taxes will continue to be based on her base year value of $100,000.

Her property is reassessed for 2012 at $150,000. This is a base year value for 2012-2015 (she will be reassessed again in 2016). For 2012 through 2015, her school district and municipal taxes will be based on the $150,000 assessment.

For 2012 and 2013, her County taxes will continue to be based on the 2002 base year value of $100,000. Through trending, her property is assessed at $115,000 for 2014 which means that this is the fair market value of her property for 2014 (which will frequently be different from the fair market value of her property for 2012). This 2014 assessed value will be used for County taxes through 2011. However, this new assessment does not change her 2012 base year assessment for purposes of her school district and municipal taxes. Her assessed value for school district and municipal taxes will continue to be her base year value of $150,000 for years 2014 and 2015.

SUMMARY

This lawsuit was filed by owners of property within Allegheny County who are paying more than their share of the real estate taxes. On April 29, 2009, the Pennsylvania Supreme Court ruled in favor of the Property Owners and directed the trial court to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion.

At an October 19, 2009 trial to consider the County's progress and a timeframe for a reassessment, it was the Property Owners' position that I should order an interim computer-based reassessment, using the existing database, for tax year 2010 followed by a comprehensive reassessment involving the inspection of each property within the County.

It was the County's position that I should not order the computer-based reassessment using the existing database because this reassessment would not meet the IAAO standards of fairness. I agreed with the County that I should not be requiring an interim assessment that does not meet IAAO standards.

While it was the County's position that only a comprehensive reassessment will meet IAAO standards, it did not propose any plan for reassessing the County—in fact, it did not offer any evidence as to what would be a realistic timeframe for the County to complete a comprehensive reassessment. It was the County's position that it is looking to this court to tell it what to do.

The October 19, 2009 trial consisted of the testimony of two expert witnesses. Mr. Denne, the expert witness offered by the Property Owners, did not offer any testimony as to a realistic timeframe for completion of a reassessment that would meet IAAO standards. The County's witness. (Ms. Bunn) testified that a completion date would depend on the number of people who are hired to view the properties. However, she did not offer any testimony as to a timeframe for completing a reassessment.[23]

The Pennsylvania Supreme Court is looking to this court to develop a remedial plan that will replace base year assessments with actual values as soon as practicable. If I knew that a comprehensive assessment could be completed for use in 2012, this is the assessment that I would order the County to perform. However, I have no evidence to support a finding that such a reassessment is feasible.

Consequently, I am ordering the County to perform a reassessment pursuant to a Four-District Reassessment Plan that is more manageable and will provide greater relief than would be provided through any single reassessment that will not be completed within two years.

Under this Reassessment Plan, an entire school district and municipality must be placed in the same Assessment District. This achieves uniformity because all property owners within a school district or municipality will be paying taxes based on the same assessment.

The Chief Assessment Officer shall determine what school districts and municipalities shall be included in each Assessment District.

The assessment for the First Assessment District shall be completed for use in 2011, the assessment for the Second Assessment District shall be completed for use in 2012, the assessment for the Third Assessment District shall be completed for use in 2013, and the assessment for the Fourth Assessment District shall be completed for use in 2014.

The details of the Four-District Reassessment Plan are set forth at pages 17-21 of this Opinion. The strengths of the Four-

District Plan are set forth at pages 22-23 of this Opinion.

The primary weakness of this Assessment Plan is that until 2011 all real estate taxes will be based on 2002 base year values; Allegheny County real estate taxes will be based on 2002 base year values until 2014; and for approximately one-quarter of the County's properties, school district and municipal taxes will be based on 2002 base year values until 2014. However, for the reasons set forth at pages 10-14 of this Opinion, I did not order an interim assessment because it would not meet IAAO fairness standards. Also, I did not order a comprehensive reassessment to be completed by 2011 for use in 2012 because of the absence of any evidence that such a court order would be setting a realistic timeframe.

WHY IS THIS ASSESSMENT PLAN BEING DEVELOPED BY THE COURT RATHER THAN THE COUNTY?

Because the County did not develop an assessment plan but, instead, is taking the position that it is waiting for the court to develop an assessment plan. See the Transcript of the October 19, 2009 trial where the Allegheny County Solicitor stated, "at this point the County's position is that when we're told what we need to get done, we'll get it done" (T. 131)

ORDER OF COURT

On this 10th day of November, 2009, it is hereby ORDERED that:

(1) The request of plaintiffs that this court order an immediate reassessment through computer-based trending is denied;

(2) Allegheny County shall perform a comprehensive reassessment in accordance with the provisions of the Four-District Comprehensive Reassessment Plan that are set forth at pages 17-21 of the Opinion which accompanies this Order of Court; and

(3) The initial meeting with the court, to be attended by the Chief Assessment Officer of Allegheny County, other Department of Assessment Officials selected by the Chief Assessment Officer, and counsel, shall be held on December 2, 2009 at 2:00 P.M. o'clock in Courtroom 815. Prior to this meeting, the Chief Assessment Officer shall prepare and furnish to the court and counsel a detailed plan for the timely completion of the reassessment of the First Assessment District.

BY THE COURT:
/s/Wettick, J.

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[1] The entire Opinion can be found on-line at prothonotary.county.allegheny.pa.us, click on "Case Search," in the three blocks enter gd, 05, and 028638, page down and click on "Document 34" in the far right column.

[2] On May 22, 2009, Allegheny County filed with the Pennsylvania Supreme Court an Application for Relief and for Stay of Remand of Record. On August 7, 2009, the Supreme Court denied the Application and directed the Prothonotary to remand the record.

[3] The 2002 assessment did not involve field inspections; it adjusted neighborhoods and created new neighborhoods (10/19/09 Trial Transcript, T. 94).

[4] A price related differential (PRD) is the widely accepted statistical indicator of inequity between high-value and low-value properties. A coefficient of dispersion (COD) is the widely accepted statistical indicator of inequality in tax assessments. See Concurring Opinion of Justice Baer in *Clifton v. Allegheny County, supra,* 969 A.2d at 1234-35.

[5] IAAO, Standard on Mass Appraisal of Real Property (February 2002) at 17 defines a neighborhood as

> Neighborhood—(1) The environment of a subject property that has a direct and immediate effect on value. (2) A geographic area (in which there are typically fewer than several thousand properties) defined for some useful purpose, such as to ensure for later multiple regression modeling that the properties are homogeneous and share important locational characteristics.

[6] My June 6, 2007 Court Order provides for a COD of 15 or less. See page 10, *infra*, of this Opinion.

[7] I do not address the issue of whether a visual inspection can be based on photographs.

[8] Except for neighborhoods physically inspected in 2004 and 2005 in preparing the 2005 assessment, the properties within the County were last inspected prior to the 2001 assessment. See testimony of Ms. Bunn at T. 107 that for the 2005 assessment, field data collection was limited to the areas in the County that needed the most review.

[9] At the December 2006 hearing that resulted in my June 6, 2007 court order, the Property Owners relied on the testimony of Richard Almy, a partner of Mr. Denne. Mr., Almy testified that a COD of 15 is readily achievable in Allegheny County (12/06 Trial Transcript, T. 111).

[10] It appears to be the County's position that any court ordered temporary reassessment that does not meet the IAAO standards set forth in paragraph 3 of my June 6, 2007 court order, would be inconsistent with the directive of the Pennsylvania Supreme Court that the County be given a realistic time in which to complete a reassessment that meets these IAAO standards.

[11] This is not surprising because large numbers of elected officials criticized both the process and the results of the 2001 and 2002 assessments and offered assistance to those property owners who were dissatisfied with their assessments.

[12] Mr. Almy testified at the December 2006 trial that the common experience is that three to five percent of property owners file appeals following a reassessment. The experience of Allegheny County is "off the map I think" (12/06, T. 306).

[13] In the final paragraph of her expert opinion that is part of the County's Pretrial Statement, Ms. Bunn stated that a valid countywide reassessment will require no less than two years and probably, up to three years. This Pretrial Statement is not part of the record.

[14] This Opinion does not address tax-exempt properties. This litigation has nothing to do with the manner in which the County values tax-exempt properties.

[15] It appears that approximately one-fourth of the residential properties within Allegheny County are situated within Pittsburgh. However, Pittsburgh has a significantly higher percentage of commercial properties.

[16] My June 6, 2007 order required a COD of 15 or less and a PRD of between .98 and 1.03 as to the countywide assessment. I will

alter these standards if they are not realistic for each school district and municipality.

[17] Throughout this process, whenever the Chief Assessment. Officer believes that he needs further guidance, or sees possible problems that this court did not foresee that prevents the reassessment from moving forward, the Chief Assessment Officer shall not wait until the next monthly meeting to raise the issues. The Chief Assessment Officer shall immediately send a letter to the court with copies to counsel for the parties requesting a meeting as soon as possible.

[18] There is no requirement that an Assessment District include only municipalities or school districts that are located in the same area of the County.

[19] Although they are not forbidden from doing so, I am not inviting the Property Owners to come to court with a comprehensive assessment plan that will result in a reassessment of all properties by December 2011 for use in 2012 because I believe that only the County can create a comprehensive plan with a starting point based on the County's current database that addresses personnel and other costs.

[20] In an extreme case, a common pleas court, in order to comply with a directive from the Pennsylvania Supreme Court, may need to order a county to increase millage or order the Chief Assessment Officer to increase assessed values as to the county.

[21] This disparity will have a limited impact on property owners because for most property owners the County taxes make up 10% to 15% of the total property tax. Furthermore, this system of assessing property creates a cycle in which each property owner has a turn at being in the first district to be reassessed and in the last district to be reassessed. For example, if County taxes were based on each base year assessment, in 2014 it would now be the property owner in Assessment District Four who could complain that her County taxes are based on today's values while the County taxes for property owners in Assessment District One are based on 2010 values.

[22] Litigation instituted in the Common Pleas Court of Allegheny County in 1970 challenged the constitutionality of legislation permitting the County to reassess one-third of the County every three years. The trial court dismissed the litigation on the ground that the statutory appeal of the assessment to the Board of Assessments provides an adequate remedy. In *Borough of Green Tree v. Board of Property Assessments, Appeals and Review,* 328 A.2d 819 (1974), the Pennsylvania Supreme Court reversed; it ruled that a court of equity has jurisdiction to decide abroad constitutional challenge to the validity of a taxing statute.

This litigation was remanded to the trial court to consider the constitutional challenge to this legislation. However, the challenge was never considered because on October 28, 1977, the Board of Property Assessment, Appeals and Review discontinued the use of triennial assessments. See *Boro of Green Tree v. Board of Property Assessments*, 127 P.L.J. 172, 178 n.9 (1978).

[23] In her expert report which is part of the County's Pretrial Statement, she stated, without explanation, that a valid countywide reassessment will require no less than two years and more probably up to three years. The report is not part of the record.

Washington Mutual Bank, F.A. v. Lynn Kuchnicki a/k/a Lynn K. McGann and Keith McGann

Foreclosure Action—Summary Judgment—Issue of Fact

1. Plaintiff filled a foreclosure action against Defendants for failure to make payments on the mortgage.

2. Plaintiff's removal of negative reporting to credit agencies for three months of non-payment on the mortgage is not an admission that payment was actually made.

3. Although one payment was made on the account after the action was filed, the account remained in default.

4. Plaintiff was entitled to summary judgment because Defendant presented no evidence that raised any dispute of fact as to the making of the mortgage or being in default under it.

(Elizabeth P. Collura)

Francis Hallinan, *Sheetal R. Shah-Jani* and *Robert Wendt* for Plaintiff.
Louis C. Blauth, Jr. for Defendants.

No. GD 07-20881. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

O'Reilly, J., July 16, 2009—This matter came before me on the Plaintiff's Motion for Summary Judgment. It is a mortgage foreclosure action that was commenced on October 1, 2007 by the Plaintiff, Washington Mutual Bank, F.A. ("Washington Mutual") against the Defendants, Lynn Kuchnicki a/k/a Lynn McGann and Keith McGann (collectively "McGann") alleging a default on the mortgage for the premises located at 424 Parklyn Street, Pittsburgh, PA 15234. On January, 12, 2009, after I considered the arguments raised by the parties, I granted Washington Mutual's Motion. On January 29, 2009, McGann filed an Appeal to the Superior Court.

The Order that I signed was the one that was prepared and presented to me by Washington Mutual. In particular, it reads as follows:

> "…an *in rem* judgment is entered in favor of Plaintiff and against Defendants, Lynn Kuchnicki, a/k/a Lynn K. McGann and Keith A. McGann, for $79,898.36 plus interest from April 30, 2008 at the rate of $15.69 per diem and other costs and charges collectible under the mortgage, for foreclosure and sale of the mortgaged property. However, the affect of the Judgment will be stayed for thirty (30) days. Plaintiff cannot list the property for sheriff's sale until after January 29, 2009. Additionally, Plaintiff and Defendants will continue to discuss loss mitigation."

The record clearly established that the mortgage was in default. The only matter of any significance was McGann's contention that the predecessor to Washington Mutual admitted payments were made for the months of May, June and July of 2007 by them. However, as amply pointed out by Washington Mutual, the letter that McGann relied on was dated three (3) weeks after the commencement of this action and it only stated that "any negative reporting for the months of 5/07, 6/07 and 7/07" were removed from certain credit agencies, not that payments were made for those months.

In addition, Washington Mutual acknowledged that McGann did make a payment after the case was filed. Nevertheless, the account was still in default. On this basis, Washington Mutual argued that there was no material issue of fact, and that it was therefore entitled to summary judgment.

Applying the standard summary judgment principle that I must view the matter in the light most favorable to the non-moving party, which in this case was McGann, and that all doubts pertaining to issues of material fact(s) must be resolved against the moving party, I found that Washington Mutual was entitled to summary judgment because McGann offered no credible evidence to suggest that there was no default under the mortgage. Indeed, while McGann's Answer consists of a series of denials, no evidence was presented that raised *any* dispute of fact as to making the mortgage and being in default under it. The reference to erroneous reporting to credit agencies does not raise any issue that a dispute of fact exists. Accordingly, I entered the Order that Washington Mutual presented to me, which contained the additional provision regarding loss mitigation. This provision indeed seems favorable to McGann as it suggests that Washington Mutual was still willing to resolve this matter with them. I have heard nothing from the parties as to whether any "loss mitigation" occurred. However, since McGann filed this appeal I am obliged to file this Opinion and it sets forth what I did and why I did it.

BY THE COURT:
/s/O'Reilly, J.

Dated: July 16, 2009

All Automatic Transmission Parts, Inc. v. James Corwin and James Busch t/d/b/a Cottman Transmission and Budget Transmission

Breach of Contract—Credibility of Witnesses—Counsel Fees

1. Plaintiffs operated a business selling motor vehicle transmissions to businesses that do repair work. Plaintiffs operated a small family business with unconventional invoice and billing practices as compared to traditional office procedures. Plaintiffs would charge trusted customers by monthly invoice, instead of per-purchase.

2. Plaintiffs and Defendants had a long history of doing business together. Defendants usually paid invoices upon receipt, but got behind on payments. Plaintiffs requested Defendants comply with a payment plan, but Defendants made few payments and failed to pay many of the monthly invoices.

3. Plaintiffs testified that they delivered a copy of all unpaid invoices to Defendants. Defendants denied ever receiving invoices. Defendants' defense was that the invoices presented at trial were inaccurate.

4. The trial court, hearing the matter as a bench trial, determined that the Plaintiffs' testimony was credible, and that Defendants simply refused to pay without justification. Plaintiffs were entitled to an award of the unpaid balance, plus interest.

5. Because Plaintiffs' billing method was unusual, defense counsel did not act in a vexatious or dilatory fashion in crediting his client's argument that the Defendant never received the invoices. Plaintiffs were therefore not entitled to counsel fees.

(Elizabeth F. Collura)

Thomas J. Dancison, Jr. for Plaintiffs.
Ernest Simon for Defendants.

No. AR 08-10682. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

DECISION

Friedman, J., October 7, 2009—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

The captioned contract action was tried before the undersigned, sitting without a jury. After considering all the evidence and the arguments of counsel, we conclude that Plaintiff has met its burden of proof and is entitled to an award of its contract claim, with statutory interest from the date payment was due. However, we also conclude that this is not a case where counsel fees should be awarded for dilatory and vexatious conduct.

In the end, the case involves the credibility of witnesses. We found the testimony of Plaintiff's President, Joseph D'Amico, credible and pertinent to the legal issues in the case, and that of Defendants not helpful to their cause. Neither side kept its business records in a traditional manner. For example, Plaintiff's invoices are dated with a *starting* date rather than the date of preparation. In addition, the invoice numbers depend on *where* the preparer was when the invoices were typed up and have nothing to do with when they were prepared. As a result, anyone familiar with more standard office procedures would initially suspect that the invoices were created for trial and had nothing to do with contemporaneous record-keeping.

Mr. D'Amico testified that the Plaintiff is a family-owned and operated business that sells parts for motor vehicle transmissions to businesses that do the actual repair work for the owners of the vehicles. He, his wife, their son and daughter and son-in-law were the only employees, and their operation appeared to the Court to be a classic "small business." Defendants also operated two small businesses, as partnerships. They repaired transmissions. Mr. D'Amico explained the Plaintiff's billing method very clearly, and in the course of that testimony explained, credibly, why the invoice numbers and dates were as they were.

The procedure for receiving and filling orders for parts involved phone calls throughout the day from customers such as Defendants, with pick up or delivery also throughout the day. As calls came in, they were usually taken by Mr. D'Amico who would

note the order in a daily log, a notebook. The order would then be processed and the item given to the customer. Sometimes an invoice would accompany the item; sometimes a monthly bill, in the form of an invoice, would be sent to trusted customers. The monthly invoices were prepared by referring to the daily log of the orders placed. The parties had a long history of doing business together and until 2004 Defendants generally paid the invoices upon receipt, whether sent monthly or with a delivery.

In 2004, Defendants got behind in their payments. At first, Plaintiff did nothing, but when the unpaid balances got too large, Plaintiff, through Mr. D'Amico, asked Defendants to make payments of $500 every two weeks until the unpaid balance was paid. Only a few such payments were made. Mr. D'Amico eventually stopped the monthly billing, which had been a courtesy to good customers, and demanded and received payment upon each delivery. Plaintiff's Group Exhibit A1-30 is a collection of the monthly invoices that Defendant did not pay. Plaintiff delivered a copy of those same unpaid invoices to Defendants, who claimed, not credibly, that they did not receive them. Defendants sold their Cottman franchise in January of 2008. They still operate the Budget Transmission partnership.

Defendants' defense relies on the supposed falsity of Plaintiff's Exhibit A1-30. As indicated, we find them to be accurate although unusual. We believe Defendants received those invoices on a regular basis between September/October 2004 and August/September 2005, and we also believe they were given a complete set of the invoices again by Mr. D'Amico when he was trying to get them to pay the past due balances. This is sufficient demand for payment. Defendants simply declined to pay, without providing any justification for non-payment except to deny receiving the demands.

As to the demand for counsel fees, we cannot say Defendants' able and diligent counsel was wrong to credit his clients' contention that they hadn't received the bills, given Plaintiff's unusual practices regarding the preparation of invoices. Until we heard Mr. D'Amico's explanation, we were concerned about the authenticity of the invoices as well.

We therefore conclude that Plaintiff is entitled to an award of the unpaid balance of $20,033.36, with simple interest at the statutory rate of 6% per year. For ease of calculation we begin interest on the entire amount from March 1, 2005, the latest date by which payment should have been made on the last invoice; we will not use the possible alternative basis of calculating interest for each invoice separately. Our total award in favor of Plaintiff and against Defendants, with interest through October 7, 2009, is $25,567.58.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT:
/s/Friedman, J.

Dated: October 7, 2009

Commonwealth of Pennsylvania v. Robert Allan Kennedy

Ineffective Assistance of Counsel—Credibility of Witnesses—Evidence of Defendant's Character—Qualifications of Experts—Excessiveness of Sentences

1. Defendant was convicted of two counts of rape, one count of sexual assault, and two counts of indecent assault following a bench trial. Evidence presented by the prosecution included the victim's testimony that she fell asleep at the defendant's house and woke up to find him having sex with her without her consent, and that she asked him to stop but that he would not until she forced herself apart from him; evidence of bruising and trauma to the victim's vagina; toxicology evidence that there was Benadryl present in the victim's bloodstream; and testimony of the friends and attendants of the victim concerning her mental and emotional trauma.

2. Trial counsel was not ineffective for failing to discover the victim's *crimen falsi* convictions of theft because the evidence of credibility would not have influenced the verdict, due to the corroborating physical evidence and third-party witness testimony.

3. Trial counsel was not ineffective for failing to call character witnesses, because calling such witnesses could have opened the record up to the introduction of prior offenses of the defendant. Trial counsel's strategy was reasonably calculated to protect the defendant's interests.

4. The trial court did not err in admitting and considering witness testimony concerning prior romantic relationships between the defendant and two witnesses, in which the defendant brought the witness into a relationship-type atmosphere, then took control of the situation and tried to attack the witness. This evidence was probative on the issues of motive, opportunity, intent, preparation, and plan.

5. Trial counsel was not ineffective for basing the only defense around the theory that the victim suffered an alcoholic blackout. This strategy was calculated and prepared by counsel, and had a reasonable basis in furtherance of the defendant's interests.

6. The trial court did not err in permitting the testimony of the Commonwealth's toxicology expert, as she had ample qualifications to testify under the requirements of Pennsylvania law. Trial counsel was not ineffective for failing to object on the basis that the expert did not possess a medical degree or PhD. Trial counsel did find a motion in limine to preclude her testimony (which was not granted), cross-examined her, and objected to portions of her testimony.

7. The trial court's sentencing of the defendant to consecutive sentences on three different counts was not excessive. Sentencing, including the imposition of consecutive sentences, is within the trial court's discretion. The trial court considered the sentencing guidelines, pre-sentencing report, and the defendant's prior record, and was not unreasonable in determining the defendant's sentence.

8. Trial counsel was not ineffective for failing to communicate a plea offer to defendant. Trial counsel testified on record that he communicated the offer to defendant twice, kept the offer open until the day of trial, and that the defendant rejected it because it would have involved incarceration. The prosecutor also corroborated trial counsel's testimony in this regard.

(Elizabeth F. Collura)

Robert Schupansky for the Commonwealth.
Carl Marcus for Defendant.

No. CC 2007-03178. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., August 6, 2009—The Defendant, Robert Kennedy, was charged at CC 200703178 with various counts of Rape, Sexual Assault, and Indecent Assault. Following a bench trial on August 27, 2008, he was convicted of two (2) counts of Rape, one (1) count of Sexual Assault, and two (2) counts of indecent assault.

On November 24, 2008, the Defendant was sentenced as follows: at count one (1), Rape of an unconscious person, 18 Pa.C.S. 3121(a)(3), a period of incarceration of sixty (60) to one-hundred and twenty (120) months; and at count two (2), Rape by forcible compulsion, 18 Pa.C.S. 3121(a)(1), a consecutive period of incarceration of sixty-six (66) to one-hundred and thirty-two (132) months. No further penalty was imposed at any other count.

The Defendant filed Post-Sentencing Motions on December 3, 2008, and filed Amended Post-Sentencing Motions on March 16 and April 17, 2009. Hearings on those motions were denied, and pursuant to Pa.R.A.P. 1925, a Concise Statement of Matters Complained of on Appeal was filed on Defendant's behalf from which the following is taken verbatim:

> 1. The trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective, in a case which turned wholly on the credibility of the "victim," for failing to discover and introduce [the victim]'s crimen falsi convictions of theft and tampering with evidence, as well as her related possession with intent to deliver convictions, especially since she hid the convictions from the prosecutor.
>
> 2. The trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to call highly relevant character witnesses Charisse Richards, Matthew Richards and Marvin Cammon in a case that turned on the credibility of [the victim] versus that of Mr. Kennedy.
>
> 3. The trial court erred in denying appellant's post sentencing motions since the trial court erred in admitting and considering the irrelevant and prejudicial prior bad acts involving Jacqueline Smith and Chastity Gumpp.
>
> 4. The trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for centering the only defense around a theory that the victim suffered an alcoholic blackout, and therefore could have engaged in consensual sex with Mr. Kennedy.
>
> 5. The trial court erred in denying appellant's post sentencing motions since the trial court erred in admitting and considering the "expert" testimony of toxicologist Jennifer Jannsen and trial counsel was ineffective for failing to object to her testimony.
>
> 6. The trial court erred in denying appellant's post sentencing motions since Mr. Kennedy's convictions of 2 counts of rape, for rape of an unconscious person, and rape by forcible compulsion, were not supported by sufficient evidence and were against the weight of the evidence.
>
> 7. The trial court erred in denying appellant's post sentencing motions since the imposition of consecutive sentences resulted in an excessive sentence, the individual sentences were excessive and the trial court failed to state adequate reasons on the record for the sentence of 10 ½ - 21 years imprisonment.
>
> 8. The trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to communicate a plea offer to Mr. Kennedy.

The facts can be summarized as follows: Sometime in the Fall of 2006, the victim and the Defendant met each other on the dating website Match.com. Approximately three weeks later, after talking online and on the telephone, they agreed to meet in person. On the night of December 15, 2006, they met at a bar in Versailles, PA. They danced and consumed a number of drinks until the early morning, and then left the bar and went to a restaurant for breakfast.

After eating, they returned to the Defendant's house, where the victim fell asleep on the couch. She woke up some time later to find the Defendant having sex with her, and she asked him to stop, but he continued until she forced herself apart from him. She ran into the bathroom where she experienced vaginal pain and vaginal bleeding, then returned to the living room where she found the Defendant sleeping, and left through the kitchen. She called a friend on her cell phone, reported the rape, and received directions home.

The victim's friend contacted the police, and a police officer contacted the victim the next morning. A forensic examination was then conducted at a hospital. The examination revealed vaginal swelling and vaginal abrasions, bruising on the victim's body, and Diphenhydramine (Benadryl), in the victim's blood. The victim reported she believed she had been drugged by the Defendant the night before.

I.

The Defendant avers five (5) claims of ineffective assistance of trial counsel. To establish a claim of ineffective assistance of trial counsel, the Defendant must demonstrate that: (1) the underlying claim has substantive merit; (2) counsel did not have a reasonable basis for his or her actions or failure to act; and (3) the Defendant suffered prejudice as a result of counsel's deficient performance. A failure to satisfy any prong of this test will require rejection of the claim. *Commonwealth v. Bromley,* 862 A.2d 598 (Pa.Super. 2004).

The Defendant first claims that the trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to discover and introduce the victim's crimen falsi convictions of theft and tampering with evidence. To establish this claim, the Defendant must demonstrate that he suffered prejudice as a result of counsel's deficient performance. *Id.*

In support of this claim, the Defendant avers that the case "turned wholly on the credibility of the 'victim.'" Despite this averment that the only evidence presented at trial was first-party witness testimony, physical evidence and third-party witness testimony were also presented. Physical evidence included photographs and medical reports detailing the bruising and vaginal trau-

ma of the victim, and third-party witness testimony included statements by friends and attendants of the victim evidencing her mental and emotional trauma.

Considering this additional evidence, discovery and introduction of the victim's crimen falsi convictions would not have influenced the verdict, and the Defendant did not suffer prejudice as a result of trial counsel's deficient performance. Since the Defendant did not suffer prejudice, his claim that trial counsel was ineffective for failing to discover and introduce the victim's crimen falsi convictions must fail.

II.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to call character witnesses. To establish this claim, the Defendant must demonstrate that trial counsel did not have a reasonable basis for his failure to act. *Id.* At the Post-Sentence Motions Hearing, trial counsel gave his tactical reasons. Trial counsel stated generally that "[w]hen you put the character witnesses in, you…create a potential to open the door to…all of the prior acts that the [Defendant] did" (M.T. at 49).[1] Trial counsel stated specifically that, in this case, "[t]here was a danger there" (M.T. at 49). The Defendant himself stated on the record that "[trial counsel] told me…[character witnesses] weren't needed" (M.T. at 10).

Furthermore, the Defendant must also demonstrate that he suffered prejudice as a result of counsel's deficient performance. *Id.* In support of this claim, the Defendant again avers that the case turned on the credibility of the victim versus that of the Defendant. However, in addition to first-party witness testimony, physical evidence and third-party witness testimony was also presented at trial. The discovery and introduction of the victims crimen falsi convictions would not have influenced the verdict, and the calling of character witnesses would not have overcome the evidence presented at trial.

Instead, the calling of such witnesses may have opened the record up to other prior offenses of the Defendant himself. Trial counsel's actions were thus reasonably calculated to effectual the Defendant's interests. Since trial counsel had a reasonable basis for his failure to act, and the Defendant did not suffer prejudice, the Defendant's claim that trial counsel was ineffective for failing to call character witnesses must fail.

III.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since the trial court erred in admitting and considering testimony involving prior bad acts by the Defendant. Pa.R.E. 404(b)(2)-(3) provides that "[e]vidence of other crimes, wrongs, or acts may be admitted," to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," and may be admitted "upon a showing that the probative value of the evidence outweighs its potential for prejudice." A trial court's ruling regarding the admissibility of Rule 404(b) evidence may be reversed only upon a showing that the trial court abused its discretion. *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa.Super. 2003).

Both witness testimonies involved prior romantic relationships with the Defendant. Each witness detailed prior bad acts by the Defendant proving motive, opportunity, intent, preparation, and plan. One witness testified to a prior situation where the Defendant grabbed her, threw her onto a bed, and tried to forcibly remove her underwear. (T.T. 1 at 96). The other witness testified to a prior occasion where the Defendant pushed her down and constantly called her despite her requests for him to stop (T.T. 1 at 102-103).

The evidence of these prior bad acts show intent to get the victim in a relationship-type atmosphere, where the Defendant thereupon takes control of the situation, which is what he did in this case. The trial court ruled that the 404(b) evidence had probative value that outweighed its potential for prejudice and indicated its ability to separate the relevant evidence from the prejudicial evidence (T.T. 1 at 3-9).

When the trial court indicates the reason for its decision, the scope of review is an examination of the stated reason, and the standard is an abuse of discretion. *Id.* Since the testimony was of probative value and any prejudicial evidence was able to be separated from consideration by the trial court, the Defendant's claim that the trial court erred in admitting and considering testimony involving prior bad acts by the Defendant must fail.

IV.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for centering the only defense around a theory that the victim suffered an alcoholic blackout. To establish this claim, the Defendant must demonstrate that trial counsel did not have a reasonable basis for his actions. *Bromley*, 862 A.2d 598.

Based on contradictory testimony at various hearings from various first-party and third party witnesses, the number of drinks allegedly consumed by the victim ranged anywhere from two (2) to ten (10) (M.T. at 59). Based on these testimonies, the Defendant's expert witness testified that while it was unlikely that the victim suffered an alcoholic blackout, it was not impossible (T.T. 3 at 13).[2] Furthermore, trial counsel stated that his reason for calling the expert was not to prove his defense theory, but to present his defense theory and define "alcoholic blackout" (M.T. at 58-59). Trial counsel was well aware that his expert could not testify to a reasonable degree of scientific certainty that the victim suffered an alcoholic blackout, and had instead calculated a strategy to use witness testimony that the victim "couldn't remember," and other corroborating evidence, to prove this theory (M.T. at 60).

Many people pursue losing defenses, and some defenses are better than others, but trial counsel gave reasons for why he called his expert witness and presented his defense theory. Since trial counsel had a reasonable basis for his actions, the Defendant's claim that trial counsel was ineffective for failing to call character witnesses must fail.

V.

The Defendant raises two (2) claims of error with regard to the Commonwealth's expert witness. First, the Defendant claims that the trial court erred in admitting and considering the expert testimony of the prosecution's expert witness. Second, the Defendant claims trial counsel was ineffective for failing to object to her testimony. To establish these claims, the Defendant must demonstrate that the underlying claims have substantive merit. *Id.*

Pa.R.E. 702, testimony by experts, provides that if "knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert…may testify thereto in the form of an opinion or otherwise." A trial court's decision to qualify expert testimony can be reversed "only in the event the court abused its discretion or committed an error of law." *Commonwealth v. Hetzel*, 822 A.2d 747, 761 (Pa.Super. 2003).

The Defendant first attacks the expert's qualification by stating that she did not possess a medical degree or a PhD. However, in Pennsylvania, the standard for qualification of an expert is a liberal one, and qualification is proper "where it will aid the [fact-

finder] regarding the subject matter beyond the knowledge...of an average layperson. *Hetzel*, 822 A.2d at 761. The Commonwealth's expert was a certified toxicologist with a Master of Science Degree who has been employed by the Allegheny County Medical Examiner's Office for 28 years. She was properly qualified to testify as an expert in toxicology. The Defendant then attacks the expert's testimony by claiming that it was not persuasive beyond a reasonable doubt. However, "[t]he law is clear that an expert's conclusions need not be stated as beyond a reasonable doubt," and whether an expert's testimony is persuasive is a matter for the fact-finder's consideration. *Id.* She was called to testify to the existence of Diphenhydramine in the victim's bloodstream, and it is the duty of the fact-finder to consider the persuasiveness of this evidence.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to object to her testimony. However, the Defendant's counsel filed a Motion in Limine to preclude the expert's report and testimony (which the trial court did not grant), cross-examined the expert, and objected to portions of her testimony at trial (T.T. 2 at 26). Since both underlying claims are without merit, the Defendant's claims that the trial court erred in admitting and considering the expert testimony of the prosecution's expert witness and that trial counsel was ineffective for failing to object to her testimony must fail.

VI.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since the Defendant's convictions of two (2) counts of rape were (a) against the weight of the evidence and (b) not supported by sufficient evidence.

A challenge to the weight of the evidence must establish that verdict was so contrary to the evidence that it shocks one's sense of justice and makes a new trial imperative. *Commonwealth v. Butler*, 647 A.2d 928 (Pa.Super. 1994). A verdict is said to be against the weight of the evidence such that is shocks one's sense of justice when "the figure of Justice totters on her pedestal[.]" *Commonwealth v. Davidson*, 860 A.2d 575, 581 (Pa.Super. 2004).

The facts set forth in the record clearly establish the crimes charged, and there is nothing in the record which shocks one's sense of justice and "cries out for a new trial in order to permit justice to prevail." *Commonwealth v. Brown*, 648 A.2d 1177, 1191 (Pa. 1994). The fact-finder is entitled to believe all, part, or none of the evidence, and while the Defendant avers that the only evidence presented at trial was incredible first-party witness testimony, physical evidence and third-party witness testimony was also presented. The physical evidence included photographs and medical reports detailing the bruising and vaginal trauma of the victim and the presence of Diphenhydramine in the victim's blood.

Regardless, the Defendant argues that there were not two (2) rapes in this case, and requests that at least one (1) conviction for rape be reversed and the sentence vacated. The Defendant argues that the transition between the victim waking up and the termination of the act occurred in an instant, an instant too fleeting to justify convictions for rape of an unconscious person *and* rape by forcible compulsion. However, the trial court found that the victim fell asleep on the couch and woke up some time later to find the Defendant having sex with her. The trial court also found that she asked him to stop, but he continued until she forced herself apart from him. These findings clearly justify the conviction for two (2) counts of rape. Since there was sufficient evidence to find that the Defendant was guilty of the crimes charged, his claim that the verdict was against the weight and sufficiency of the evidence must fail.

VII.

The Defendant also claims that the trial court erred in denying appellant's post sentencing motions since (1) the individual sentences were excessive, (2) the imposition of consecutive sentences resulted in an excessive sentence, and (3) the trial court failed to state adequate reasons on the record for the sentence.

In Pennsylvania "sentencing is vested in the discretion of the trial court, and will not be disturbed absent a manifest abuse of that discretion." *Commonwealth v. Malovich*, 902 A.2d 1247, 1252-1253 (Pa.Super. 2006). "A manifest abuse of …discretion" occurs when the sentence is "manifestly unreasonable," or resulted from "partiality, prejudice, bias or ill will." *Id.* When the trial court imposes a sentence that is within the statutory limits "there is no abuse of discretion unless the sentence is manifestly excessive so as to inflict too severe a punishment." *Commonwealth v. Person*, 297 A.2d 460, 462 (Pa. 1972). In this case, the trial court imposed two standard range sentences (S.T. at 17). 3 Since the Defendant has failed to provide a plausible argument that the individual sentences were excessive, his claim that the imposition of consecutive sentences resulted in an excessive sentence must fail.

Regardless, the Defendant argues that it is the imposition of *consecutive* sentences that result in an excessive sentence. However, "[t]he general rule in Pennsylvania is that in imposing a sentence the court has discretion to determine whether to make it concurrent with or consecutive to other sentences then being imposed or other sentences previously imposed." *Commonwealth v. Graham*, 661 A.2d 1367, 1373 (Pa. 1995). The imposition of consecutive sentences does not present a substantial question "regarding the discretionary aspects of sentencing," unless the trial court has "failed to state adequate reasons on the record for the sentence imposed[.]" *Commonwealth v. L.N.*, 787 A.2d 1064, 1071 (Pa.Super. 2001). Thus, the Defendant finally argues that the trial court failed to state adequate reasons on the record for the imposition of the sentence.

When imposing a sentence, the trial court is required to consider the circumstances of the offense and the character of the Defendant, and "to state its reasons for the sentence on the record, so that a reviewing court can determine whether the sentence imposed was based upon accurate, sufficient, and proper information." *Id.* "Where the sentencing judge had the benefit of a pre-sentence report, it will be presumed that he was aware of relevant information regarding appellant's character and weighed those considerations along with the mitigating statutory factors." *Id.* A sentence stated to be based upon "accurate, sufficient, and proper information" cannot be found manifestly "unreasonable" or "excessive," nor resulting from "partiality, prejudice, bias or ill will."

The trial court reviewed the sentencing guidelines and the pre-sentence report, and noted the Defendant's prior record, (S.T. at 16-17). Taking all of this information into consideration, the trial court found no reason to sentence in the mitigated section nor in the aggravated section, but believed that the high standard range was appropriate for the cases (S.T. at 17). The sentence of standard range consecutive sentences was based upon "accurate, sufficient, and proper information," and the trial court's reasons for imposing the sentence are clearly stated on the record. *Id.* Considering the foregoing, the Defendant's claim that the imposition of standard range consecutive sentences was excessive and unreasonable must fail.

VIII.

The Defendant finally claims that the trial court erred in denying appellant's post sentencing motions since trial counsel was ineffective for failing to communicate a plea offer. To establish this claim, the Defendant must demonstrate that the underlying

claim has substantive merit. *Bromley*, 862 A.2d 598.

The Defendant avers that trial counsel never told him about the plea offer. However, trial counsel testified on record that he communicated the offer to the Defendant twice, kept the offer open until the day of trial, and that the Defendant ultimately rejected the offer because "[i]t would have involved jail…[the Defendant] didn't want to go to jail" (M.T. at 73). Also, the prosecutor in this case corroborated trial counsel's testimony, stating on record that he communicated the offer to the defense counsel, left the offer open, and after readdressing the offer with the defense counsel, witnessed a conversation between the defense counsel and the Defendant, after which he was told a second time that the Defendant was not interested in the offer (M.T. at 31).

Considering this testimony, trial counsel clearly communicated the plea offer to the Defendant, and the underlying claim is thus without substantive merit. Since the underlying claim is without substantive merit, Defendant's claim that trial counsel was ineffective for failing to communicate a plea offer must fail. Based on the foregoing, Defendant's issues raised as matters complained of on appeal are deemed without merit.

BY THE COURT:
/s/Zottola, J.

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[1] M.T.: Denote Motion Transcript dated April 30, 2009.

[2] T.T.: Denote Trial Transcript Volume 1 dated August 25, 2009; Trial Transcript Volume 2 dated August 27, 2009; or Trial transcript Volume 3 dated May 20-21, 2009.

[3] S.T.: Denote Sentencing Transcript dated November 24, 2008.