

NO. 63079-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

In re the Marriage of:

CARMEN ROCKWELL,

Respondent,

v.

PETER ROCKWELL,

Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable James A. Doerty)

REPLY BRIEF OF APPELLANT

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Court Rules and Statutes

RCW 26.09.0801
CR 52(a)(2)(B)9

I. INTRODUCTION

As an error-correcting court, this Court refrains from determining whether a particular division of marital assets is fair and equitable until the trial court has had an opportunity to do so, and then reviews the trial court's determination for a manifest abuse of discretion. According to Carmen, this Court abandoned that rule in the first appeal in this case and judged as fair and equitable a division of assets the trial court had never considered. Carmen points to no extenuating circumstances that could have justified such extraordinary action by this Court, and her argument is inconsistent with this Court's published opinion remanding to the trial court for "further proceedings." *In re Marriage of Rockwell*, 141 Wn. App. 235, 255, 170 P.3d 522 (2007).¹

Consistent with the rule that remand is required where the trial court mischaracterized assets (unless it is clear that the mischaracterization was harmless error), this Court remanded to the trial court to reconsider the overall property division in light of the proper character of the pension. But the trial court failed to do so, instead accepting Carmen's argument that this Court preempted any exercise of discretion by the trial court to determine a fair and equitable division in the first instance and remanded to the trial court only for ministerial entry of orders. The trial court's failure to exercise its discretion is reversible error and requires a second remand.

¹ Carmen even asserts that this Court can now "independently determine that the property distribution was fair and equitable under RCW 26.09.080 without requiring a second remand." Respondent's Brief at 24.

Even assuming the trial court exercised its discretion on remand, it abused that discretion in maintaining a 60/40 division of the community property in the face of a substantial decrease in the pool of community assets while awarding significant additional separate property to Carmen. The disparity between Peter's and Carmen's shares of the marital estate grew by more than \$343,000, so that Carmen's share is now more than twice Peter's after a 26-year marriage. If the original division of assets placed the parties in roughly equal financial positions for the rest of their lives as required by this Court, the division on remand with such an increase in disparity could not also meet the same standard.

II. ARGUMENT

A. The Social Security Offset Is a Red Herring.

Attempting to distract the Court from the simple issue raised in this appeal, Carmen accuses Peter and his attorneys of misrepresenting the facts regarding the "social security offset." There was no misrepresentation and, in any event, the social security offset is a red herring.

The social security offset was a means by which the trial court "compensated" Carmen for the fact that her receipt of federal pension benefits is in lieu of any social security benefits, while Peter can receive social security benefits if available when he becomes eligible. The trial court found that, absent the pension, Carmen could have received \$159,464 in social security benefits in her lifetime (present value in 2005).

The trial court deducted this amount from the present value of Carmen's pension survivor benefit for purposes of determining the division of property. Appendices A and B to Opening Brief (CP 166-67). This resulted in her receiving additional tangible assets in the form of a lump sum, and reduced Peter's share of the tangible assets accordingly. This Court upheld the social security offset in the first appeal. *Rockwell*, 141 Wn. App. at 244-45.

It is not a misrepresentation to state that the division of assets on remand was nearly 70/30. At the time of divorce in 2005, Peter was over 10 years away from receiving social security benefits at age 65. The 70/30 figure reflects the actual division without the fiction of the social security offset for benefits that would not begin to be paid for another ten years. In any event, the offset is clearly called out in the spreadsheets. Appendices A and B to Opening Brief (CP 166-67). Likewise, it is not a misrepresentation to refer to the original overall division as "60/40" when, as noted in the Opening Brief at 11, both this Court and the trial court used those figures as shorthand in referring to the 62/38 overall division including the offset. *See Rockwell*, 141 Wn. App. at 239, 255.

Regardless, the social security offset has no bearing on this appeal. Whether the property division is considered with or without the offset, the increased disparity in the overall division on remand compared to the original division is the same—the difference between Peter's and Carmen's awards grew by about \$343,000 (to more than \$1 million):

	Difference Between Carmen's and Peter's Awards	
	<i>With Offset</i>	<i>Without Offset</i>
Remand	\$1,982,967 (Carmen) - 955,044 (Peter) =\$1,027,923	\$2,242,431 (Carmen) - \$955,044 (Peter) =\$1,187,387
Original	\$1,811,239 (Carmen) - \$1,126,769 (Peter) =\$684,470	\$1,970,703 (Carmen) - \$1,126,769 (Peter) =\$843,934
Change	\$343,453	\$343,453

See Appendices A and B to Opening Brief (CP 166-67).

To eliminate this irrelevant issue and avoid further wasted time, this Brief will refer to the amounts and percentages awarded *including* the offset, that is: 62/38 in the original division, 67/33 on remand.

B. The Trial Court Failed to Follow This Court's Mandate in Refusing to Exercise Its Discretion to Revisit the Division of Assets on Remand after Properly Characterizing the Pension.

The trial court's error in characterizing the federal pension (per this Court's decision in the first appeal) had a profound impact on the amount of community and separate assets: correction of the error reclassified \$446,789 from community assets into Carmen's separate assets. See Appendices A and B to Opening Brief ("Wife's separate property") (CP 166-67). Carmen argues that because this Court affirmed the trial court's original 60/40 division of the community property as a proper exercise of discretion, that split became the "law of the case," and the trial court was required to divide the substantially smaller pool of community assets 60/40 on remand *and* award Carmen all of her separate assets.

This Court affirmed the overall division of the assets, but only “[a]bsent the error in characterizing the federal pension.” *Rockwell*, 141 Wn. App. at 255. This Court found that a 60/40 division of the community property and a 62/38 overall division was fair and equitable as applied to the *original* amounts of community and separate property. This Court did *not* determine whether applying those percentages to the *new* amounts of community and separate property (after the pension was recharacterized) could result in a fair and equitable distribution, *i.e.*, one that placed the parties in “roughly equal financial positions for the rest of their lives.” Therefore, as recognized by this Court in *In re Marriage of Shui*, 132 Wn. App. 568, 586-87, 125 P.3d 180 (2005), it was appropriate for the trial court to reconsider the overall division of assets on remand. *See also In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992).

Carmen concedes that she expected this Court, if it found that the trial court mischaracterized the pension, to remand for the trial court to reconsider the division of assets. Respondent’s Brief at 17. But she argues that, even though this Court remanded to the trial court due to the mischaracterization of the pension, this Court preempted the exercise of any discretion on remand and decided it would be fair and equitable to increase the difference between Carmen’s and Peter’s awards by \$343,000. Carmen cites a single sentence in this Court’s opinion as the basis for her argument:

When the trial court's 60/40 division of the property is applied to the community property of the pension, using the time rule method means that Peter will receive 24.4 percent of the gross pension, and Carmen will receive 74.6 percent of the gross pension.

Rockwell, 141 Wn. App. at 253.

This Court does not determine a fair and equitable division of property in the first instance. "The trial court is in the best position to assess the assets and liabilities of the parties and determine what is 'fair, just and equitable under all the circumstances.'" *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999), quoting *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985).

As discussed in the Opening Brief, when placed in the context of this Court's opinion and the unbroken line of cases under which remand to the trial court is required where property was mischaracterized, it is clear that the figures calculated by this Court were meant as an illustration of the result if the original 60/40 division of community assets were maintained, not a mandate to keep that division despite the decreased pool of community assets and ignore the increased disparity between the overall amounts awarded each party. Although this Court found that characterizing the pension according to the time rule "more appropriately values Carmen's first 16 years of work for the federal government," this Court held that the 62/38 overall division placed the parties in "roughly equal financial positions for the rest of their lives," and neither considered

nor decided whether a 67/33 overall division could also meet that standard. *Rockwell*, 141 Wn. App. at 253-55.

Carmen focuses upon this Court's rejection of Peter's argument in the first appeal that the Court should affirm the original distribution of assets without regard for the mischaracterization of the pension because, "[o]bviously, the [trial] court would not have further reduced its award to Peter based on a different characterization of the pension." Respondent's Brief at 19, quoting Appellant's Reply Brief dated 1/8/2007. Carmen ascribes undue significance to the rejection of that argument, characterizing it as a sign that this Court reached the opposite conclusion—*i.e.*, that the trial court obviously would have blindly applied the same percentages in dividing the property notwithstanding the large increase in the disparity between the parties shares of the marital estate and their financial circumstances. There is no indication that this Court so concluded.²

This Court's decision to remand was consistent with a finding under *Shui* and *Kraft* that it was unclear whether the trial court would have made the same division of all the property but for the mischaracterization. The consequence of such a finding under those cases is that the trial court is given an opportunity to reconsider the division of assets. Importantly, in a dissolution proceeding, all property, both separate and community, is

² And the record on remand demonstrates that such a conclusion would have been erroneous. RP (10/12/08) 17-19.

before the trial court for distribution to either party. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 348, 48 P.3d 1018 (2002). Thus, the trial court could have exercised its discretion on remand in various ways to maintain a distribution that would place the parties in “roughly equal financial positions for the rest of their lives,” including by redividing the community property or by awarding some of Carmen’s separate property to Peter. *See* Opening Brief at 26.

Carmen’s argument and the trial court’s ruling on remand are contrary to *Shui* and *Kraft*, and contrary to the principle that this Court, in its role as an error-correcting court, affords the trial court the opportunity to exercise its discretion to divide assets in the first instance following recharacterization. *See Brewer*, 137 Wn.2d at 769. The trial court was required to revisit the division of assets on remand and failed to exercise its discretion, apparently based on Carmen’s arguments, which were grounded in a misunderstanding or, worse, a mischaracterization of this Court’s decision. This was an abuse of discretion. *See Brunson v. Pierce County*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009) (“Failure to exercise discretion is an abuse of discretion.”). This Court should reverse the judgment and remand for further proceedings.

C. Even if the Trial Court Exercised Its Discretion on Remand, the Property Division on Remand Was Not Fair and Equitable.

Even as the difference between Peter’s and Carmen’s shares of the marital estate grew by more than \$343,000 so that Carmen’s share is now

more than twice Peter's after a 26-year marriage, the trial court did not enter a finding that a 60/40 division of the reduced pool of community property assets on remand or a 67/33 overall division was fair and equitable. Even assuming the trial court reached that conclusion silently (which would violate the requirement of written findings under CR 52(a)(2)(B); see *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972)), it abused its discretion. To maintain the 60/40 division of the community property in the face of a substantial decrease in the pool of community assets while awarding significant additional separate property to Carmen was neither fair nor equitable. If a 62/38 overall division placed the parties in "roughly equal financial positions for the rest of their lives," a 67/33 split could not meet the same standard.

Notwithstanding her argument that *this* Court determined that a 67/33 overall division placed the parties in "roughly equal financial positions for the rest of their lives" just the same as a 62/38 division, and that the trial court lacked discretion to consider the issue on remand, Carmen argues that such a disparate division was "well within the *trial court's* discretion." Respondent's Brief at 25. She cites a handful of cases where a disproportionate property division was affirmed. But those examples are not instructive where, as here, the trial court previously decided the amount of assets that must be awarded each party to place the parties in "roughly equal financial positions for the rest of their lives."

This Court ruled in the first appeal that a 62/38 overall division was within the trial court's discretion "based on the difference in age, earning capacity, physical condition, and that Peter has the ability to earn income and save for retirement in the future." *Rockwell*, 141 Wn. App. at 255. But, at some point, the disparity exceeds what the facts can support, or the standard of "roughly equal" is meaningless.

The difference in age is only eight years and four months. *Rockwell*, 141 Wn. App. at 246. Carmen states that Peter "has fewer future medical/financial needs than the wife." Respondent's Brief at 26. But, presumably, Carmen cannot predict the future. There is no assurance that Peter, as he ages, will be any healthier than Carmen was at any particular age. Indeed, since the time of trial, Peter was diagnosed with atrial fibrillation (irregular heartbeats), which already has landed him in the emergency room twice, and this condition substantially increases the risk that Peter will suffer a stroke. CP 314. In addition, Peter developed a hernia caused by age and regular lifting of heavy equipment during recent employment. *Id.*

The notion that Peter could "make up" the disparity between the property awards through employment is unsupportable under the 67/33 division on remand. Under the original 62/38 division, Carmen received \$684,470 more than Peter. Appendix A to Opening Brief (CP 167). The trial court stated its goal was to leave the parties "in the same position or nearly the same position in the large picture," 4RP 110, but reasoned that

62/38 was “close enough” because Peter could work seven years at a salary of \$70,000, to earn an additional \$490,000. 4RP 109-110. On remand, however, the disparity in the awards grew by more than 343,000, to \$1,027,923. Appendix B to Opening Brief (CP 166). At 70,000 per year, Peter would have to work almost 15 years—until age 70—to earn that amount. This assumes that Peter, already age 55 at the time of trial in 2005 and having been out of the workforce more than five years, and now age 59 with health issues, could find suitable work earning \$70,000 per year. And the likelihood of this dropped significantly with the onset of the current recession.³

The parties are not in roughly equal financial positions where, after a 26-year marriage, Carmen will receive more than twice the assets awarded Peter, and where Peter’s financial future is at far greater risk than Carmen’s. Carmen retired at age 60, and her financial future is secure because her money is already in hand or being received in the form of guaranteed pension payments. Peter must work until age 70 (if he can) and bet on social security benefits being available in 2016 and beyond.

³ Carmen asserts that Peter was “voluntarily unemployed for at least two years” and “sought employment only after being ordered to do so pending trial.” Respondent’s Brief at 3-4. Peter had successfully found new employment four times during the marriage, including two times after moving to accommodate Carmen’s career. He was otherwise continuously employed until being laid off in 1999. 1 RP 26; 3RP 105-06. After Peter unsuccessfully searched for employment until the spring of 2002 (during the last recession), both spouses agreed to retire. 1RP 26-27, 29, 42, 60; 3RP 106-11, 113-17, 129-131, 155.

In an attempt to argue that the disparity between the property awards is not what it seems, Carmen asserts that her \$326,400 pension survivor benefit is essentially worthless. Respondent's Brief at 27. The trial court did not view the benefit as worthless or it would not have accepted the actuary's valuation and included it in the award. The parties were awarded the actuarially-derived 2005 present value of their respective survivor benefits under the pension. Although the trial court found that Carmen will more likely than not predecease Peter—in which case only Peter would receive a survivor benefit—Carmen still has a 43 percent chance of outliving Peter, 2RP 80, and the chance is probably greater in light of Peter's more recent health problems mentioned above. If Peter were to die first, Carmen would receive 100% of the basic annuity payments (more than the total annuity being paid now), and Peter's heirs would receive nothing from the pension, the largest asset of this 26-year marriage. 2RP 80; CP 86-87.

Carmen also asserts that Peter has an additional inheritance coming from a trust. Respondent's Brief at 7. The evidence at trial was the trust was paying distributions to Peter's stepmother, and Peter had a one-third interest in the remainder, if any, upon her death. 3RP 180-82. The possibility of an inheritance from this trust was so speculative that the trial court did not consider it (Carmen concedes this in her brief at 7), and it remains irrelevant. Furthermore, it would be unfair to penalize Peter for

this inheritance he may never receive when he received no separate property credit for inheritances he actually received during the marriage.

The disparity in the division of the marital property is not just unfair in future terms, but significantly undervalues Peter's contributions during the 26-year marriage. Peter's trust disbursements and inheritance of about \$67,000 early in the marriage were the primary building blocks for growth of the parties' fixed assets, valued at nearly \$1.1 million in 2005. 3RP 158, 178; CP 166. He also accrued over \$350,000 in retirement accounts, 1RP 174; CP 82 (attached as Appendix A to this Reply Brief), and was the primary caretaker of the largest tangible asset in the marital estate—the family home. 1RP 166-68; Appendix A (CP 82). The tangible assets were developed largely through Peter's efforts as the family financial manager, 2RP 135; 3RP 78, but Carmen was awarded 68 percent of the tangible assets, even as she was awarded about 75 percent of the pension. Appendix A (CP 82). The trial court awarded 90 percent of Peter's Rollover IRA, worth \$311,638, to Carmen. *Id.*

Although the federal pension was associated with Carmen's employment, both parties sacrificed to earn it and planned for its availability in retirement. Carmen moved fifteen times to gain promotions in her career before the marriage, and she continued that approach during the marriage. 1RP 62-63. Peter repeatedly left good jobs and had to search for employment and take less-than-ideal positions so the family could relocate to advance Carmen's career. 1RP 22-26, 3RP 76, 99-105,

178-79. A husband deferring to the wife's career was uncommon, particularly in the 1980s and 1990s, but this was essential to the growth of the pension benefit to its value of about \$84,000 per year at the time of trial in 2005, a present value of about \$2,000,000. CP 86, 92. If Carmen had left federal employment when the parties married in 1978, the pension would have been worth only \$6,000 per year (beginning at age 62)—a present value of about \$30,000 to \$50,000 in 1978 dollars. CP 88; 2RP 12-14, 51, 78; Appendix B. And it certainly was possible that Carmen could have given up her government job early in the marriage; she had done this twice before marrying Peter in 1978 (once to accommodate a former husband) and withdrew her retirement contributions. 1RP 61; 2RP 75-76, 155. Peter and Carmen repaid the withdrawn contributions with community funds to reinstate the pension and get credit for Carmen's prior years of federal employment. 2RP 75-78.

This was a 26-year marriage—the kind of lengthy partnership this Court presumably seeks to encourage. *See Herrett v. Herrett*, 80 Wash. 474, 479, 141 P. 1158 (1914) (“The law recognizes marriage as a civil contract founded on public policy, and encourages it in the interest of morality.”). The parties capitalized upon the limited assets they had early on and made logical, orderly plans for the future. They both worked and sacrificed over the course of 26 years to achieve a comfortable retirement. They were successful in increasing the value of their tangible assets from less than \$100,000 in 1978 to \$1.1 million in 2005 and

increasing the value of the pension from a present value of \$30,000 to \$50,000 in 1978 to \$2,000,000 in 2005. One spouse should not be forced work until age 70 or more and assume the risk of being able to build up retirement assets a second time. The 67/33 overall division on remand creates an unfair disparity between the parties' financial positions, far from satisfying the "roughly equal" standard employed by this Court. This Court should reverse the judgment and remand for further proceedings.

D. The Award of Prejudgment Interest on Pension Benefits Was Error Because the "Overpayment" Was Unliquidated.

Carmen argues that the pension "overpayments" were liquidated "because it was undisputed that the time rule method would result in [a] 62/38 split of the pension between community and separate." Respondent's Brief at 31. But Peter's liability for pension "overpayments" was not a certainty even after this Court's decision in the first appeal. As discussed above and in the Opening Brief, the trial court was not required, on remand, to *distribute* the pension according to the time rule without any exercise of discretion. Instead, the trial court was required to *characterize* the pension according to the time rule, then reconsider the division of all the assets in light of their proper character in accordance with *Shui* and *Kraft*. The amount of overpayment, if any, was completely within the trial court's discretion and, thus, not liquidated. See *Car Wash Enters., Inc. v. Kampanos*, 74 Wn. App. 537, 548-49, 874 P.2d

868 (1994) (claim was unliquidated where, although the amount expended to clean up contamination was a sum certain, the amount owed by defendant was not). The award of prejudgment interest should be vacated.

E. This Court Should Deny Carmen's Request for Attorney's Fees and Award Attorney's Fees to Peter.

Carmen argues that Peter's appeal is frivolous and, thus, he should be required to pay Carmen's attorney's fees as a sanction under RAP 18.9. "[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). The court considers the record as a whole and resolves all doubts against finding an appeal frivolous. *Delaney v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475 (1997).

If either party's position is frivolous, it is Carmen's. This Court's decision in the first appeal was clear, and this second appeal was made necessary mainly due to the actions of Carmen and her attorneys in the trial court on remand. Peter should be awarded his attorney's fees considering the disparity in financial resources, the relative merit of his appeal, and the actions of Carmen's attorneys both in the trial court on remand and on appeal, including their contradiction of prior briefing in which they acknowledged that the trial court would have discretion to reconsider the division of assets on remand. *See* Opening Brief at 14 and Appendix D to same.

III. CONCLUSION

The trial court erred in failing to reconsider the division of assets on remand and in concluding it lacked authority and discretion to do so. This Court should reverse the judgment (including the award of prejudgment interest, attorney's fees, and costs) and remand for further proceedings. Alternatively, the division of assets on remand was not fair and equitable because it failed to place the parties in roughly equal financial positions for the rest of their lives. It is thus an abuse of discretion, and this Court should reverse and remand for further proceedings, including reconsideration of the overall division of assets.

DATED this 8th day of January, 2010.

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APPENDICES

APPENDIX A: Table of Tangible Assets (CP 82)

APPENDIX B: Approximation of Value of Federal Pension in 1978

APPENDIX A

Exhibit J
Tangibles per Decree

TANGIBLE ASSETS as Distributed by the Trial Court in its Decree

Summary: By the decree, wife received \$ 393,026 more than husband in Tangible Assets. Her share was 113% greater than husband's share.

Asset	Gross Value	Encumbrance	Net Value	Wife's separate property	Total Community Property	% of Total Community Prop of this Type	Award of Community Prop to Husband	Award of Community Prop to Wife	COMMENT
Retirement Accounts									
Wife's IRA	\$0	\$0	\$0		\$0		\$0	\$0	Finding 2.8.2
Wife's Thrift Plan	\$84,965	\$0	\$84,965		\$84,965		\$0	\$84,965	Finding 2.8.3; Decree 3.3.2
Husband's Contributory IRA	\$65,389	\$0	\$65,389		\$65,389		\$65,389	\$0	Finding 2.8.4; Decree 3.2.11
Husband's Rollover IRA	\$311,638	\$0	\$311,638		\$311,638		\$31,164	\$280,474	Finding 2.8.5; Decree 3.2.12 & 3.3.3.
Subtotal Retirement	\$461,992	\$0	\$461,992		\$461,992	42.51%	\$96,553	\$365,439	
Vehicles									
Subaru Forester 2003	\$17,895	-\$11,149	\$6,746		\$6,746		\$6,746	\$0	Finding 2.8.6; Decree 3.2.2
Subaru Forester 2005	\$1,000	\$0	\$1,000		\$1,000		\$0	\$1,000	Finding 2.8.7; Decree 3.3.4
Subtotal Vehicles	\$18,895	-\$11,149	\$7,746		\$7,746	0.71%	\$6,746	\$1,000	Based on Drebln appraisal
Real Property									
Family Home	\$710,000	-\$93,000	\$617,000		\$617,000		\$246,800	\$370,200	Finding 2.8.1; Decree 3.2.1 & 3.3.1
Percentage							40.00%	60.00%	5
Award to Wife							-\$2,640	\$2,640	Decree 3.14.1
Award to Wife							-\$603	\$603	Decree 3.3.8
Subtotal Family Home	\$710,000	-\$93,000	\$617,000		\$617,000	56.78%	\$243,557	\$373,443	
SUBTOTAL TANGIBLE ASSETS			\$1,086,738.00		\$1,086,738.00	100.00%	\$346,856	\$739,882	Wife received \$ 393,026 more than husband. Her share of the Tangible Assets was 113% greater than husband's share.
PERCENTAGE							31.92%	68.08%	

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APPENDIX B

Appendix B

Approximation of Value of Federal Pension in 1978

The following calculations show an approximation of the value of the parties' federal pension at the time of the marriage in 1978, based on figures contained in the record, with the results indicating that the value was about \$30,000 to \$50,000.

Pension accrued as of 1978 = \$505/month or \$6,060/year (CP 88; 2RP 51-52, 78)

Pension accrued as of 2005 = \$7,010/month or \$84,120/year (CP 86; 2RP 12)

Ratio of two pension amounts = $\$6,060 \div \$84,120 = 0.0720$

Present value of total pension benefits in 2005=

$\$1,431,045 + \$326,400 + \$253,289 = \$2,010,734$ (CP 167)

The present value of a \$6,060/year pension in 2005 was $0.0720 \times \$2,010,734$ or \$144,773

The present value of the same amount in 1978 can be determined as follows (using the 6% interest rate used by Carmen's expert at trial, 2RP 44):

$$\frac{1}{1.06^{27}} = .0207 \quad 0.0207 \times \$144,773 = \$29,968$$

The present value of a \$6,060/yr pension benefit in 1978 was \$29,968, using a 6% interest rate.

The same calculation with a 4% interest rate results in a 1978 present value of \$50,210.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on the date below I caused copies of the *Reply Brief of Appellant* and this *Certificate of Service* to be served upon counsel of record as follows:

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DATED this 8 day of January, 2010.


Catherine A. Norgaard, legal assistant