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

REPLY BRIEF OF APPELLANT MICHIGAN STATE POLICE DETECTIVE SPECIALIST JAKE LISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Firefighter's Statute bars claims against governmental employees that arise from "the normal, inherent and foreseeable risks of the firefighter's or police officer's profession." MCL 600.2966. Here, Liss simply seeks to apply the statute's plain language. Even accepting Lego's allegations as true, his claims are barred because his injuries arise from police officers using justified deadly force against an engaged shooter – a risk that is normal, inherent, and foreseeable.

In particular, both Lego and Liss were confronted with circumstances demanding an instant judgment. A dangerous criminal had just committed an armed robbery, left the store still armed, refused to follow lawful orders of police, and pointed a firearm in the direction of Lego, Liss, and other police officers. It is normal, inherent, and foreseeable that multiple police officers will be present where justified deadly force is being used, that they will fire their weapons while close to each other, and that an officer could make a mistake in judgment during such a fluid and rapidly evolving situation. Liss is entitled to governmental immunity as conferred by the plain language of the Firefighter's Statute.

In arguing that gross negligence is "almost always" outside the range of risks from injuries that arise from the conduct of fellow officers (Lego Br. 17) Lego ignores the reality of police work and litigation. As this case shows, an officer's mistake in the most dangerous and heated of moments is subject to the kind of second guessing that allows allegations that the officer's actions were "bizarre," seeking "trigger time," shooting "wildly" an unarmed man who lay dying. *Id.* at 5, 24, 26. In the world of allegations, a negligent act can give rise to gross claims of negligence.

As argued in Liss' opening brief, the proper demarcation in examining the Firefighter's Statute is between (1) intentional or wanton and willful conduct on one side, and (2) gross negligence and negligence on the other. The former is generally outside the "normal, inherent, and foreseeable." One does not expect fellow police officers to engage in criminal conduct. Rather, fellow officers may make mistakes—even important ones—in extreme circumstances with tragic consequences. The danger of friendly fire or other mistakes by fellow officers is a known risk. It is reality. But it is normal, inherent, and foreseeable. The Firefighter's Statute forecloses liability for these kinds of risks.

In this reply to Lego's filing, Trooper Liss intends to make three points. First, Lego's reliance on *Gibbons v Caraway,* 455 Mich 314; 565 NW2d 663 (1997) is misplaced. The controlling analysis—from Justice Boyle—is consistent with the arguments advanced here by Liss. Second, the policy underlying the Firefighter's Statute is furthered by dividing the criminal mindsets of intentional acts and wanton and willful misconduct from degrees of negligence. And third, the other case that Lego relies on—a federal district case— is not binding and is distinguishable in any event.

This Court should reverse the decision of the Court of Appeals.

ARGUMENT

I. The only inquiry in this case is whether Lego's injury stems directly from risks that are inherent, normal and foreseeable in the police profession. The decision in *Gibbons* does not indicate otherwise.

Lego contends that an officer's culpability is always relevant to whether the Firefighter's Statute applies. In support of this contention, Lego relies upon *Gibbons v Caraway*, 455 Mich 314; 565 NW2d 663 (1997) for the principle that negligent conduct is never outside the normal, inherent and foreseeable risks of the profession because safety officers are specifically trained to expect and deal with that type of conduct. At the same time, conduct that is at least grossly negligent is almost always outside the normal, inherent and foreseeable risks of the profession, because that type of conduct exposes the officers to situations that exceed their training and expectations. Therefore, according to Lego, the level of culpability must always be determined (Lego Br. at 20). But Lego's reliance on *Gibbons* for such a guiding principle is improper.

First, *Gibbons* was applying the common-law Fireman's Rule, which was abolished by MCL 600.2965. Second, there was no majority holding in *Gibbons*. Thus, the proposition that Lego quotes is not controlling in any event. See Lego Br. 14-15, quoting *Gibbons,* 455 Mich at 326 (Cavanagh, J., joined by Mallett, J. and Kelly, Marilyn, J.) ("the allegedly negligent operation of her automobile . . . which is alleged to have been wanton, reckless, careless, negligent, or grossly negligent, precludes any ruling as a matter of law at this stage of the proceedings that Officer Gibbons' claims are barred by the fireman's rule"). The plurality was dependent on the support of Justice Boyle in in her concurrence, and she made clear that the

alleged gross negligence was "subsequent" to the accident and arose from "an independent third party *unconnected* to the situation that brought the officer to the scene." *Gibbons,* 455 Mich at 329 (emphasis added).[1] That is not the case here.

Moreover, *Gibbons* does not support the principle derived by Lego for another reason. The principle Lego derives from *Gibbons* is based on Justice Boyle's statement that "Officers are trained at taxpayer expense to handle these very situations." *Id*.[2] But the significance of this statement is not, as Lego contends, that the officers were trained to handle only "arguably negligent" situations, but that the training was at taxpayer expense. Justice Boyle was not specifically opining on the relevance of the actor's culpability, but simply referring to the general policy behind the Fireman's Rule that, because the public compensates and trains officers, lawsuits against taxpayers would effectively "subject them to multiple penalties for the protection." See *Kreski v Modern Wholesale Elec Supply Co*, 429 Mich 347, 366; 415 NW2d 178 (1987). Lego's attempt to glean a broad guiding principle that culpability is always relevant because the Fireman's Rule only applies to injuries from negligent conduct, because only that conduct presents risks "for which officers are trained to handle" (Lego Br. at 21, 31) is not supported by Justice Boyle's concurring opinion, let alone a majority of Justices in *Gibbons*.

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[1] See also *id.* at 330 ("Officer Gibbons did not assume the risk of being injured by a subsequent wanton, reckless, or grossly negligent act of a third party by virtue of the fact that he was dispatched to the scene of an automobile accident any more than he assumed the risk of being intentionally run down by a vindictive driver with a score to settle who happened to pass by as the officer was directing traffic.")

[2] The "situation" to which Justice Boyle was referring was "arguably negligent" conduct of drivers committed while an officer was directing traffic. *Id*.

Rather, the proper guiding principle was that stated in *Boulton v Fenton Twp*, 272 Mich App 456, 461; 726 NW2d 733 (2006), that "the only inquiry is whether plaintiff's injury arose from a normal, inherent, and foreseeable risk of his profession." Applying that principle here, 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. 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 – compels this conclusion.

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.

Liss's state of mind or level of culpability in causing Lego's injury, whether negligent or grossly negligent, does nothing to inform the inquiry of whether Officer Lego's injuries stem directly from his duties as a police officer. Shootings between police officers, while thankfully infrequent, are a reality of law enforcement.

Because Lego was injured as a result of "a normal, inherent, and foreseeable risk of his profession," his claim must be dismissed under MCL 600.2966.

II. The claim that the purpose of the Firefighter's Statute is not furthered by its application here reveals a misunderstanding of the statute and the real danger of officer error.

The purpose of the statute is that police officers and firefighters enter their profession knowing that "their personal safety is at risk while on duty" and that they will come "into contact with other governmental employees under circumstances likely to result in injury more often than people in other professions." *Boulton,* 272 Mich App at 468. The contention that training would not contemplate serious mistakes of fellow officers, i.e., gross negligence, appears predicated on the assertion that officers are not often harmed by the gross negligence or friendly fire of fellow officers. Lego Br. at 30.

The publicly available information does not bear this assertion out. Relying on the website cited by Lego, "Officer Down Memorial Page," a survey of the 37 police officers killed in the line of duty this year (as of April 13, 2015), two were killed by "accidental gunfire" and eleven were killed in "automobile accidents." If the ten heart-attacks are eliminated from those killed in the line of duty, almost half of those officers who died did so in circumstances that may have involved at least the negligence of fellow officers.[3] And even a casual search of a "friendly fire" google search discloses multiple recent stories of police officer accidental shootings.[4]

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[3] See http://www.odmp.org/search/year/2015?ref=sidebar (last visited April 13, 2015).

[4] See, e.g., http://www.policemag.com/list/tag/friendly-fire.aspx (eight stories in last three years involving friendly fire police shootings) (last visited April 13, 2015)

III. *Rought v Porter* is not binding, and is distinguishable from this case. If anything, *Rought* demonstrates that the Firefighter's Statute should apply here.

Lego's reliance on *Rought v Porter*, 965 F Supp 989 (WD Mich, 1996), is misplaced. First, it should be noted that *Rought* is not binding on this Court. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Second, the United States District Court was analyzing the common-law Firefighter's Rule, and not MCL 600.2966. Consequently, *Rought* has no analytical value to this case whatsoever.

In addition, on the merits, *Rought* is distinguishable. In short, the defendant in *Rought* acted criminally and unconstitutionally by using deadly force without probable cause, failing to make even minimal efforts to ascertain whether probable cause existed. *Id.*

The facts in *Rought* stand in stark contrast to the facts of this case. Here, there is no question that the use of deadly force was justified—Lego himself admits this. A criminal had just committed an armed robbery, had just left the store still armed, refused to follow lawful orders of police, and pointed a firearm in the direction of Lego, Liss, and other police officers.

In fact, *Rought* actually demonstrates that the Firefighter's Rule should apply here. *Rought* recognizes that a police officer being shot by an accidental discharge of another officer would "appear to be [a] 'normal' risk[] of a safety officer's duties[.]" *Id.* at 994. And while *Rought* does state that "it is much less clear that the risk of being shot by a fellow officer who is clearly not following constitutionally-mandated department policies regarding use of deadly force is a 'normal' risk of performing one's

duties[,]" again, that circumstance is not what happened here. *Id.* at 994. Any policies allegedly violated by Liss were not "constitutionally-mandated department policies regarding use of deadly force." Rather, the policies he allegedly violated are officer-safety considerations that have nothing to do with constitutional considerations about the appropriateness of the use of deadly force. *Rought* is really an illustration of why the Firefighter's Rule should preclude Lego's claim.

Here, Liss made a mistake in judgment during a rapidly evolving situation. To be accidentally shot by a fellow officer while apprehending an armed and dangerous criminal through the justified use of deadly force is a normal, inherent, and foreseeable risk of Officer Lego's profession. Although the police try to avoid it, accidental friendly fire is one of the known risks of the police profession.

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, Trooper Liss, and other officers in immediate danger. There is no question that the use of deadly force by Officer Lego and Trooper Liss was absolutely justified. The accidental shooting of Officer Lego by Trooper 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 Trooper Liss's favor.

Respectfully submitted,

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