STATE OF MICHIGAN

IN THE SUPREME COURT

FREDIE STOKES, Plaintiff-Appellee, vs DAIMLERCHRYSLER CORPORATION, a Self-insured, Defendant-Appellant. _______________________________________/	Supreme Court: 132648 Court of Appeals: 268544 Lower Court: WCAC Docket No: 020388

132648
Suppl

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTION PRESENTED

DOES THE COURT OF APPEALS' OPINION IN THIS MATTER PROPERLY RECOGNIZE THAT PLAINTIFF MUST PROVE DISABILITY BY A PREPONDERANCE OF THE EVIDENCE, AND DOES IT ALSO ACKNOWLEDGE THAT THE BURDEN OF GOING FORWARD WITH THE EVIDENCE SHIFTS AS THE PARTIES PRESENT THEIR RESPECTIVE PROOFS?

Plaintiff-Appellee answers "YES."
The WCAC answered "YES."
The Court of Appeals answered "YES."

II

DID THE WCAC CORRECTLY HOLD THAT THE WORKER'S DISABILITY COMPENSATION ACT CONFERRED UPON DEFENDANT NO RIGHT TO AN EVALUATION BY A VOCATIONAL "EXPERT," AND DID IT ALSO CORRECTLY FIND THAT THERE WAS NO ABUSE OF DISCRETION IN THE MAGISTRATE'S REFUSAL TO GRANT AN ADJOURNMENT UNDER THE CIRCUMSTANCES OF THIS CASE?

Plaintiff-Appellee answers "YES."
The WCAC answered "YES."
The Court of Appeals ?????

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vs

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Defendant-Appellant.

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Court of Appeals: 268544

Lower Court: WCAC Docket No: 020388

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses without further reference shall denote pages of the transcript of proceedings held on June 10, 2002. “Rem” refers to the transcript of proceedings on remand held on October 7, 2003. The medical depositions shall be referred to as follows:

"M" Philip Mayer, M.D.
"P" Arturo Paz, M.D.)

Plaintiff was born on September 4, 1951 (13,43). He is a high school graduate (Rem 9,14). He attended college after graduation, attempting to further a career in sports, but quit after one year (Rem 9-10).

On June 9, 1971, at age 19, plaintiff began work for defendant (14). He spent the next 28 years in defendant’s employ, working at its Warren Truck Plant (17). Plaintiff generally drove some type of hi-lo during his time with defendant (14-17,23). During periods of lay-off, he occasionally worked at his cousin’s record shop as a stock person (Rem 22).

About three or four years prior to his last day of work, plaintiff started to experience neck and arm symptoms (33). By the time he stopped work, he could no longer turn around or look back, and had trouble walking (33-35). His upper extremities were weak

and he had little strength in his hands (38). Ultimately, he was no longer physically able to do his job (52), due to extreme neck and upper back pain (37).

Plaintiff's treating neurosurgeon, Dr. Paz, diagnosed myelopathy as well as rheumatoid changes and instability of the cervical spine, and a fracture of the odontoid (P 7,11-12). The doctor performed cervical spine surgery during February, 2000 (39,53; P 12).

In a decision mailed on August 27, 2002, Magistrate John J. Rabaut found plaintiff entitled to benefits, because his work-related condition prevented him from returning to the job he held with defendant. At about the same time the magistrate was rendering this opinion, this Court issued its decision in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), reinterpreting the statutory definition of "disability." As a result, after an appeal to the Workers' Compensation Appellate Commission ["WCAC"], the case was remanded "for reconsideration of the disability issue under the *Sington* standard."

After further proceedings on remand, Magistrate Rabaut issued a new decision mailed on October 17, 2003, again finding plaintiff to be disabled. The magistrate held that plaintiff was trained and qualified solely for physically strenuous work, to which he could no longer return.

The case then returned to the WCAC, which had retained jurisdiction. The WCAC considered the matter *en banc*, and affirmed the magistrate's finding of disability in a lengthy and divided opinion dated January 26, 2006.

Thereafter, defendant filed both an application for leave to appeal with the Court of Appeals and a bypass application with this Court. On June 1, 2006, this Court directed the Court of Appeals to grant defendant's application and issue an expedited decision.

That decision was issued by the Court of Appeals on October 26, 2006. The Court affirmed the WCAC's finding that plaintiff was disabled, although it modified the WCAC's analysis in so holding. Portions of the WCAC's opinion dealing with discovery were also

substantially modified, and the Court vacated portions of that opinion concerning wage loss and partial disability as unnecessary to the outcome. *Stokes v DaimlerChrysler Corp*, 272 Mich App 571, 589; 727 NW2d 637 (2006),

Defendant subsequently sought leave to appeal to this Honorable Court. In an order dated April 13, 2007, this Court directed its clerk to schedule oral argument on the application, and the parties to "address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich. 144; 648 NW2d 624 (2002)." *Stokes v DaimlerChrysler Corp*, 477 Mich 1097; 729 NW2d 511 (2007). The Court's order also permitted the parties to file supplemental briefs, which plaintiff now does.

ARGUMENT

THE COURT OF APPEAL'S OPINION IN THIS MATTER PROPERLY RECOGNIZES THAT PLAINTIFF MUST PROVE DISABILITY BY A PREPONDERANCE OF THE EVIDENCE, BUT ALSO ACKNOWLEDGES THAT THE BURDEN OF GOING FORWARD WITH THE EVIDENCE SHIFTS AS THE PARTIES PRESENT THEIR RESPECTIVE PROOFS.

Standard of Review. Plaintiff agrees with defendant that this Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

In its most recent order in this matter, the Court directed that the parties "address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his

qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002)." *Stokes v DaimlerChrysler Corp*, 477 Mich 1097; 729 NW2d 511 (2007).[1] Defendant's contention that this is so is based upon its failure to distinguish between the burden of persuasion, which remains with plaintiff, and the burden of going forward with the evidence, which shifts as the proofs proceed. Furthermore, defendant would impose a burden of proof far more demanding than the "preponderance of the evidence" standard generally applicable in workers' compensation cases.

In its opinion below, the Court of Appeals held that a worker's compensation claimant makes a prima facie case of disability by establishing the type of work he or she has previously performed and other jobs for which he or she has training, and then proving the inability to perform those jobs as the result of a work-related injury:

> On the other hand, to the extent the WCAC addressed the issue from the standpoint of the production of evidence, and held that as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume-i.e., a listing and description of the jobs the employee held until the time of the injury, the pay for those jobs, and a description of the employee's training and education-and testimony that the employee cannot perform any of the jobs within his qualifications and training paying the maximum wage, the WCAC did not err. By producing such evidence, in addition to evidence of a work-related injury causing the disability, an employee makes a prima facie case of disability-a limitation in the employee's maximum wage-earning capacity in all jobs suitable to the employee's qualifications and training. [*Stokes v DaimlerChrysler Corp*, 272 Mich App 571, 589; 727 NW2d 637 (2006).]

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[1]This Court's remand order refers solely to "the burden-shifting analysis described in the Court of Appeals opinion in this case..." *Stokes v DaimlerChrysler Corp*, 477 Mich 1097; 729 NW2d 511 (2007). That analysis concerned only jobs that paid maximum wages, as did the analysis of this Court in *Sington v Chrysler Corp*, 467 Mich 144, 160; 648 NW2d 624 (2002). In fact, in its opinion below, the Court of Appeals expressly vacated that portion of the WCAC's opinion dealing with partial disability, and deemed resolution of that issue unnecessary to this case. As a result, references to "jobs" in this brief are intended to be a "shorthand" reference to those positions paying maximum wages, the only positions relative to the inquiry this Court directed the parties to address.

The Court below further held that the extent of proofs required would depend upon the nature and depth of the claimant's qualifications and training:

> An objective evaluation of the employee's past employment, skills, training, and education, measured against the employee's work-related physical limitations, will no doubt make it apparent to the parties and the magistrate whether, in any particular case, it is likely that there are jobs within the employee's qualifications and training that the employee is still able to perform, and the employee may, indeed, need to address these jobs and the pay associated with them in order to sustain his burden of proof. In such cases, the need for further proofs will arise from the extent of the employee's qualifications and training and the nature of the employee's disability, and not from theoretical arguments presented by the employer. In other cases, the employee's proofs will seem sufficient, and the existence of other jobs within the employee's qualifications and training will not be apparent. [*Stokes, supra*, 272 Mich App at 591]

Of course, a plaintiff's presentation of a prima facie case does not mean that he or she must automatically prevail. Instead, where the record does not make it apparent that a claimant might be qualified or trained for other jobs, the defendant would still be permitted to come forward with evidence suggesting otherwise: "In such cases, the employer would be expected to establish facts on which to base a contrary conclusion." *Id.*

As the Court below correctly pointed out, "Such practical recognition does not change the allocation of the burden of proof; the burden of proof remains on the employee to show disability." *Id.* This is simply an acknowledgment that there are two elements to the burden of proof: "It is generally recognized that the burden of proof is composed of two parts: the burden of persuasion and the burden of going forward with the evidence, commonly referred to as the burden of production. The burden of production may shift several times during the trial, but the burden of persuasion generally remains with the party who bears the risk of nonpersuasion." *Reed v Breton,* 475 Mich 531, 548; 718 NW2d 770 (2006). Put in terms applicable to this litigation, the burden of proving disability remains with plaintiff, but the burden of persuasion shifts back and forth as each party brings forth further evidence.

This is the answer to *amicus* Alticor's contention that the Court of Appeals erred in not requiring a claimant to rule out suitability for jobs to which his or her skills might be "transferable." If the proofs indicate that a plaintiff might still be able to perform jobs suitable to his qualifications and training, he has a duty to prove that this is not the case. If this is not readily apparent from the evidence adduced, the defendant may still come forward with proofs suggesting that there are other jobs the plaintiff could still perform.

In fact, the Court expressly stated that "[a] transferable skills analysis may yield credible testimony," provided it did not reach the level of assumption and speculation:

> A transferable skills analysis may yield credible testimony that there is actual employment that the employee's qualifications and training make the employee capable of performing upon hiring, although the employee has never performed it before. On the other hand, a particular transferable skills analysis may reach conclusions that are based on assumptions and speculation, and are not supported by the employee's actual qualifications and training or the realities of the workplace. In any particular case, the magistrate should be well able to discern the difference. [*Stokes*, 272 Mich App at 590-591]

Given this analysis, it is simply wrong to assert that transferable skills have been excluded from the inquiry. The Court of Appeals never so held. Instead, it left it up to the finder of fact in the first instance – the magistrate – to determine when evidence of such skills might be appropriate, based upon the record presented, the type of limitations sustained by the claimant, and his or her degree of training or education.

However, there are limits to this doctrine. If a claimant has training which could be utilized in a field other than the one in which he or she was injured, such skills are already taken into account by the Court of Appeals' opinion below. If defendant and Alticor are instead stating that the factfinder must also take into account jobs for which the claimant's skills could be adapted or retooled, it is really saying that the disability definition must include work for which the claimant *could be* trained. This is not work suitable to a claimant's qualifications and training at the time of injury, and is therefore outside the

scope of the statutory definition. The Court of Appeals correctly limited the inquiry to work the claimant could perform "*upon hiring.*" *Stokes*, 272 Mich App at 589.

As a result, the Court of Appeals got it right. If a plaintiff fails to put in at least a prima facie case for disability, he should not prevail, whether or not the defendant comes forward with any proofs. If the plaintiff does present a prima facie case, the defendant is given the opportunity to rebut that prima facie case with proofs of its own. This does not shift the burden of persuasion to the defendant; that remains with the plaintiff. Instead, merely the burden of going forward shifts to the defendant. If it fails to rebut the plaintiff's prima facie case, and if the record does not suggest that there are other jobs suitable to his or her qualifications and training that the plaintiff could still handle, only one result is appropriate – a finding that plaintiff has satisfied his burden of proof.

This is consistent with the burden of proof in workers' compensation matters – proof by a preponderance of the evidence. MCL 418.851; *Aquilina v General Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978). This standard does *not* require proof to a factual certainty, but is instead satisfied if "the party who has the burden of proof has produced evidence which preponderates when [the finder of fact] is persuaded, viewing all the evidence, circumstances and reasonable inferences, that the evidence and inferences which support the claim outweigh those which oppose it." *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 135-136; 274 NW2d 411 (1979).

This standard has been applied by this Court with respect to the issue of causation, to require only a reasonable showing of cause and effect without the need to exclude every single possibility beyond doubt:

> The link between the work and the heart damage need only be one of reasonable relationship of cause and effect. Other possible or probable causes need not be excluded beyond doubt. [*Miklik v Michigan Special Machine Co*, 415 Mich 364, 370; 329 NW2d 713 (1982).]

The same reasoning should apply to the disability analysis as well. A claimant must make a reasonable showing of inability to perform work suitable to his or her qualifications and training, but should not have to exclude every potential job beyond doubt. In most cases, that will mean proof of an inability to do anything he or she has previously done, coupled with a demonstration of inability to do anything else for which he or she is specifically trained. These proofs need only outweigh those of the defendant; they need not be overwhelmingly inclusive to the point where the burden becomes impossible to satisfy.

Defendant requests a far more stringent burden of proof. In essence, defendant would require plaintiff to rule out every single job in existence as either (1) outside his or her qualifications and training, (2) beyond his or her capacity to perform, or (3) not reasonably available. It resists any suggestion that it might have its own obligation to come forward with evidence to rebut plaintiff's proofs. This is not a preponderance of the evidence standard, but instead approaches one requiring a showing of factual certainty. It also fails to acknowledge the shifting burden of going forward with the evidence.

The record in this matter indicates that plaintiff has done predominantly physical labor for nearly three decades, practically all with defendant. The record includes no indication that he has training to perform any other type of task. One year of college 30 years earlier, which did not lead to a degree, does not represent any such indication, nor does any other aspect of plaintiff's background. As a result, this Court should not disturb the finding that plaintiff is disabled within the meaning of MCL 418.301(4).

Amicus Alticor has tried to inject one other issue as well, suggesting that the Court of Appeals did not require the claimant to prove a wage loss, as required by the second sentence of MCL 418.301(4):

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

Alticor apparently comes to that this conclusion because the Court of Appeals vacated the WCAC's discussion of the issue.

However, the Court of Appeals did not vitiate or ignore the wage loss requirement. Instead, the Court found that resolution of this issue was not necessary *to this case*. Indeed, plaintiff has suffered a total wage loss. That being so, there can be no dispute that the second sentence of §301(4) has been satisfied, and there was no need for the Court to delve into the subject. This fact also suggests that this issue is outside the scope of the Court's order, which was limited solely to "the burden-shifting analysis described in the Court of Appeals opinion in this case..." *Stokes v DaimlerChrysler Corp*, 477 Mich 1097; 729 NW2d 511 (2007). Since the Court of Appeals did not discuss wage loss in its opinion, that subject is obviously not part of the analysis referred to in its decision.

In any event, Alticor (and presumably defendant) would place far too great an emphasis on the second sentence of §301(4), insisting that it includes a requirement that the claimant prove that his or her wage loss is due to a work-related injury or disease. However, no such requirement appears in the language of that sentence.

Instead, the causation requirement of §301(4) applies to the claimant's *wage earning capacity*, not his or her wage loss:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease.

Clearly, it is the claimant's wage earning capacity that must be related to the work condition.

By contrast, and as this Court noted in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), the second sentence is merely in place to ensure that a claimant who is disabled, but who still manages to earn full wages, does not receive compensation nonetheless:

> With regard to the second sentence of § 301(4), which establishes that disability does not create a presumption of wage loss, one likely explanation for this sentence is the provision of reasonable employment with full wages to an injured employee despite a reduction in wage earning capacity. That is, a person might suffer a disability under § 301(4), i.e., a reduction in wage earning capacity in work suitable to his qualifications and training, because of an inability to actually earn wages in the ordinary job market, but be paid full wages by an employer for the performance of reasonable employment. In such a situation, the employee would be "disabled," but not suffer wage loss. [*Sington, supra*, at 170]

There is no deeper meaning to this sentence than this. In fact, the *Sington* Court made it clear that the disability analysis is to be completed before the wage loss question is even considered:

> We note that, once it is found that an employee is disabled under § 301(4), the employee must then establish wage loss in order to compute wage loss benefits under MCL 418.361. [*Sington, supra*, at 160, n11]

As a result, wage loss is simply not part of the disability analysis.

Perhaps defendant's misinterpretation is the result of this Court's discussion of a hypothetical situation in *Sington*:

> For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [*Sington, supra*, at 160-161]

This hypothetical, and its proposed resolution, does indeed suggest that the wage loss must be connected to the work-related injury, but that conclusion is faulty.[2] In point of fact, the claimant in that hypothetical could well have sustained a work-related wage loss, despite his impending retirement. In that regard, it is not at all unusual for employees to retire from one position and begin collecting a pension, only to secure a new position that

[2]This is clearly the by-product of an attempt by this Court to render a holding applicable to all situations, including those not expressly before the Court.

pays concurrent, but lesser, wages. If such a new position was foreclosed by a work injury, the claimant in question would indeed suffer a wage loss.

The error is in suggesting that the wage loss must be related to the work injury, where the statute only indicates that the limitation of wage earning capacity must be so related. In the hypothetical above, the claimant would be deemed disabled by his pre-retirement injury, and would be entitled to compensation because he suffered a wage loss. If, in fact, he remained capable of taking on a new job, the employer would get credit for the wages earned. MCL 418.361(1). If not, workers' compensation would cover the wage loss.

However, even then, the recovery would be limited, because an employer is entitled to coordinate for pension benefits received by a regular retiree. MCL 418.354(1). Consequently, the only wage loss that would be compensated is the difference between the workers' compensation rate and the after-tax value of the pension. If social security benefits are also received, there is a credit for that as well. *Id.* If an individual who retires is never entitled to workers' compensation benefits, as suggested by the *Sington* hypothetical, there would be no need for a coordination of benefits statute. That coordination statute addresses the issue, not the second sentence of §301(4).

Defendant may suggest that such an interpretation, requiring only the limitation in wage earning capacity and not the wage to be related to a work injury, might require it to pay compensation where the claimant's unemployment is the result of a nonwork-related reason. However, this would simply not be the case. If the work injury did not cause a limitation of the claimant's wage earning capacity, the fact that he or she left work for a nonwork-related reason would not render the unemployment compensable. The facts of *Sington are* instructive in that regard.

Mr. Sington had a work injury, but was unemployed because of a non-work-related stroke. However, his claim was defeated not because he left work due to the stroke, but

because his ability to continue working in a "regular" job *before the stroke* meant that his work injury had not caused a limitation of his wage earning capacity:

> "Magistrate Wierzbicki, having heard the live testimony of both plaintiff's and defendant's witness, determined as noted above that defendant would have hired and placed a new worker with similar physical limitations (PQX vs. PQ) in at least 13 regular full-time classified positions. Further, the magistrate found plaintiff able to continue in such full-time-classified positions despite a *de-minimus* physical limitation. Finally, while it remains true a giant manufacturer has the flexibility in moving employees from one job to the next that a small "mom and pop" operation might not have, given the facts as found by the magistrate, these were real jobs in which plaintiff could have been replaced with new unrestricted workers.
>
> * * *
>
> Thus, the magistrate was legally correct in holding such a job would be a regular (or real) job for which there continued to be a substantial job market (in the real world). Further, the record supports such a finding. Accordingly, plaintiff has failed to prove a *Sington* threshold disability. [*Sington v Chrysler Corp (aft rem)*, 2004 ACO #220].

The finding here was that Mr. Sington had not proven a limitation in his wage earning capacity as the result of his work injury. The fact that he subsequently sustained a nonwork-related wage loss had nothing to do with the outcome. A wage loss, regardless of the reason, would simply not render an otherwise noncompensable condition compensable.

In any event, this issue was not considered by the Court and is not part of this Court's recent order. Its resolution is therefore unnecessary at this time, and is perhaps ill-advised, absent consideration by the Court below and full briefing by the parties.

With respect to the issue specifically noted by the Court, the "burden shifting analysis," the Court of Appeals got it right. It imposed the burden on plaintiff to prove disability, but did so within the established parameters of a normal "preponderance of the evidence" analysis. In that regard, the party carrying the burden of proof need not prove his or her claim to a factual certainty, but instead must present at least a prima facie case

suggesting disability is more likely than not. At that point, the burden of going forward shifts to the defendant and it may rebut the plaintiff's prima facie case. If the evidence it produces outweighs that produced by the plaintiff, the latter has failed to satisfy the burden of proof and will lose accordingly.

This is nothing revolutionary. Instead, it represents a recognition of the reality of proofs, and findings of fact dependent upon which party presents the more compelling evidence. That being so, there is no need for this Court to further tinker with an informed and well-written opinion by the Court of Appeals, and leave to appeal should simply be denied.

RELIEF

WHEREFORE Plaintiff-Appellee FREDIE STOKES respectfully requests that this Honorable Court deny defendant's application for leave to appeal, and further requests any other relief to which he may be entitled.

Respectfully submitted,

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Dated: June 8, 2007

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Supreme Court:
132648

Court of Appeals:
268544

Lower Court: WCAC
Docket No: 020388

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

PROOF OF SERVICE

DARYL ROYAL, being first duly sworn, deposes and says that on the 8th day of June, 2007, he deposited in the United States Mail at Dearborn, Michigan, a copy of Plaintiff-Appellee's Supplemental Brief, addressed to:

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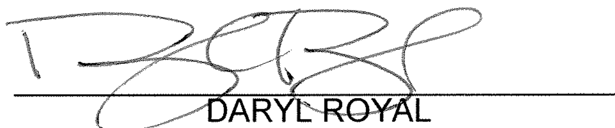
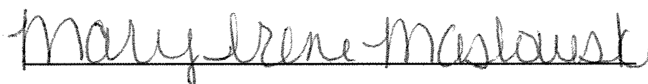


DARYL ROYAL

Subscribed to and sworn before me, a Notary Public, this 8th day of June, 2007.



MARY IRENE MASLOWSKI
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Apr 29, 2008