STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Owens, Shapiro, and Jansen

MICHAEL LEGO AND PAMELA LEGO,

Plaintiffs-Appellees,

v

MSP DETECTIVE SPECIALIST JAKE LISS, IN HIS INDIVIDUAL CAPACITY, ONLY,

Defendant-Appellant.
_____/

Supreme Court No. 149246

Court of Appeals No. 312406; 312392

Wayne Circuit Court No. 12-007085-NO

BRIEF ON APPEAL OF APPELLANT MICHIGAN STATE POLICE DETECTIVE SPECIALIST JAKE LISS

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Detective Specialist Jake Liss of the Michigan State Police seeks review of the Court of Appeals' March 27, 2014 decision, which affirmed the August 28, 2012 order of the Wayne County Circuit Court denying Liss's motion for summary disposition. Trooper Liss seeks review of only the portion of the Court of Appeals' majority decision that concerns the Michigan Firefighter Statute, MCL 600.2966. Tpr. Liss respectfully requests that this Court reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion, and remand this case to the trial court for entry of judgment in Tpr. Liss's favor.

STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Firefighter's Statute bars claims of injury that arise out of risks that are normal, inherent, and foreseeable in the police profession. Whether friendly fire—being accidentally shot by a fellow officer—a normal, inherent, and foreseeable risk of the police profession where the plaintiff is accidentally shot by a fellow officer where both were involved in the use of deadly force against an actively engaged shooter.

In connection with this question presented, this Court outlined the following additional questions:

A. Whether, and if so to what degree, a defendant governmental actor's mental state or level of culpability is relevant to determining what constitutes normal, inherent, and foreseeable risks of the firefighter's or police officer's profession, under MCL 600.2966, and in answer this question, whether, and if so to what extent, MCL 600.2967 informs the interpretation of MCL 600.2966.

B. Whether the defendant's alleged violation of numerous departmental safety procedures is relevant to determining whether the shooting in this case was one of the normal, inherent and foreseeable risks of plaintiff Michael Lego's profession.

STATUTES INVOLVED

MCL 600.2966

The state, a political subdivision of this state, or a governmental agency, governmental officer or employee, volunteer acting on behalf of a government, and member of a governmentally created board, council, commission, or task force are immune from tort liability for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession. This section shall not be construed to affect an individual's rights to benefits provided under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

MCL 600.2967

(1) Except as provided in section 2966, a firefighter or police officer who seeks to recover damages for injury or death arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity must prove that 1 or more of the following circumstances are present:

(a) An injury or resulting death that is a basis for the cause of action was caused by a person's conduct and that conduct is 1 or more of the following:

(*i*) Grossly negligent.

(*ii*) Wanton.

(*iii*) Willful.

(*iv*) Intentional.

(*v*) Conduct that results in a conviction, guilty plea, or plea of no contest to a crime under state or federal law, or a local criminal ordinance that substantially corresponds to a crime under state law.

(b) The cause of action is a product liability action that is based on firefighting or police officer equipment that failed while it was being used by the firefighter or police officer during the legally required or authorized duties of the profession, which duties were performed during an emergency situation and which duties substantially increased the likelihood of the resulting death or injury, and all of the following are true:

(*i*) The negligent person is not someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred; or the person is someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(*ii*) The negligent person is not someone from whom the firefighter or police officer had sought or obtained assistance or is not an owner or tenant of the property from where the firefighter or police officer sought or obtained assistance.

(*iii*) The negligent person is not someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity; or the person is someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(c) An injury or resulting death that is a basis for the cause of action was caused by a person's ordinary negligence and all of the following are true:

(*i*) The negligent person is not someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred; or the person is someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(*ii*) The negligent person is not someone from whom the firefighter or police officer had sought or obtained assistance or is not an owner or tenant of the property from where the firefighter or police officer sought or obtained assistance.

(*iii*) The negligent person is not someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity; or the person is someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity and the action is based on an act by that person that

occurred after the firefighter or police officer arrived at the place where the injury occurred.

(*iv*) The firefighter or police officer was engaged in 1 or more of the following:

(A) Operating, or riding in or on, a motor vehicle that is being operated in conformity with the laws applicable to the general public.

(B) An act involving the legally required or authorized duties of the profession that did not substantially increase the likelihood of the resulting death or injury. The court shall not consider the firefighter or police officer to have been engaged in an act that substantially increased the likelihood of death or injury if the injury occurred within a highway right-of-way, if there was emergency lighting activated at the scene, and if the firefighter or police officer was engaged in emergency medical services, accessing a fire hydrant, traffic control, motorist assistance, or a traffic stop for a possible violation of law.

(2) This section shall not be construed to affect a right, remedy, procedure, or limitation of action that is otherwise provided by statute or common law.

(3) As used in this section:

(a) "Grossly negligent" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

(b) "Person" means an individual or a partnership, corporation, limited liability company, association, or other legal entity.

(c) "Product liability action" means that term as defined in section 2945.

INTRODUCTION

Police officers have an inherently dangerous profession. Indeed, the very nature of police work is to confront danger. Perhaps no situation is more dangerous for a police officer than engaging an active shooter with the justified use of deadly force. Such a situation is rapidly evolving, high-risk, and requires split-second decision making. Unfortunately, under these circumstances, fellow officers can make mistakes, resulting in injury to police officers. These mistakes are known as "friendly fire," and the resulting injuries are normal, inherent, and foreseeable when justified deadly force is being used. They are therefore within the scope of Michigan's Firefighter's Statute.

To determine whether an injury is the result of a normal, inherent, or foreseeable risk of the police profession, the proper focus is whether an injury stems directly from the officer's duty to perform a particular police function. In situations where all parties agree that the injury to the police officer is the result of some degree of negligence, a governmental defendant's state of mind or level of culpability is not a relevant factor in deciding whether an injury stems directly from the injured officer's police function. In contrast, where the injury is the result of alleged intentional or willful and wanton misconduct, a governmental defendant's state of mind or level of culpability may be relevant insofar as it informs the question of whether an injury stems directly from the injured officer's police function.

Here, Trooper Liss's state of mind is not relevant because all parties agree that Tpr. Liss's shooting of Officer Lego was accidental. Whether Tpr. Liss was

negligent or grossly negligent, there is no question that Officer Lego's injury stems directly from his duties as a police officer who was apprehending an active shooter, using deadly force as part of a task force assigned with such duties. As such, Officer Lego's injury is the result of a normal, inherent, and foreseeable risk of his profession, and his claims against Tpr. Liss are barred by Michigan's Firefighter's Statute. Holding Tpr. Liss liable for Officer Lego's inherent and foreseeable injuries was clearly erroneous. The Court of Appeals' majority decision should be reversed.

STATEMENT OF FACTS

This is a personal-injury action brought by Michael and Pamela Lego against Michigan State Police Detective Specialist Jake Liss. This action arises out of Trooper Liss's October 29, 2009 accidental shooting of Officer Michael Lego during the apprehension and shooting of an armed robber who actively engaged the officers with a firearm, justifying the use of deadly force.

At the time of the events giving rise to the complaint, Officer Lego was an 18-year veteran of the Plymouth Police Department in Plymouth, Michigan. (Pls' Compl, ¶ 5; Appendix Page No. 2a.) On October 29, 2009, he was assigned to the Western Wayne Community Response Team ("CRT"), a specialized task force comprised of detectives from several police departments, including the Michigan State Police. . (Pls' Compl, ¶ 6; Appendix Page No. 2a.)The CRT operated under the direction of an "umbrella" task force known as the Western Wayne Criminal Investigation Bureau, which, in addition to CRT, contains other task forces including Western Wayne Narcotics ("WWN") and Western Wayne Auto Theft. (Pls' Compl, ¶ 7; Appendix Page No. 2a.)

In October of 2009, CRT was investigating a series of armed robberies occurring in and around Canton, Michigan. (Pls' Compl, ¶ 13; Appendix Page No. 3a.) A suspect named LeBron Bronson was identified in connection with the robberies. (Pls' Compl, ¶ 13; Appendix Page No. 3a.) After Bronson was identified as a suspect, members of WWN, including Tpr. Liss, joined CRT in the investigation of Bronson. (Pls' Compl, ¶ 15; Appendix Page No. 3a.)

On October 29, 2009, Lego, along with members of CRT and WWN, followed Bronson and surveiled him. (Pls' Compl, ¶ 16; Appendix Page No. 3a.) They followed Bronson to the parking lot of a Verizon Wireless store in Plymouth Township and observed him entering the store wearing a hat, with his face covered, and carrying a handgun. (Pls' Compl, ¶ 17; Appendix Page No. 4a.) Officer Lego and other members of CRT and WWN, including Tpr. Liss, took positions outside the store to apprehend Bronson as he exited. (Pls' Compl, ¶¶ 18-19; Appendix Page No. 4a.) When Bronson exited the store, Officer Lego ordered him to drop his weapon. Bronson did not comply with the command. Instead, he raised his gun and pointed it at Officer Lego; Officer Lego then shot Bronson twice in the chest. (Pls' Compl, ¶¶ 22-23; Appendix Page No. 5a.)

The Legos claim that:

> [a]s Lego fired his weapon, Liss discharged his weapon and the round from Liss's rifle struck Lego in the back of Lego's right shoulder. The round exited the front of Lego's shoulder, struck Lego's weapon, then struck Lego in both hands and then penetrated the left front fender of the suspect's vehicle. [Pls' Compl, ¶ 24; Appendix Page No. 5a.]

Officer Lego asserts that he lost two fingers on his left hand as a result of being shot. He states that he suffers from constant pain and psychological problems, and is unable to work as a result of being shot. (Pls' Compl, ¶ 27; Appendix Page No. 5a.)

The Legos concede that Tpr. Liss's shooting of Officer Lego was accidental and that Tpr. Liss did not intentionally shoot Lego. (Pls' Compl, ¶ 30; Appendix Page No. 6a.)

But in Count I, the Legos allege that Tpr. Liss was grossly negligent in shooting Officer Lego. (Pls' Compl, ¶¶ 28-32; Appendix Page No. 6a-7a.) They alleged that Tpr. Liss disregarded his special training by:

leaving his position; inserting himself in the stacking formation; failing to communicate that he was behind Lego; failing to exercise proper muzzle discipline; failing to keep his finger off the trigger and outside the trigger guard of his weapon until he acquired a clear line of fire; indulging in a reckless desire to get into the action by discharging his weapon; and attempting to conceal his recklessness in shooting Lego by recklessly firing his weapon two more times at Bronson as he lay unarmed on the asphalt near death. [Pls' Compl, ¶ 30 subparts (a)–(g); Appendix Page No. 6a.]

In Count II, the Legos allege loss of consortium. They state that Pamela Lego has lost the support and assistance of Michael Lego and that their marital relationship has been disrupted. (Pls' Compl, ¶¶ 33-38; Appendix Page No. 7a-8a.)

PROCEEDINGS BELOW

On September 2, 2011, the Legos filed a complaint in the United States District Court for the Eastern District of Michigan. (Pls' Compl in the U.S. District Court for the Eastern District of Michigan, Case No. 11-13834; Appendix Page No. 10a-19a.) The Legos alleged a violation of the Fourth and Fourteenth Amendments to the United States Constitution and gross negligence. Plaintiff Pamela Lego also asserted a claim for loss of consortium.

In lieu of an answer, on November 4, 2011, Defendants filed a motion to dismiss. (Defs' Mot to Dismiss in USDC ED No. 11-13834; Appendix Page No. 20a-46a.) On February 3, 2012, the United States District Court dismissed the Legos' constitutional claims with prejudice and dismissed the state law claims of gross negligence and loss of consortium without prejudice. (Opinion & Order Granting Defs' Mot to Dismiss in USDC ED No. 11-13834; Appendix Page No. 47a-57a.)

On May 24, 2012, the Legos filed a complaint in the Wayne County Circuit Court, re-alleging their gross-negligence and loss-of-consortium claims. Once again, in lieu of an answer, on July 3, 2012, Liss filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10).

In the motion, Liss argued that he is entitled to governmental immunity as the Legos' claims are barred by the Michigan Firefighter's Statute, MCL 600.2965 to MCL 600.2967, because their injuries arise from a normal, inherent, and foreseeable risk of Michael Lego's profession. Liss further claimed he was entitled to a dismissal based on the exclusive-remedy provision of the Michigan Workers' Disability Compensation Act, arguing that the Legos' claims are barred because Michael Lego and Michigan State Police Detective Specialist Liss were co-employees in a joint enterprise. (Def Liss's Motion for Summary Disposition; Appendix Page No. 59a-73a.)

On August 16, 2012, the trial court held oral argument on Liss's motion. The court denied Liss's motion, stating there are issues of fact regarding the gross-negligence claim. The trial court did not address the substance of Liss's arguments

regarding the Firefighter's Statute or the Michigan Workers' Disability Compensation Act. The trial court entered the order denying Liss's motion on August 28, 2012. (Order dated August 28, 2012; Appendix 74a.)

Liss filed an application for leave to appeal the trial court's denial of the motion for summary disposition based on the exclusive-remedy provisions of the Michigan Workers' Disability Compensation Act. He also filed a claim of appeal as to the trial court's denial of the motion for summary disposition based on the Firefighter's Statute. The Court of Appeals granted the application for leave to appeal, and the two appeals were consolidated.

On March 27, 2014, the Court of Appeals issued an opinion affirming the denial of Liss's motion for summary disposition. *Lego v Liss*, unpublished per curiam opinion of the Michigan Court of Appeals, issued March 27, 2014 (Docket Nos 312392 and 312406). All members of the Court of Appeals panel concluded that issues of fact remained with respect to application of the exclusive-remedy provisions of the Michigan Workers' Disability Compensation Act.

But regarding application of the Firefighter's Statute, the Court was split. The majority declined to hold that being shot in an active-shooter situation is, as a matter of law, a normal, inherent, and foreseeable risk of a police officer's profession. *Lego*, slip opinion at 2-3. In support of their position, the majority relied on the decision of the United States District Court for the Western District of Michigan in *Rought v Porter*, 965 F Supp 989 (WD Mich, 1996). The majority determined that "if plaintiff's allegations are true, a jury could . . . reasonably find

that defendant's actions were outside of the 'normal, inherent, and foreseeable risks' of police work within the meaning of MCL 600.2966." *Id.*

But the dissent determined that there was no genuine issue of material fact with respect to whether Tpr. Liss was entitled to immunity under MCL 600.2966. In Judge Jansen's view, the application of MCL 600.2966 is a pure question of law for the court, and being shot by a fellow officer while engaging an active shooter is a normal, inherent, and foreseeable risk of a police officer's profession within the meaning of the statute. *Lego*, slip opinion at 2-3 (Jansen, J., dissenting).

On May 7, 2014, Liss sought leave to appeal the decision of the Court of Appeals to this Court. On December 19, 2014, this Court granted Liss's application for leave to appeal.

ARGUMENT

I. Accidental friendly fire is a normal, inherent and foreseeable risk of a police officer using deadly force while apprehending an engaged shooter in the presence of other police officers.

A. Standard of Review

This Court reviews de novo a trial court's determination regarding a motion for summary disposition. *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008). Matters of statutory interpretation are also reviewed de novo. *Duffy v Michigan Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). Whether a plaintiff's injuries arise from a "normal, inherent, and foreseeable risk of

[his] profession" under MCL 600.2966 is a question of law for this Court to decide. *Boulton v Fenton Twp*, 272 Mich App 456, 461; 326 NW2d 468 (2006).

B. Analysis

Lego's injuries arise from a risk that is inherent, normal, and foreseeable where multiple police officers are using justified deadly force against an engaged shooter. Even accepting Lego's complaint allegations as true, his claims are barred.

The general rule should be that negligence, or even gross negligence, of another governmental actor, is a known risk of any police officer or fire fighter. The danger of accidental friendly fire is a fact of life. Thus, allegations of negligence or gross negligence do not subject the government to liability in the context of injuries between public safety officers. That general rule does not apply to intentional actions or wanton and willful misconduct. These conclusions are supported by the foundational policy rationale behind the Michigan's Firefighters' Statute, and the plain language of MCL 600.2966.

1. The defendant governmental actor's mental state is not relevant where the allegation is one of gross negligence or negligence as here.

Before the Legislature enacted the statutory firefighters' rule embodied in MCL 600.2965 to MCL 600.2967, Michigan recognized the common-law fireman's rule. See *Kreski v Modern Wholesale Electric Supply Co,* 429 Mich 347, 367-368; 415 NW2d 178 (1987). Generally, the rule barred recovery for two types of injuries: (1) those deriving from the negligence causing the safety officer's presence, and (2) those stemming from the normal risks of the safety officer's profession. *Woods v*

City of Warren, 439 Mich 186, 190; 482 NW2d 696 (1992). The rule generally waived the duty of care that third parties owe safety officers. *Roberts v Vaughn,* 459 Mich 282, 285; 587 NW2d 249 (1998).

The fundamental rationale of the firefighters' rule has always been that the public should not be liable for damages for injuries occurring during the performance of the very function police officers and firefighters are intended to fulfill. *Kreski*, 429 Mich at 368; *Woods*, 439 Mich at 109-191. In *Boulton v Twp of Fenton*, 272 Mich App 456, 468; 726 NW2d 733 (2006), (internal citation omitted), the Court of Appeals nicely summarized the rationale of the statute:

> The very nature of police work and firefighting is to confront danger. . . .
>
> In sum, fire fighters and police officers are different than other employees whose occupations may peripherally involve hazards. Safety officers are employed, specially trained, and paid to confront dangerous situations for the protection of society. They enter their professions with the certain knowledge that their personal safety is at risk while on duty.
>
> Given the nature of their work, police officers and firefighters come into contact with other governmental employees under circumstances likely to result in injury much more often than people in other professions.

Based on this rationale, the focus in determining whether a danger is unique to the safety officer, i.e., whether a risk is normal, inherent, and foreseeable, is to analyze whether the injury stems directly from the police officers' functions. In other words, the inquiry requires a court to look at the duty the police officer is tasked to perform, and ask whether the injury flows directly from that obligation.

The Legislature abolished the common-law rule when it enacted MCL 600.2965. The common law rule was replaced with a statutory scheme that lays out the situations where a police officer may sue for injuries arising out of risks

inherent in the police profession. MCL 600.2967 provides the framework for deciding whether a police officer or firefighter may recover against a *private party* for injuries "arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity." MCL 600.2967(1).

Under MCL 600.2967, a safety officer may recover damages from a *private party* for injuries arising from the "normal, inherent, and foreseeable risks" of the safety professions, provided the injuries arise from a person's grossly negligent, wanton, willful, or intentional conduct; under product liability theories in certain circumstances; or from ordinary negligence, as long as certain other enumerated conditions are satisfied. See MCL 600.2967(1)(a), (b), and (c). Thus, MCL 600.2967 recognizes that when the defendant is a *private party*, it may be a normal, inherent, and foreseeable risk that a firefighter or police office may be injured by conduct that is intentional, negligent, grossly negligent, or willful and wanton.

Significantly, under MCL 600.2967, the private party defendant's state of mind is not a relevant factor in determining whether a risk is a normal, inherent, and foreseeable part of a police officer's profession. Instead, it is assumed that the spectrum of normal, inherent, and foreseeable risks includes being intentionally injured by a private party, negligently harmed by a private party, or even harmed by the gross negligence or willful and wanton conduct of a private party. Stated another way, MCL 600.2967 assumes that under certain circumstances, where the alleged tortfeasor is a non-governmental private party, intentionally inflicted,

negligently inflicted, and willfully and wantonly inflicted injuries will stem directly from the police officers' function as a police officer.

But MCL 600.2967 applies "except as provided in section 2966." And subsection (2) of MCL 600.2967 states that "[t]his section shall not be construed to affect a right, remedy, procedure, or limitation of action that is otherwise provided by statute or common law." Thus, the plain, unambiguous language of MCL 600.2967 states that it does not affect the limitation of action found in MCL 600.2966. In other words, MCL 600.2967 does not lay out the circumstances under which a police officer may recover from a governmental defendant. Nevertheless, MCL 600.2967 does inform the inquiry in this case insofar as the statute demonstrates injuries to police officers arising from normal, inherent, and foreseeable risks encompass full spectrum of states of mind and levels of culpability – from intentional conduct to negligent conduct and everything in between – at least in terms of a private-party defendant.

The question is different, however, where the party inflicting injury on a police officer is not a private party but another government actor. That situation is governed by a different part of the statutory firefighters' rule, MCL 600.2966.

MCL 600.2966 states:

> The state, a political subdivision of this state, or a governmental agency, governmental officer or employee, volunteer acting on behalf of a government, and member of a governmentally created board, council, commission, or task force are immune from tort liability for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession.

The plain and unambiguous language of the statute provides a government actor with immunity from all tort liability arising from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession – not just negligence. As such, police officers and firefighters are barred from recovery from injuries arising from intentional, negligent, grossly negligent, or willful and wanton actions of a government employee, so long as the injury arises from the normal, inherent, and foreseeable risks of the safety profession.

The question then becomes this: in the context of one police officer injuring another officer, how do we determine if the injury arises from a normal, inherent, and foreseeable risk? What are the factors to be considered in determining what risks are normal, inherent and foreseeable? The answers require returning to the fundamental rationale of the firefighters' rule – that the public should not be held accountable for injuries occurring during the performance of the very function police officers and firefighters are intended to fulfill. In other words, in order to determine what injuries arise from risks that are normal, inherent and foreseeable, the primary focus must be whether the injury stems directly from the officer's police functions.

In some cases, it will be useful to consider the governmental defendant's state of mind during this inquiry, but only to the extent that the governmental defendant's state of mind informs whether the injury stems directly from the officer's police functions. For example, suppose that a police officer is intentionally shot by another officer during the apprehension of an armed and dangerous felon.

The shooting is not at all accidental; rather, one officer shoots another officer simply because that officer does not like a co-worker.

It is difficult to imagine a rationale for the proposition that such an injury would stem directly from the police officer's function. It is a risk in any profession – albeit a remote one – that one co-worker may not like another co-worker and will harm the other as a result. There is nothing special about a police officer's functions or duties that make that sort of intentionally inflicted injury more or less likely. Stated another way, it is not a normal, inherent, or foreseeable risk of police work specifically that one will be intentionally shot by a co-worker out of animus. In that situation, the state of mind of the government defendant is relevant insofar as it informs the question of whether the injury stems directly from the police officer's function.

The same is true of injuries suffered as a result of willful and wanton conduct by a police officer. Willful misconduct is defined by the standard jury instructions as "conduct or a failure to act that was intended to harm the plaintiff," while wanton misconduct is "conduct or a failure to act that shows indifference to whether harm will result as to equal to a willingness that harm will result." *Odom v Wayne County,* 482 Mich 459, 475; 760 NW2d 217 (2008), citing M Civ JI 14.11, 14.12. Again, it is difficult to imagine a scenario where a police officer who is injured by the willful and wanton conduct of another officer is normal, inherent, or foreseeable. And therefore it makes logical sense that the willful and wanton state of mind of a government actor is a factor to be considered in determining whether a police

officer's injury stems directly from his function as a police officer. One does not expect police officers to injure each other willfully or wantonly, and there is nothing unique about the duties of a police officer that would inherently make such an occurrence any more normal or foreseeable.

But this is not to say that injury inflicted on one police officer by another police officer as a result of intentional or willful and wanton conduct will never be the result of normal, inherent, and foreseeable risks of the police profession. Certainly, the plain language of MCL 600.2966 leaves this possibility open by granting immunity from all tort liability for injuries arising from normal, inherent, and foreseeable risks of the police profession – including those occurring as a result of intentional or willful and wanton conduct. The point here is only that the state of mind or level of culpability of the governmental defendant is a factor to be considered in determining whether an injury arises out of a normal, inherent, and foreseeable risk of the police profession, especially where it is alleged that the injury is the result of intentional or willful conduct.

In situations where, as here, it is alleged that the injury arises from some degree of negligence by a government defendant, however, the state of mind of the governmental tortfeasor is ordinarily not relevant at all. In situations involving alleged negligence or gross negligence, the government actors' state of mind does not inform the inquiry of whether the injury stems directly from the function as a police officer. This case is an illustration of why.

In the complaint, Officer Lego explains that he was assigned to a "specialized unit" known as the Western Wayne County Community Response Team (CRT). (Ex A, ¶ 6.) The primary area of responsibility of the Response Team "was to provide a concentrated effort to investigate violent crimes such as armed robbery and assaults and to affect the arrest of the perpetrators of those crimes." (Ex A, ¶ 8.) Officer Lego was trained in SWAT (special weapons and tactics) techniques because "they were often called upon to perform high risk operations such as raids on buildings . . . ." (Ex A, ¶ 10.)

In October of 2009, Officer Lego, along with other members of his task force, was investigating a series of armed robberies. (Ex A, ¶ 13.) A suspect named LeBron Bronson was identified in connection with the robberies. (Ex A, ¶ 13.) After Bronson was identified as a suspect, Tpr. Liss joined Officer Lego and the others in the investigation of Bronson. (Ex A, ¶ 15.)

On October 29, 2009, Officer Lego, along with other police officers, followed Bronson and surveiled him. (Ex A, ¶ 16.) They followed Bronson to the parking lot of a Verizon Wireless store in Plymouth Township and observed him enter the store wearing a hat, with his face covered, and carrying a handgun. (Ex A, ¶ 17.) Officer Lego and other police officers, including Tpr. Liss, took positions outside the store to apprehend Bronson as he exited. (Ex A, ¶¶ 18-19.) When Bronson exited the store, Lego ordered him to drop his weapon. Bronson did not comply with the command. Instead, he raised his gun and pointed it at Officer Lego; Officer Lego then shot Bronson twice in the chest. (Ex A, ¶¶ 22-23.) As Officer Lego fired his weapon, Tpr.

Liss discharged his weapon and the round from his rifle struck Officer Lego in the back of his right shoulder. The round exited the front of Officer Lego's shoulder, struck his weapon, then struck him in both hands and proceeded to penetrate the left front fender of the suspect's vehicle. (Ex A, ¶ 24.) Officer Lego concedes that Tpr. Liss's shooting of Lego was accidental and that he did not intentionally shoot Officer Lego or that his conduct was willful or wanton. (Ex A, ¶ 30.)

Under these circumstances, Tpr. Liss's state of mind or level of culpability does not inform the question of whether Officer Lego's injury stems directly from his duties as a police officer because it is *not* alleged that Lego acted intentionally or willfully. Officer Lego was a member of a taskforce that regularly dealt with the apprehension of dangerous criminals under circumstances where it is foreseeable that deadly force may be necessary and justified. Indeed, on the day in question, a dangerous criminal was being apprehended, and the use of deadly force was justified. The use of deadly force is inherently dangerous, as multiple officers will be making split-second decisions and firing their weapons in close proximity to each other. Unfortunately, mistakes in judgment occur and accidents happen. To be accidentally shot by a fellow officer while apprehending an armed and dangerous criminal through the use of deadly force is a normal, inherent, and foreseeable risk of Officer Lego's profession, regardless of whether Tpr. Liss was negligent or grossly negligent. Although the police try to avoid it, accidental friendly fire is one of the known risks.

Tpr. Liss's state of mind or level of culpability in causing Lego's injury, whether negligent or grossly negligent, does little to inform the issue of whether Officer Lego's injuries stem directly from his duties as a police officer. Officer Lego has alleged that Tpr. Liss was grossly negligent because he violated numerous safety procedures by:

> leaving his position; inserting himself in the stacking formation; failing to communicate that he was behind Lego; failing to exercise proper muzzle discipline; failing to keep his finger off the trigger and outside the trigger guard of his weapon until he acquired a clear line of fire; indulging in a reckless desire to get into the action by discharging his weapon; and attempting to conceal his recklessness in shooting Lego by recklessly firing his weapon two more times at Bronson as he lay unarmed on the asphalt near death. [Ex A, ¶ 30 subparts (a)–(g).]

But even accepting these allegations as true, Officer Lego's injuries nonetheless stemmed directly from his duties as a police officer.

Thus, the following schema reflects the way the general rule should operate under MCL 600.2966 of the Firefighters' Statute:

Relevant Mental State	Irrelevant Mental State
Intentional misconduct;	Negligence;
Wanton and willful misconduct	Gross negligence.

2. The alleged violations of departmental safety policies and procedures are not relevant.

Virtually every situation where a police officer is injured by a fellow officer will likely involve violations of policy. *Lego*, slip opinion at 2 (Jansen, J., dissenting). Indeed, a fellow officer's failure to abide by policy and procedure under the pressure

of a life-threatening, rapidly evolving situation is normal, inherent, and foreseeable. Here, both Officer Lego and Tpr. Liss were confronted with circumstances demanding an instant judgment. Bronson had just committed an armed robbery, had exited the store still armed, refused to follow lawful orders of police, and pointed a firearm in the direction of Officer Lego, Tpr. Liss, and other police officers. Both Tpr. Liss and Officer Lego had to make a split-second decision. Friendly fire is an unfortunate reality of law enforcement work, as is the fact that policy and procedure may be abandoned in the face of a life-threatening emergency. Mistakes in judgment are inherent – especially where split-second, life-and-death decisions are being made.[1]

Significantly, the Court of Appeals has recognized on multiple occasions that injuries arising out of the negligent actions of fellow officers who were committing policy violations are normal, inherent, and foreseeable risks of police work. See, e.g. *McGhee v State Police Dept,* 184 Mich App 484, 486-87; 459 NW2d 67 (1990); *Boulton*, 272 Mich App at 461; *Chapman v Phil's County Line Service, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals, issued April 19, 2007 at *1 (Docket No. 269150) (Appendix Page No. 75a-80a). The facts of these

[1] It is worth noting that even if Lego violated his training or multiple safety procedures, such facts do nothing to demonstrate gross negligence on the part of Liss. "In Michigan, the violation of administrative rules and regulations is evidence of negligence…." *Zalut v Andersen & Assoc, Inc,* 186 Mich App 229, 235; 463 NW2d 236 (1990), citing *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982). Therefore, violations of rules, regulations or procedures would be relevant to the issue of negligence. *Id.* "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood,* 461 Mich 109, 122; 597 NW2d 817 (1999). Thus, evidence about possible violations of departmental procedure is only relevant to the issue of ordinary negligence.

cases are illustrative. In *Boulton*, for example, a county sheriff's deputy was injured when he was struck by a township fire truck being operated by a township fireman at the scene of a car accident. 272 Mich App at 459. The trial court granted the township summary disposition based on MCL 600.2966, finding that the sheriff's deputy's injuries arose from a normal, inherent, and foreseeable risk of his profession. *Id.*

Similarly, in *McGhee v State Police Dept,* 184 Mich App 484, 486-87; 459 NW2d 67 (1990), the plaintiff, a City of Detroit police officer, was injured in a head-on collision with a driver who speeding and trying to avoid Michigan State Police troopers who were pursuing. The plaintiff sued the Department of State Police and the troopers who initiated the high-speed chase. 184 Mich App at 486-487. The Court of Appeals held that the plaintiff's injuries were the result of risks and hazards inherent in police work – specifically, taking part in a high speed chase. *Id.* at 487.

Likewise, in *Chapman v Phil's County Line Service, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals, issued April 19, 2007 at *1 (Docket No. 269150), the plaintiff, a volunteer police officer, was riding in the front seat of a police cruiser being operated by an Osceola County Sheriff's Deputy. While responding to a breaking and entering call, the Deputy lost control of the cruiser and the car struck an oncoming vehicle. *Chapman*, slip opinion at *1 (Appendix Page No. 75a). The court held that traffic accidents are a normal,

inherent, and foreseeable risk stemming directly from fulfilling the police duties of an officer, which include responding to emergency calls. *Id.* at *4.

These cases support the principles that demonstrate that Tpr. Liss is entitled to immunity in this case. *Boulton, McGhee*, and *Chapman* stand for the proposition that it is a normal, inherent, and foreseeable risk that a police officer may be injured by the negligent acts of a fellow officer. In all three cases, the plaintiffs argued that they were injured by the negligent acts of fellow police officers. And in all three cases the Court of Appeals held that the officer defendants were immune from liability. Moreover, it is reasonable to conclude that the defendants in all three cases were violating department mandated policies about the safe operation of motor vehicles.

This case is analogous. Officer Lego was injured when Tpr. Liss made a split-second mistake in judgment during a deadly force situation. Even assuming Tpr. Liss violated department-mandated policies regarding officer safety during the use of deadly force, that type of violation or mistake is itself a risk inherent to situations like this, where a weapon is pointed at officers and they must react immediately. It is foreseeable that a police officer could violate policy during such a fluid circumstance, when his own life is also at stake. In any rapidly evolving endeavor involving life and death decisions, mistakes in judgment are normal and inherent.

In summary, there is no question that the scope of MCL 600.2966 does not include all possible risks encountered by police officers, and that the statute is not a license for the police to act with impunity as it relates to the well-being of a fellow

officer. The circumstances presented here, however, are that Tpr. Lego was a member of a task force assigned to apprehend dangerous criminals and, if necessary, to use deadly force. It is normal and foreseeable that in these sorts of high-pressure, high-stakes situations, mistakes will be made and fellow officers will be injured. Officer Lego's injury resulted from risks inherent in this type of dangerous police work. Although a police officer may be able to recover for being shot be a fellow officer where the shooting was intentional or wanton or willful, here, Officer Lego's injuries stemmed directly from his duty and function as a police officer. While such situations are unquestionably unfortunate, friendly fire is one of the dangers inherent in the police profession. As stated by the dissent:

> [E]ngaging an active shooter is a fluid and high risk operation. It is also the type of operation that police officers are called up to perform regularly. During such an operation, it is both normal and foreseeable that several police officers will be present and will be discharging their weapons while in close proximity with one another. [*Lego*, slip opinion at 3 (Jansen, J., dissenting).]

This is precisely the circumstance presented in this case. This Court should reverse the Court of Appeals.

CONCLUSION AND RELIEF REQUESTED

Being accidentally shot by a fellow officer is a normal, inherent, and foreseeable risk of the police profession where an officer is using deadly force to apprehend an engaged shooter in the presence of other officers. Here, Plaintiff Lego was accidentally shot by Defendant Liss during the apprehension of an armed and dangerous felon while both were working as members of a specialized task force. The felon pointed a firearm at the officers attempting to apprehend him, placing the

lives of Officer Lego, Tpr. Liss, and other officers in immediate danger. There is no question that the use of deadly force by Officer Lego and Tpr. Liss was absolutely justified. The accidental shooting of Officer Lego by Tpr. Liss is a normal, inherent, and foreseeable risk of this type of dangerous situation.

Defendant Liss of the Michigan State Police respectfully requests that this Court reverse the March 27, 2014 decision of the Court of Appeals, and remand this case to the trial court for entry of judgment in Tpr. Liss's favor.

Respectfully submitted,

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