

CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 25 Appellee Thomas K. Byerley makes the following disclosure:

1. No publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of this appeal.

Victoria V. Kremski

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8/8/02

August 8, 2002

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee requests oral argument in this matter if the Court believes that it will emphasize and clarify the arguments presented in the briefs.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291,
as it is a final decision of the United States District Court for the Western
District of Michigan.

STATEMENT OF THE ISSUES

1. Did the District Court err in granting summary judgment in favor of Appellee after finding that Appellant failed to meet the elements of a 42 U.S.C. § 1983 claim?

Appellant: Yes

Appellee: No

Standard of Review: De novo. *Davis v. Sodexo, Cumberland Coll. Cafeteria*, 157 F.3d 460 (6th Cir. 1998).

STATEMENT OF THE CASE

Appellant Stephen Dean applied for admission to the State Bar of Michigan in 2000. Believing the State Bar violated the law in the processing of his application, Dean began picketing in front of the State Bar building. Dean and two other individuals also picketed one morning in front of the private residence of Appellee, Thomas K. Byerley, Regulation Counsel for the State Bar.

Dean alleges that as Byerley left his home that morning, Byerley told Dean that he would never be admitted to practice in Michigan because of the picketing and that if he continued to picket on private property he would be arrested, and further, that Byerley drove his vehicle in a reckless fashion to intentionally provoke fear of physical harm in Dean and the other individuals. Dean brought suit against Byerley in the United States District Court for the Western District of Michigan, alleging that Byerley's statements chilled Dean from continuing to picket, a violation of his First Amendment rights under 42 U.S.C. § 1983. Dean also alleged state law claims of assault and libel.

The United States District Court for the Western District of Michigan granted Byerley's motion for summary judgment on the federal

claims and dismissed the state law claims for lack of jurisdiction. Dean then filed this appeal.

STATEMENT OF THE FACTS

In 2000, Appellant Stephen Dean (hereinafter "Dean") applied for admission to the State Bar of Michigan (hereinafter "State Bar").

Appellee Thomas K. Byerley (hereinafter "Byerley") is Regulation Counsel at the State Bar of Michigan. Byerley is also the Director of the Professional Standards Division of the State Bar. The Character and Fitness Department is a separate department within the Professional Standards Division.

The Character and Fitness Department is required by the Supreme Court of the State of Michigan, via Rule 15 of the Rules Concerning the State Bar of Michigan, to investigate the background of all applicants to the State Bar and to make recommendations regarding whether or not the applicants have the requisite character and fitness to practice law. [Rule 15, of the Rules Concerning the State Bar of Michigan, Exhibit A to Defendant's Motion for Summary Judgment, Docket #42]. In investigating the background of an applicant, the Character and Fitness staff person is required to gather information regarding the suitability of an applicant and either favorably recommend the applicant to the Board of Law Examiners, if no significant adverse information is discovered, or transmit the information to the appropriate District and Standing

committees. [Rule 15.] The Character and Fitness investigator often contacts the applicant directly to obtain any needed information. The ultimate decision of whether an applicant to the State Bar is of sufficient character and fitness is determined by the Board of Law Examiners upon recommendation of the District and Standing Committees, all of which are comprised of attorneys who volunteer their time to this process.

[Rule 15; Affidavit of Frank Reynolds, Exhibit B, to Defendant's Motion for Summary Judgment, Docket #42]

Sometime in early to mid March 2001, Dean and two other individuals began picketing in front of the State Bar of Michigan. The signs that Dean and the other individuals carried stated as follows:

"MI. Bar, Pres. Ryan, Berry, Wilkinson, Van Aken & Byerley allegedly discriminated against Bar applicant."

"MI. Bar Character Fitness Board Allegedly lied in letter to Bar Applicant."

"Michigan Bar is subverting the law allegedly."

[Exhibit C, photos, Defendant's Motion for Summary Judgment, Docket Sheet #42]

Thomas Ryan is a former President of the State Bar, John Berry is the Executive Director of the State Bar, Keith Wilkinson is a Character and Fitness Investigator, and Diane Van Aken is the manager of the

Character and Fitness Department. Dean and the other individuals picketed in front of the State Bar building for several hours for several days during the month of March, 2001.

On March 27, 2001, at about 7:00 AM, Dean and two other individuals appeared at Byerley's residence, which is located in a subdivision in Dimondale, Michigan. Dimondale is a "bedroom community" of Lansing, the state capitol. Dean and the two individuals began walking in front of Byerley's home, carrying the same signs they carried in front of the State Bar building. They walked in front of Byerley's house for almost half an hour. They did not walk in front of any residence other than Byerley's [Deposition of Larry Doolittle, Exhibit D to Defendant's Motion for Summary Judgment, Docket #42] It is unclear whether Dean and the other individuals ever entered onto Byerley's personal property.

Dean alleges that as Byerley backed his car out of the garage that morning, he "intentionally drove his automobile towards plaintiff" and that Byerley told him "that because of his picketing the State Bar of Michigan and his home Plaintiff (Dean) would never be allowed to practice law in the State of Michigan." Dean also alleges that Byerley

again intentionally drove his car directly towards Dean and the two picketers a few minutes later.

On March 29, 2001, Byerley sent Dean a letter, indicating that he did not have a constitutional right to picket on private property and that if Dean trespassed on Byerley's private property, Byerley would ask that Plaintiff be arrested. [3/29/01 Letter, Exhibit E, to Defendant's Motion for Summary Judgment, Docket #42] Dean responded with two letters, one dated March 29, 2001 and the other dated April 3, 2001. [Exhibits F & G to Defendant's Motion for Summary Judgment, Docket #42]

Shortly thereafter, Dean filed a complaint in the United States District Court for the Western District of Michigan, alleging the following claims against Byerley:

- a. A violation of his constitutional rights (pursuant to 42 USCS § 1983) alleging that Byerley "chilled" the exercise of his first amendment rights by threatening that Dean would be arrested if he picketed on private property and that he would not be admitted to the State Bar because of his picketing.
- b. Two counts of assault
- c. Libel as a result of the 3/29/01 letter.

Byerley filed a Motion for Summary Disposition. On January 9, 2002, the magistrate issued a Report and Recommendation that Deans' § 1983 claims be dismissed and that the court not retain supplemental jurisdiction over Plaintiff's state law claims. [Report and Recommendation, January 9, 2002, Docket #60] The Report and Recommendation found that Dean had no constitutional right to picket Byerley's residence and that Dean's right to picket elsewhere was not chilled. [Report and Recommendation 1/1/02, Docket Number 60]

The District Court approved and adopted the dismissal of the § 1983 and state law claims, but cited different grounds for the dismissal, specifically finding that Byerley was not acting under color of state law. [3/18/02 Opinion, Docket #69]

If called to testify, Byerley would deny making the alleged statement regarding admission to the Bar and that he drove his car in a fashion that would constitute an assault.

SUMMARY OF THE ARGUMENT

Dean cannot prove the first element of a §1983 claim, which is that he was deprived of a right guaranteed him by statute or constitution.

Targeted residential picketing, one type of picketing Dean engaged in, is not constitutionally protected activity as United States Supreme Court precedent has held that it can be banned completely by statute or ordinance. Nor is there any other law allowing Dean to engage in targeted residential picketing.

Dean's general picketing, which is constitutionally protected, was not chilled by Byerley's statements because Byerley acknowledged and reaffirmed in writing Dean's right to picket on public property.

Dean's claims are also barred by governmental immunity.

ARGUMENT

In order to prove a claim under 42 U.S.C. § 1983, a plaintiff must show: 1) that he was deprived of a right secured by the laws or the constitution of the United States; and 2) that the defendant deprived the plaintiff of this right while acting under the color of state law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-156, 98 S.Ct. 1729, 1733 (1978).

Dean fails to prove that he was deprived of a constitutional right. Further, Byerley is entitled to governmental immunity.

The standard of review of orders granting summary judgment is de novo. *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460 (6th Cir. 1998).

I. Dean Had No First Amendment Right That Was Chilled

Dean engaged in two different modes of expression: 1) general picketing in front of the State Bar in downtown Lansing, Michigan and 2) targeted residential picketing in front of Byerley's suburban home. Dean does not specify whether one mode in particular, or both, were chilled.

A. Targeted residential picketing is not a right secured to Dean by constitution or other law

The First and Fourteenth Amendments do not give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780,1785 (1971). Although American constitutional jurisprudence regarding the First Amendment has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved are important in determining the degree of protection afforded by the First Amendment to the speech in question. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 2717, (1974).

The government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas that cannot be totally banned from the public dialogue. *Cohen*, supra at 1786 (citations omitted.) As evidenced by Supreme Court precedent, an individual's privacy interests in the peaceful enjoyment of their home often outweigh the First Amendment rights of another individual. In *Frisby v. Schultz*, 487 U.S. 474, (1988), the Supreme Court held that targeted residential picketing, the exact type of picketing that Dean engaged in at Byerley's home [Deposition of Larry Doolittle, Exhibit D

to Defendant's Motion for Summary Judgment, Docket #42] can be banned outright by ordinance:

"The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. In such cases "the flow of information [is not] into . . . household[s], but to the public." Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted residential picketing on the quiet enjoyment of the home is beyond doubt: (citations omitted)

"To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s] . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility." (citation omitted)

The *Frisby* court discussed why private residences are treated differently than other locations in First Amendment situations:

"One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead a special benefit of the privacy

all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. (citations omitted)

The lower court, in its March 28, 2002 Order Denying Defendant's Motions for Sanctions, [Docket #72] correctly characterized *Frisby* as not precluding targeted residential picketing in the absence of an ordinance or state law prohibiting it, but went on to suggest that, as a result, Dean had a constitutionally protected right to picket in front of Byerley's home. (There is no statute or ordinance prohibiting targeted residential picketing in this case. Nor is there a statute or ordinance allowing targeted residential picketing.)

Dean errs in asserting that the absence of a statute or ordinance banning targeted residential picketing results, ipso facto, in such picketing being constitutionally protected. Quite simply, if a specific mode of speech or conduct may be banned outright under First Amendment precedent, then the activity is inherently unworthy of constitutional protection. Dean may have lawfully been present at Byerley's home that morning and engaging in lawful activity but the activity was not constitutionally protected activity. (Emphasis added).

New York state's recent statute prohibiting motorists from using hand held cellular phones while driving is analogous to the issues here.

While New York motorists have a constitutional right to freedom of expression, no constitution or other law provides them a right to use hand held cellular phones while driving. Accordingly, a law prohibiting motorists from using hand held cell phones does not violate constitutional provisions.

Dean's argument here is akin to a New York motorist, cited for erratic driving while using a hand held cell phone prior to the adoption of the statute, suing the local police department, claiming that the citation chilled his First Amendment rights.

Conduct or speech that is, by its inherent nature, not constitutionally protected, like targeted residential picketing, does not automatically become constitutionally protected speech because of a lack of statute or ordinance forbidding it. In fact, the lack of a statute or ordinance indicates an unlikely violation of § 1983, as the right must be a right "secured by the laws . . . of the United States." It is true that Dean could not be arrested solely for engaging in the targeted residential picketing of Byerley's home, unless he violated another statute or

ordinance in the process. However, that does not mean that Byerley's alleged statements rose to a violation of Dean's constitutional rights, in the same sense that a police officer warning a New York motorist about driving while using the cellular phone would amount to a "chilling" of the motorist's First Amendment rights.

Dean's speech and activity that morning was not just intended to communicate a message, it was intended to intrude upon Byerley. The only people besides Byerley and his family that would have seen Dean's signs alleging corruption at the State Bar are Byerley's neighbors, a factor that raises the intrusive and intimidating nature of Dean's conduct. Indeed, the magistrate found that: ". . . [P]laintiff increased the invasive and confrontational nature of the situation by paying Mr. Doolittle to assist him in picketing Defendant's home." [Report and Recommendation 1/1/02, Docket #60] This is the sort of picketing that *Frisby* and other precedent expressly state is not entitled to constitutional protection. *See also Tompkins v. Cyr*, 995 F.Supp. 664 (N.D. Texas 1998).

As the targeted residential picketing Dean engaged in is not guaranteed to him by constitution or other law, there is no "constitutional

right” that Byerley chilled. Further, Dean, as explained below, had ample alternate forms of communicating his message

Dean’s First Amendment Right
To Engage in Picketing At Other
Locations was Recognized and Protected

Dean claims that Byerley “chilled” his First Amendment rights by allegedly telling Dean that: “. . . because of [Plaintiff’s] picketing the State Bar of Michigan and [Defendant’s] home, Plaintiff would never be allowed to practice law in the State of Michigan. [Amended complaint, p. 13; Docket #20]

The facts, however, belie Dean’s claims. Two days after the confrontation at Byerley’s home, Byerley sent Dean a letter recognizing and affirming his right to engage in picketing at locations other than the private residences of State Bar employees and officers. [Defendant’s Motion for Summary Judgment, Exhibit E, Docket #42] Byerley’s warning that the police would be called to pursue an arrest for trespassing was specifically limited to the targeted residential picketing which carries no constitutional protection. If Dean was found to be in violation of another ordinance or state law (such as trespassing on private property)

while engaging in the targeted residential picketing, he could have been arrested.

Second, Dean did not offer any evidence to contradict the affidavit of Frank Reynolds, and other evidence produced by Defendant, [Defendant's Motion for Summary Judgment, Exhibits A & B, Docket #42] proving that Byerley is not involved in the admission process and could not have improperly influenced the admission decision. In fact, Dean conceded that he was not contending that Byerley did or would do anything improper to deny Dean admission to the State Bar or that if Dean was not admitted to the State Bar it would be because of the misconduct of Byerley. [Order Granting Motion in Limine, 8/23/01, Docket Sheet #50]

If, by Dean's admission, Byerley's conduct did not and will not adversely impact Dean's admission to the State Bar, then in what way was Dean "chilled" in speech or activity? How can a person be chilled in expressing a message unless an adverse reaction to the expression is anticipated?

Dean has failed to show how his constitutional right to engage in picketing at non-residential areas was chilled by Byerley's alleged (and denied) statements. As Dean has no right secured to him by the

constitution or other law to engage in targeted residential picketing, and his right to engage in picketing at other locations was acknowledged and affirmed, Dean has failed to prove that a First Amendment right was violated by Byerley.

II. Was Defendant Acting Under Color of State Law?

The magistrate found that Dean presented no evidence that Byerley was acting under color of state law but nonetheless assumed, for purposes of deciding the summary judgment motion, that Byerley was acting under color of state law. [Report and Recommendation, 1/19/02, Docket #60.]

There was little, if any, discussion in the lower court regarding the issue of whether Byerley was acting under color of state law. Dean is correct that Byerley acknowledged in his answer that the only reason Dean was at Byerley's house on the morning of March 27, 2001 was because of his status as Regulation Counsel for the State Bar, and that Dean's allegations arose from the events of that morning.

Even if Byerley was acting under color of state law, Dean's claims would be barred by governmental immunity.

III. Plaintiff's § 1983 Claims Are Barred by Governmental Immunity

Had Plaintiff filed suit against the State Bar of Michigan, his claims would be barred by Eleventh Amendment immunity. The Eleventh Amendment to the United States Constitution bars suits in federal court against the State, its agencies and officials sued in their official capacity unless this immunity from suit is expressly waived by either the State or Congress, regardless of the nature of the relief requested. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

The federal courts have consistently held that state bar associations performing the character and fitness screening function are acting as agents of the state judiciary and are therefore entitled to Eleventh Amendment protection.¹ See *Thiel v. State Bar of Wisconsin*, 94 F. 3d 399 (7th Cir. 1996); *Lewis v. Louisiana State Bar Association*, 792 F. 2d 493 (5th Cir. 1986); *Bishop v. State Bar of Texas*, 791 F. 2d 435 (5th Cir.

¹Pursuant to its rule-making powers, the Michigan Supreme Court has adopted the Rules Concerning the State Bar, which govern the operations of the State Bar. Under Rule 1, the State Bar is organized and exists as a public body corporate "pursuant to powers of the Supreme Court over the bar of the State." Therefore, the State Bar of Michigan is an agency of the Michigan Supreme Court, and is entitled to Eleventh Amendment protection.

1986); and *Ginter v. State Bar of Nevada*, 625 F. 2d 829 (9th Cir. 1980).
See also, Patmon v. Michigan Supreme Court, et al, Case No. 98-CV-
71470-DT, *Kish v. Michigan State Board of Law Examiners*, 999 F.
Supp. 958, 962 (E.D. Mich. 1998).

As Plaintiff is sued in his official capacity, he is entitled to governmental immunity. The Supreme Court has held that government officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73, 73 L.Ed.2d 396 (1982). *Mayo v. Macomb County* 183 F.3d 554 (6th Cir. 1999). *Waters v. City of Morristown*, 242 F.3d 353 (2001).

The first step in any qualified immunity analysis is to determine whether a clearly established statutory or constitutional right has been violated. *Waters, supra*, at 360. The right allegedly violated must also be clearly established in a much more particularized sense than a broad constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). The proper test is whether it was “objectively reasonable” for the employee to believe that his actions were

lawful at the time of the challenged act. *Mayo, supra*, at 557. *Waters, supra* at 360. The official can even be mistaken. If his conduct meets the “objectively reasonable” test, immunity attaches. *Mayo, supra* at 557.

A plaintiff has the burden to show that the government employee is not entitled to governmental immunity. *Mayo, supra* at 557.

Dean has failed to show that Byerley is not entitled to qualified immunity. It was objectively reasonable for Byerley to conclude that Dean’s conduct in picketing at a private residence was not constitutionally protected. Byerley was correct in his letter to Dean that Dean had no right to picket on private property. (Although it was unclear whether Dean actually entered Byerley’s private property.) Further, Byerley’s conclusion was reasonable in light of the *Frisby* holding that targeted residential picketing is not a constitutionally protected activity.

Byerley’s letter to Dean clearly acknowledged that Dean had a right to picket in front of the State Bar building. Even if Byerley had informed Plaintiff that he would not be admitted to practice because of his picketing, Byerley would have been reasonable in that conclusion. As stated in the Affidavit of Frank Reynolds, [Exhibit B, to Defendants Motion for Summary Judgment, Docket #42] Former Chairperson of the State Bar of Michigan Standing Committee on Character and Fitness,

past applicants to the Bar have been denied admission based in part upon activity, that, although lawful, reflected poorly on their character and fitness to practice law. Byerley's alleged comments would not have constituted a violation of clearly established rights, precisely because the alleged statements would be accurate, reasonable conclusions based on Byerley's past experience.

This Court has neatly articulated the reasons why it is important to grant immunity to government officials such as Byerley:

“The immunity of participants in the judicial process stems not from the “location” of the judicial process in one branch of the government or another . . . but from the “characteristics” of the process. One of these characteristics is that the controversies with which the process deals are often “intense” and the loser, given an opportunity to do so, will frequently charge the participants in the process with unconstitutional animus; “[a]bsolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation.”

Watts v. Burkhardt, 978 F.2d 269 (6th Cir. 1992), (citing *Burns v. Reed*, 500 U.S. 478 111 S.Ct. 1934, 1943, 114 L.Ed.2d 547 (1991)); See also, *Ginger v. Circuit Court*, 372 F.2d 621 (6th Cir.), cert. Denied 387 U.S. 935, 87 S.Ct. 2061, 18 L.Ed.2d 998 (1967).

As Byerley is entitled to qualified governmental immunity,
Plaintiff has failed to state a claim upon which relief may be granted.

CONCLUSION

The applicable standard of review of orders granting summary judgment is de novo, *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460 (6th Cir. 1998). The role of the judge at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Talley v Bravo Pitino Restaurant, Inc.* 61 F.3rd 1241, 1245 (6th Cir. 1995).

The District Court did not err in determining that there was insufficient evidence for a jury to return a verdict for Dean. No statute, ordinance or other law secured a right for Dean to engage in the picketing at Byerley's home.

Further, Byerley did not chill Dean's constitutionally protected right to engage in general picketing as he acknowledged this right in writing to Dean and Dean himself conceded that he was not alleging that Byerley did or could do anything to block his admission to the State Bar.

For these reasons, no jury could find that Dean was deprived of a constitutional right by Byerley. Appellee requests that this Court affirm the District Court's Order Granting Summary Judgment.

August 8, 2002

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I affirm that this brief, being a principal brief, contains no more than
14,000 words and complies with the dictates of Fed. R. App. P. 32(a)(7).

August 8, 2002

Victoria V. Kremski

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

E. STEPHEN DEAN

Case No. 02-1421

Plaintiff-Appellant

On appeal from the U.S.
District Court, Western
District of Michigan,
Lower Court # 01-CV-40

v.

THOMAS K. BYERLEY, individually and
in his official capacity

Defendant-Appellee

PROOF OF SERVICE


I, Karen Spohn, say that on the 8th day of August, 2002, I served two copies of **Appellee's Designation of Appendix Contents, Brief of Appellee Thomas K. Byerley and this Proof of Service** on the following by placing same in an envelope(s) properly addressed and depositing the envelope(s) in the United States mail, with first class postage therein.

E. Stephen Dean
P. O. Box 27
Patterson, MO 63956

I hereby declare that the statement above is true to the best of my knowledge, information and belief.

DATE: 8-8-2002


Karen Spohn

NOTARY 

"Subscribed to and sworn before me
this 8th day of August 2002."

GLORIA JONES, Notary Public
Ingham County, Michigan
My Commission Expires December 25, 2005

