STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL LEGO and
PAMELA LEGO,

Plaintiffs-Appellees,

vs.

MSP DETECTIVE SPECIALIST JAKE LISS,
in his individual capacity only,

Defendant-Appellant.

Supreme Court Case No. 149247
COA Case Nos. 312392/312406
Wayne Circ. Ct. Case No.12-7085-NO

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PLAINTIFFS-APPELLEES' BRIEF OPPOSING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

149246-7

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THE SUPREME COURT DENY THE APPLICATION FOR LEAVE WHEN THE COURT OF APPEALS PROPERLY DENIED DEFENDANT'S SUMMARY DISPOSITION MOTION TO PERMIT FURTHER ON THE ISSUE OF GOVERNMENTAL IMMUNITY UNDER THE MICHIGAN FIREFIGHTER'S RULE?

Defendant-Appellant says "no"

Plaintiffs-Appellees say "yes"

II. SHOULD THE SUPREME COURT ADOPT A BLANKET RULE PROHIBITING RECOVERY AGAINST GOVERNMENT OFFICIALS UNDER THE MICHIGAN FIREFIGHTER'S RULE WHEN THE PLAIN LANGUAGE OF THE STATUTE PERMITS RECOVERY AND THIS COURT'S JURISPRUDENCE IS THAT THE RULE IS ANALYZED ON A CASE-BY-CASE BASIS AND EXCEPTIONS TO IMMUNITY CAN APPLY?

Defendant-Appellant says "yes"

Plaintiffs-Appellees say "no"

I. INTRODUCTION

This is an action for gross negligence and loss of consortium brought by Plaintiffs-Appellees Michael Lego ("Lego"; "Detective Lego") and his wife, Pamela Lego, against Defendant-Appellant Jake Liss ("Liss"). At the time of the events in this case, Detective Lego was a Plymouth Township police officer, assigned to a multi-jurisdictional fugitive apprehension task force. Liss was a Michigan State Police trooper assigned to a separate task force that was assisting Detective Lego's unit in apprehending an armed robbery suspect outside a mobile phone store. During the suspect apprehension, Liss committed numerous egregious violations of departmental safety procedures, including leaving his position and improperly inserting himself in a formation behind Detective Lego. Detective Lego shot and killed the armed robber when he failed to surrender and raised his gun to fire at Lego. Liss fired his weapon without making certain that Lego was out of his line of fire striking Detective Lego in the back, seriously wounding him. Liss continued firing wildly even after Lego was hit and the suspect, having been shot by Lego, already lay mortally wounded on the ground.

In lieu of answering Lego's complaint, Liss filed a motion for summary disposition on the ground that, *inter alia*, Detective Lego's gross negligence claim was precluded by governmental immunity pursuant to the Michigan Firefighter's Rule. The trial court denied Liss' motion, and the Michigan Court of Appeals affirmed the trial court. The Court of Appeals ruled that further discovery was necessary for the trial court to determine, as a matter of law, whether or not Lego's claim is barred by the Firefighter's Rule. Liss has now brought the instant Application in which he contends that the Court of Appeals' decision was "clearly erroneous." Liss' Application suggests that the Court of Appeals incorrectly held that the issue of whether governmental immunity applies is a jury question. The Application also contends that being shot

by a fellow officer (indeed, **any** injury caused by a fellow officer) is a normal, inherent and foreseeable risk of police work under any and all circumstances.

As discussed more fully below, the Application should be denied. The Court of Appeals' decision was not in error. The Court of Appeals did not hold that the determination of immunity is a jury question. The Court of Appeals held that the immunity determination is a question of law for the court, and that further discovery was necessary for the trial court in the instant case to determine if Liss' conduct implicated application of the Firefighter's Rule. **The Court of Appeals also held that the Firefighter's Rule is not a blanket proscription barring recovery against government officials, nor has it ever been interpreted as such by this Court**. The jurisprudence of this Court is that whether the Firefighter's Rule applies is examined on a case-by-case basis to determine if a finding of immunity is appropriate under the facts of a particular case. Liss' Application improperly urges this Court to ignore both the plain language of the statute and the Court's own jurisprudence, by simply adopting a blanket rule which provides that the Firefighter's Rule insulates government officials from liability in every instance.

II. COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Lego began employment as a police officer with the Plymouth Township Police Department in 1993. Lego was later promoted to the rank of Detective Specialist. Beginning in 2008, Lego was assigned to the Western Wayne Community Response Team ("CRT"). CRT is comprised of detectives from Plymouth Township, Northville Township, Canton Township, Wayne County Sheriff, and Michigan State Police ("MSP") troopers. CRT's primary responsibilities include surveillance of criminal suspects and fugitive apprehension in cases involving armed robbery and other violent crimes in Wayne County.

CRT is one of three separate task forces which operate under the direction of an "umbrella" agency, the Western Wayne Criminal Investigation Bureau. The other two task forces are Western Wayne Narcotics ("WWN") and Western Wayne Auto Theft. WWN was formed for the purpose of enforcing narcotics and/or controlled substance laws and investigating drug-related criminal activity. At the time of the incidents in this case, Defendant Liss was a Michigan State Police trooper assigned to the WWN task force (Exhibit 1, Complaint, ¶¶ 6-12).

Officers assigned to the three task forces receive specialized and intensive SWAT-type training because they are often called upon to perform high risk operations such as building raids and take downs of vehicles occupied by armed and violent suspects. Officers assigned to the task forces are also trained and authorized to use specialized weapons such as M-4's and AR-15 assault rifles. Because the CRT, WWN and Auto Theft task forces each have a limited number of officers assigned to it, officers from one task force are sometimes directed by their supervisors to assist one of the other task forces (Exhibit 1, Complaint, ¶¶ 9-11).

In October 2009, Lego and the other CRT detectives began investigating a series of armed robberies committed in and around Canton, Michigan. CRT's investigation developed information that an individual by the name of Lebron Bronson was the person committing the robberies. The investigation revealed that Bronson had an extensive and violent criminal history, including numerous armed robberies. For several days, CRT conducted surveillance of Bronson, following him as he drove to various locations. At the direction of the Western Wayne Criminal Investigation Bureau Commander, members of the WWN drug task force, including Defendant Liss, joined CRT in the Bronson investigation (Exhibit 1, Complaint, ¶15).

On October 29, 2009, CRT, along with members of WWN, followed Bronson to the parking lot of a Verizon Wireless store located in Plymouth Township. It was apparent to the

officers that Bronson was about to perpetrate another armed robbery. After Bronson entered the Verizon store, Detective Lego and two other officers positioned themselves in a stacking formation (i.e., one behind the other) against the wall of the building adjacent to the entrance of the Verizon store. Officer Lego, acting as point man, was armed with an M-4 assault rifle and closest in line to the Verizon store's entrance.

Defendant Liss arrived at the Verizon parking lot in his police vehicle a short time later. Since Lego and the other two officers had the Verizon store's entrance/exit covered, and additional officers had the other door covered and were relaying information, Liss, in accordance with his training and proper tactics, should have remained in his vehicle to block Bronson's escape if Bronson unexpectedly returned to his vehicle (Exhibit 1, Complaint, ¶20). However, instead of remaining in his vehicle, Liss disregarded proper tactics and unexpectedly exited his vehicle carrying an AR-15 type rifle and ran up to Lego and the other two officers lined up against the side of the building without being instructed to do so, inserting himself between Lego and the two officers behind Lego (Exhibit 1, Complaint, ¶20). After Liss positioned himself behind Detective Lego, he continued to violate proper protocol by failing to follow the techniques he had been taught, including making body contact with the officer in front of him when in a stacking formation, keeping his weapon's muzzle pointed in a safe direction and keeping his finger off the trigger and outside the trigger guard until the target was engaged (Exhibit 1, Complaint, ¶21).

At that point, Bronson suddenly exited the Verizon store still holding a handgun. Detective Lego, who was the closest officer to Bronson, identified himself as a police officer and ordered Bronson to drop his weapon. Bronson ignored Lego's commands and instead raised his gun and pointed it at Lego, whereupon Lego fired two rounds from his weapon striking Bronson

in the chest and causing Bronson to drop his pistol and fall to the ground mortally wounded, (Exhibit 1,Complaint, ¶23).

As Detective Lego fired his weapon, Liss discharged his weapon without ensuring that Detective Lego was clear of his line of fire. 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 (Exhibit 1, Complaint, ¶24). Despite the fact that Bronson lay on the ground mortally wounded with his gun lying on the asphalt, Liss, now standing on Lego's right side approximately 6 feet away from Bronson, wildly fired 2 more rounds at Bronson. Neither round struck Bronson; instead, they struck the asphalt pavement near Bronson and ricocheted through the air, endangering the other officers and civilians in the area (Exhibit 1, Complaint, ¶25).

As the result of being struck by one of the bullets fired by Liss, Detective Lego sustained serious injuries; two of the fingers on his left hand were shattered and had to be amputated. Because of nerve damage Lego remains in almost constant pain. He is no longer physically or psychologically capable of working as a police officer. He continues to suffer psychologically and is unable to perform any work.

On September 2, 2011, Detective Lego and his wife filed a lawsuit against Liss and two of his supervisors in the U.S. District Court for the Eastern District of Michigan for violation of 42 U.S.C. 1983 and state law claims for gross negligence and loss of consortium (U.S. Dist. E.D. Mich. Case No. 11-13834). On February 3, 2012, the district court dismissed the federal claims pursuant to the defendants' summary judgment motion, and declined to exercise supplemental jurisdiction over Mr. and Mrs. Lego's state law claims.

On May 24, 2012, the Legos filed the instant lawsuit against Liss only, stating claims for gross negligence and loss of consortium. On July 3, 2012, in lieu of answering the Complaint, Liss filed a motion for summary disposition. Liss' motion claimed that Detective Lego's gross negligence claim was barred by the Michigan Firefighter's Rule, M.C.L. §600.2965 *et seq.* (the "Firefighter's Rule"), and the Michigan Worker's Disability Compensation Act, M.C.L. §418.101 *et seq.*

On August 16, 2012, the trial court, Judge John H. Gillis, Jr., presiding, held oral argument on Liss' motion. Judge Gillis ruled from the bench and denied summary disposition as to both issues raised in Liss' motion. With respect to the Firefighter's Rule issue, Judge Gillis noted that, as alleged in the Complaint, Liss inserted himself in line behind Detective Lego and the other task force officers after the officers were already in position to apprehend the armed robber, shot Detective Lego and continued to shoot at Bronson as he lay incapacitated on the ground after being shot by Detective Lego. The Judge ruled that application of the Firefighter's Rule was precluded because a question of fact existed on the issue of whether Liss' conduct implicated the Firefighter's Rule:

> "JUDGE GILLIS: Okay. In this case, [Lego] shot the armed robber as he came out of the Verizon store and he was on the ground dead when [Liss] shot at the armed robber and accidentally hit [Lego] in this case. I think there's a question of fact on the gross negligence issue because the person was already on the ground, number one; and number two, the Plymouth Township Police were already in line to apprehend the man when he came out of the store and [Liss] came up later. So, the Court will deny [Liss' summary disposition] motion." (Exhibit 2, Transcript of August 16, 2012 hearing on Defendant's motion for summary disposition, pp. 7-8)

On August 28, 2012, Judge Gillis entered a written order denying Liss' motion.

On September 18, 2012, Liss filed a claim of appeal of right with the Court of Appeals with respect to the trial court's denial of summary disposition on the Firefighter's Rule issue

(COA Case No. 312392). On the same date, Liss filed an application with the Court of Appeals seeking leave to appeal the trial court's denial of summary disposition on the WDCA issue (COA Case No. 312406). The Court of Appeals granted the application and consolidated that matter with the appeal of right on the Firefighter's Rule.

On March 27, 2014, the Court of Appeals issued a written opinion denying Liss' appeal (the "COA Opinion")(Exhibit 3). With respect to the Firefighter's Rule, the Court of Appeals declined to hold that being shot by a fellow officer is always, as a matter of law, a "normal, inherent, and foreseeable risk" of being a police officer. The COA Opinion noted that no substantial discovery had been conducted,[1] and that further discovery could adduce facts which showed that Liss' conduct was outside the "normal, inherent, and foreseeable risks" of police work. The COA Opinion held that, consequently, denial of Liss' motion was appropriate "at [that] juncture" of the case:

> "[Liss] claims that being shot is a 'normal, inherent, and foreseeable risk' of being a police officer. While being shot is such a risk under many circumstances, we decline to hold that being shot by another officer is always, as a matter of law, a normal, inherent, and foreseeable risk' of being a police officer. According to [Lego's] allegations, [Liss] completely and unexpectedly disregarded all of his extensive police training during the dangerous, high-risk apprehension of a violent criminal suspect. Taking the allegations in the complaint as true, [Liss] violated numerous safety procedures, discharged his weapon without making sure other officers were out of the line of fire, and continued to fire after he had shot [Lego] in the back and the suspect lay mortally wounded on the ground. [Liss' summary] motion was filed prior to any substantial discovery and we are unwilling to hold that, if [Lego's] allegations are true, a jury could not reasonably find that [Liss'] actions were outside the 'normal, inherent, and foreseeable risks' of police work within the meaning

[1] In fact, **no** discovery was conducted due to the fact that Liss filed his summary disposition motion before discovery commenced.

> of MCL 600.2966. Accordingly, the trial court did not err by denying [Liss'] motion for summary disposition under MCR 2.116(C)(7) at this juncture." (Exhibit 3, COA Opinion, p. 2)

The COA Opinion held that, following discovery, the trial court would be required (assuming Liss again moved for summary disposition) to make a factual finding with respect to whether Liss was entitled to governmental immunity under MCL 600.2966:

> "...[T]he factual findings necessary to determine whether [Liss] is entitled to summary disposition under MCR 2.116(C)(7) on the grounds of governmental immunity are reserved for the trial court, not a jury...Thus, if and when [Liss] again moves for summary disposition on the grounds of governmental immunity, the trial court must make factual findings sufficient to support its conclusion that [Lego's] injuries did or did not arise from the 'normal, inherent, and foreseeable risks' of being a police officer under MCL 600.2966." (Exhibit 3, COA Opinion, p. 2, n. 1)(emphasis added)

III. LAW & ARGUMENT

A. Standard of Review

Liss' summary disposition motion was brought pursuant to MCR 2.116 §§(C)(7) (claim barred by governmental immunity). The applicability of governmental immunity is a question of law that is reviewed *de novo* on appeal, *Pierce v. City of Lansing,* 265 Mich. App. 174, 176-177; 694 N.W.2d 65 (2005), citing *Mack v Detroit*, 467 Mich. 186, 193; 649 N.W.2d 47 (2002).

Also, a trial court's decision on a motion for summary disposition is reviewed *de novo* on appeal, *Id.*

The interpretation of a statue is a question of law which this Court reviews *de novo*, *Ameritech Mich. v. PSC (In re MCI)*, 460 Mich. 396, 413; 596 N.W.2d 164 (1999).

B. Legal Standard for Summary Disposition Motion

When reviewing a motion under MCR 2.116(C)(7), the court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, *Dextrom v Wexford Co.*, 287 Mich. App. 406, 429-433; 789 N.W.2d 211 (2010). If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact, *Id.* If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate and the court **must** deny the motion for the purpose of obtaining further factual development to enable the court to determine as a matter of law whether immunity applies, *Id.*

C. Substantive Law To Be Applied

1. The Statute

In 1998, the Michigan Legislature codified the Firefighter's Rule by enacting 1998 PA 389 (M.C.L. §§600.2965 to 600.2967). The codified Rule abrogated the common law rule which existed to that point, M.C.L. §600.2965. The Firefighter's Rule provides that a safety officer may sue for injuries arising from the "normal, inherent, and foreseeable" risks of the officer's profession under certain circumstances:

> "(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 . . . ." M.C.L. §600.2967 (emphasis added)

The remainder of §600.2967 sets forth the circumstances under which the safety officer may recover. Recovery is limited by §600.2966, which provides that a fire fighter or police officer may not recover in tort against governmental officers and employees for injuries which arise from the "normal, inherent, and foreseeable risks" of the firefighter's or police officer's profession:

> "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**." M.C.L. §600.2966 (emphasis added)

2. The Firefighter's Rule Is Not An Absolute Bar To Recovery From Government Employees

Contrary to the suggestion raised in Appellant's Brief, the jurisprudence of Michigan courts with respect to the application of the Firefighter's Rule[2] indicates that the Rule is not, nor was it ever intended to be, a blanket proscription barring recovery against government employees. The Firefighters' Rule was first adopted at common law in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich. 347; 415 N.W.2d 178 (1987). *Kreski* was a consolidated appeal of two cases. In the first case, a police officer was injured when he fell through a building's trap door while investigating a burglary. In the second case, a firefighter was killed when a roof collapsed on him during a fire. The police officer and the firefighter's

[2] M.C.L. §§600.2965 through 600.2967 are derived from the common-law firefighter's rule, House Legislative Analysis, HB 4044 (November 23, 1998). This Court has ruled that it is appropriate for Michigan courts to refer to previously established common-law rules in analyzing a statute, *Nummer v Dep't of Treasury*, 448 Mich. 534, 544; 533 N.W.2d 250 (1995).

estate sued the respective property owners. This Court officially adopted the Firefighters' Rule and dismissed the suits, holding that, generally a fire fighter or police officer could not recover damages from a private party for injuries arising from the normal, inherent and foreseeable risks of their professions, based on the defendant's negligence in the creation of the reason for the safety officer's presence, *Kreski,* p. 358.

In adopting the Firefighter's Rule, this Court enunciated several policy considerations underlying the Rule, including the fact that the public, through taxes, pays to train and compensate firefighters and police officers to respond to dangerous situations, so permitting safety officials to bring suit against negligent taxpayers would expose taxpayers to multiple penalties; it is unreasonable to require property owners to maintain their premises in case of an unknown entry onto the property by police officers or firefighters carrying out their duty; police officers and firefighters injured in the scope of their employment are eligible for workers' compensation benefits; and, as a matter of public policy, firefighters and police officers should not be able to recover for injuries attributable to the negligence that requires their assistance, *Kreski*, pp. 365-369.

Notwithstanding these policy concerns, this Court clarified in *Kreski* that the case did not define the precise boundaries of the Firefighter's Rule, and there could be exceptions to the Rule under circumstances that were not present in *Kreski,* p. 371. The *Kreski* court ruled that not all risks encountered by a safety officer are "normal, inherent and foreseeable" risks of the officer's profession and the Firefighter's Rule was not intended to afford an unconditional license for a defendant to expose a safety officer to those risks:

> "The [Firefighter's Rule] includes...those risks inherent in fulfilling...police or fire fighting duties. **Of course, this does not include all risks encountered by the safety officer. The [Rule] is**

not a license to act with impunity, without regard for the safety officer's well-being." *Kreski*, pp. 372-373.

Ten years after *Kreski*, this Court revisited the common-law Firefighter's Rule in another consolidated appeal, *Gibbons v Caraway*, 455 Mich. 314; 565 N.W.2d 663 (1997). Gibbons was a police officer who sued the driver and owners of a vehicle after being struck by the vehicle while directing traffic at an accident scene.[3] The trial court denied the defendants' motion to dismiss and a panel of the Michigan Court of Appeals reversed. Citing this Court's opinion in *Woods v Warren,* 439 Mich. 186; 482 N.W.2d 696 (1992), the Court of Appeals ruled that Gibbons was on duty when he was struck by the automobile driven by the defendant, that the risk of being struck by a negligent motorist was inherent in the activity of directing traffic, and that there were no exceptions to the Firefighter's Rule.

This Court reversed the Court of Appeals, holding that the application of the Firefighter's Rule to Officer Gibbons' claim was unjustified under the circumstances of the case. After reviewing the policy considerations underlying the Rule enunciated in *Kreski*, this Court reiterated *Kreski's* pronouncement that the Firefighter's Rule was not a blanket proscription precluding recovery to a safety officer. This Court emphatically rejected the Court of Appeals' suggestion that there were no exceptions to the Fireman's Rule; **this Court held that individual exceptions to the Rule exist in appropriate situations as determined on a case-by-case basis,** *Gibbons*, pp. 322-323.

Kreski and *Gibbons* establish that the jurisprudence of Michigan courts is that the Firefighter's Rule is not intended to apply mechanically by barring recovery in every instance;

[3] The other case in the *Gibbons* consolidated appeal, *Mariin v. Fleur, Inc.,* involved a police officer who sued a bar owner after being attacked by a patron. The *Gibbons* court upheld the Court of Appeals' ruling that the Firefighter's Rule did not apply to Officer Mariin's case, for reasons that are not relevant to the instant Application.

rather, in determining whether the Rule applies, safety officers' claims should be analyzed on a case-by-case review of the specific circumstances of an officer's claim to assess whether the complained of conduct falls within the normal, inherent and foreseeable risks of the officer's duties. The cases also establish that the risks inherent in an officer's duties **do not** include **all** possible risks that may arise after the officer has begun carrying out his duties.

D. The Application Should Be Denied Because The Court Of Appeals Did Not Err When It Ruled That Summary Disposition Was Denied Pending Further Discovery

Appellant's Brief contends that the Court of Appeals' majority decision regarding the Firefighter's Rule was "clearly erroneous" (Appellant's Brief, p. 3). In support of this contention, Appellant's Brief quotes a sentence from the COA Opinion stating that "...[I]f plaintiff's allegations are true, a jury could...reasonably find that defendant's actions were outside the normal, inherent and foreseeable risks of police work..." (Appellant's Brief, p. 8). According to Appellant's Brief, the dissenting Court of Appeals Judge, Judge Jansen, correctly asserted that application of MCL 600.296 is a "pure" question of law for the court (Appellant's Brief, p. 8).

The Court of Appeals' decision was not erroneous at all. The arguments proffered in Appellant's Brief suggest that the COA Opinion held that the Firefighter's Rule did not apply because there were disputed issues of fact, and furthermore, whether governmental immunity applies was a question for the jury. This suggestion is simply incorrect. The Court Of Appeals ruled that governmental immunity might apply after further discovery was conducted; the Court also made clear that immunity was a question of law for the trial court to decide. The COA Opinion, citing *Dextrom v Wexford Co., supra*, held that Liss' summary disposition motion was denied **to permit further discovery**, after which (should Liss again move for summary

disposition) **the trial court** would be required to decide whether Liss was entitled to governmental immunity under MCL 600.2966:

> "Under *Dextrom*, the factual findings necessary to determine whether [Liss] is entitled to summary disposition under MCR 2.116(C)(7) on the grounds of governmental immunity **are reserved for the trial court, not a jury**...Thus, if and when [Liss] again moves for summary disposition on the grounds of governmental immunity, **the trial court must make factual findings** sufficient to support its conclusion that [Lego's] injuries did or did not arise from the 'normal, inherent, and foreseeable risks' of being a police officer under MCL 600.2966." (Exhibit 3, COA Opinion, p. 2, n. 1)(emphasis added)

The Court of Appeals' holding is entirely consistent with the proper standard for deciding a motion under MCR 2.116(C)(7), discussed above in this Brief at Sec. III-B. **The holding is also consistent with the rule enunciated by this Court in *Kreski/Gibbons*, that applicability of the Firefighter's Rule must be considered on a case-by-case basis, and individual exceptions to the Rule may exist in appropriate situations.**

Liss' contention that the Court of Appeals' decision was erroneous, and that this supposed error is a basis to grant the Application, is without merit.

E. The Application Should Be Denied Because The Rule Advocated By Liss Contradicts The Plain Language Of The Statute And This Court's Interpretation Of The Statute

Liss' Application not only contends that being shot by a fellow officer is in all circumstances a "normal, inherent and foreseeable risk" of police work, the Application suggests that **any** injury caused by a fellow officer is precluded from recovery by the Firefighter's Rule ("It is a normal, inherent and foreseeable risk that a police officer may be injured by the negligent acts of a fellow officer", Appellant's Brief, p. 13); ("The foundational rationale behind the Firefighter's Rule is that...fellow officers should not be held liable for injuries...",

Appellant's Brief, p. 14). Liss' contention is contrary to both the plain language of the statute and this Court's jurisprudence.

1. The Plain Language Of The Statute Does Not Foreclose All Recovery Against Government Officials

This Court has held that the fundamental task of statutory construction is to discover and give effect to the intent of the legislature, a task which begins by examining the language of the statute itself, *People v. Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999). Where the language of a statute is unambiguous, the plain meaning reflects the legislature's intent and this Court applies the statute as written, *Id.* Judicial construction under such circumstances is not permitted, *Id.*

The statutory provision which limits recovery against governmental officers and employees does not, by its plain language, preclude recovery in all instances. The limiting language of MCL §600.2966 provides that a fire fighter or police officer may not recover in tort against governmental officers and employees for injuries which arise from the "normal, inherent, and foreseeable risks" of the firefighter's or police officer's profession:

> "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." M.C.L. §600.2966

The plain language of 600.2966 does not foreclose recovery against a government officer, provided that the tortious conduct at issue is outside the normal, inherent and foreseeable risks of the plaintiff officer's profession. This Court ruled in *Borchard, supra,* that "...**sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence**", *Id*, p. 286. Had the Michigan Legislature intended to

entirely foreclose liability against fellow officers because "accidents happen" (Appellant's Brief, p. 16), it could have easily engrafted a provision stating that recovery against officers was precluded in circumstances where the conduct was accidental. The fact is, the statute does not distinguish between conduct which is accidental versus that which is not; the statute simply provides that recovery is only precluded by conduct which arises from normal, inherent, and foreseeable risks. This Court should refuse Liss' request to interpret the Act to expand the Firefighter's Rule beyond the clear language of the statute.

2. The Jurisprudence Of This Court Is That The Applicability Of The Firefighter's Rule Is Analyzed On A Case-By-Case Basis

Liss' contention that a blanket application of the Firefighter's Rule is appropriate should be denied by this Court for the additional reason that the contention conflicts with the well-established jurisprudence of this Court. This Court has never interpreted 600.2966 as providing a blanket grant of immunity to government officials. As noted *supra* at p. 12, the prior holding of this Court is that **that applicability of the Firefighter's Rule must be considered on a case-by-case basis, and individual exceptions to the Rule may exist in appropriate situations.**

The only reported case which has addressed the applicability of the Michigan Firefighter's Rule in the context of an officer being shot by a fellow officer is *Rought v Porter*, 965 F.Supp. 989 (U.S. Dist. W.D. Mich. 1996), cited in the COA Opinion at pp. 2-3. In *Rought*, Deputy Rought was a Kalamazoo County narcotics detective assigned to a multi-jurisdictional narcotics task force comprised of officers from various southwest Michigan departments and the state police. Lieutenant Porter was a state police trooper assigned as commander of the task force. During the execution of a search warrant by the task force at a suspected drug house, Lt. Porter shot and seriously wounded Deputy Rought after mistakenly concluding that Rought was one of the suspected drug dealers. Testimony from other task force members present at the raid

suggested that Porter discharged his weapon at least four times without first making certain that he was shooting at an armed suspect, and not a fellow officer.

Deputy Rought sued in the U.S. District Court Western Michigan District. Porter moved for summary judgment on several grounds, including his contention that he was immune from liability under MCL 600.2966. The district court denied Lt. Porter's motion, noting that Porter's conduct appeared to transcend a simple accidental shooting of a fellow officer by virtue of the fact that Porter had disregarded department policy regarding use of deadly force. The court held that the Firefighter's Rule did not apply since being shot by a fellow officer who clearly violated department policy regarding use of deadly force was not a "normal" risk of police work:

> "...[The Michigan Firefighter's Rule] is limited by case law to 'injuries arising from the normal, inherent, and foreseeable risks of the chosen profession.' In this case, the application of the doctrine is questionable. While shooting by a felon or even an accidental discharge by another officer would appear to be 'normal' risks of a safety officer's duties, **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. Accordingly, summary judgment on this ground is denied.**" *Rought*, p. 994 (citations omitted) (emphasis added).

In *Rought,* the district court ruled that it was reasonable to anticipate that in executing the search warrant, Deputy Rought could be shot by one of the occupants of the drug house or as the result of accidental gunfire by a fellow officer during the execution of the search warrant. However, Lt. Porter's violation of departmental deadly force policies was not a normal risk of the narcotics task force officers' duties—Lt. Porter's policy violations unreasonably increased the risk to the task force officers, resulting in Deputy Rought being shot and wounded. Like Deputy Rought, Detective Lego was carrying out a law enforcement duty which entailed certain obvious risks to Lego and the other task force officers. However, the grossly negligent conduct

of Defendant Liss unacceptably increased the risk inherent in that duty and caused injury to Lego.

Taking the Complaint's allegations as true, Liss' actions can hardly be considered normal, inherent or foreseeable. Liss violated numerous procedures and policies, including improperly inserting himself in the stacking formation of three other officers, firing his rifle without ensuring that Detective Lego was out of the line of fire, and continuing to fire even after Lego was hit and the suspect already lay mortally wounded on the ground (Exhibit 1, Complaint, ¶¶ 20-25). It stretches the imagination to suggest that Detective Lego (or any police officer) could have anticipated the risk of being shot in the back by an experienced law enforcement officer who suddenly and unexpectedly disregarded proper safety procedures and policies in the middle of a dangerous suspect take-down operation.

Appellant's Brief contends that the Court of Appeals' reliance on *Rought* was erroneous because the federal case is not binding authority on Michigan courts (Appellant's Brief, p. 15). It is true that *Rought* is not binding authority, but prior to the instant matter it was the only reported case to consider whether the Michigan Firefighter's Rule barred recovery where the plaintiff was shot by a fellow police officer, so the case is helpful with respect to the proper application of the Firefighter's Rule.[4] In addition, Appellant's Brief contends that *Rought* should be disregarded because the *Rought* court analyzed the Firefighter's Rule prior to it being codified in 1998 (Appellant's Brief, p. 15), but this contention is also without merit. As discussed in this Brief *supra* at p. 10, the Firefighter's Rule is properly analyzed based upon the common-law rules in effect prior to the Rule becoming a statute.

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[4] As discussed *infra* at pp. 24-26, Liss cites cases from California and New York involving shootings by fellow officers but these cases do not support his position that MCL 600.2966 recognizes a blanket rule prohibiting recovery in every instance that a police officer is shot by a fellow officer.

Appellant's Brief also argues that *Rought* is distinguishable from the instant case due to the fact that Lt. Porter "intentionally" shot Deputy Rought, while in the instant case Liss accidentally shot Detective Lego. According to Appellant's Brief, Lt. Porter violated the prohibition against deadly force without probable cause, but in the instant case "there is no question" that the use of deadly force was justified (Appellant's Brief, pp. 15-16). In the first place, Liss' characterization of Lt. Porter's shooting of Deputy Rought as "intentional" is disingenuous. The fact that Lt. Porter intentionally pulled the trigger of his weapon, mistakenly thinking that he was shooting at a criminal, does not mean that Porter's shooting of Deputy Rought was any less "accidental" than Liss' shooting of Detective Lego. Furthermore, while Liss claims that the use of deadly force in apprehending Lebron Bronson was justified, he has presented no evidence that, given the allegations of his numerous violations of safety procedures, **his decision** to use deadly force, and **the manner in which he implemented that deadly force**, was justified. The Court of Appeals did not err when it ruled that additional discovery was necessary for the trial court to decide whether governmental immunity applies to Liss' conduct.

Appellant's Brief argues that *Rought* is inapplicable for the additional reason that Lt. Porter was alleged to have violated policies about whether deadly force should be used, while Liss is alleged to have violated policies about how deadly force is used (Appellant's Brief, p. 16). First of all, *Rought* discussed whether Lt. Porter should have used deadly force in the context of whether federal qualified immunity applied to his actions; but, the suggestion that *Rought* did not also address **how** Lt. Porter applied deadly force is incorrect. *Rought* held:

> "[D]efendant Porter did not ascertain prior to shooting whether his target was in possession of a firearm and whether his target posed any threat to him or his fellow officers. Indeed, the testimony of officer Picketts suggests that Porter barely looked at his target before firing four shots at him." *Rought*, p. 993.

The instant case is even more inappropriate for application of the Firefighter's Rule than *Rought.* In *Rought*, Lt. Porter was present with the narcotics task force throughout the entire search warrant operation prior to his engaging in negligent conduct. In the instant case, the increased risk of injury was caused by Liss' actions upon his arrival, **after** the take-down of LeBron Bronson was in progress and Lego and the other task force officers were in position outside the Verizon store. Considering that Liss did not even come upon the scene until the take-down operation had already started, it was all the more unforeseeable that Liss would unexpectedly insert himself in the stacking formation and shoot Lego in the back. In *Gibbons, supra*, the Michigan Supreme Court ruled that the Firefighter's Rule did not apply based on the defendant's grossly negligent operation of her vehicle **after** Officer Gibbons had already arrived at the scene of the traffic accident. In her concurring opinion, Justice Boyle clarified that the Firefighter's Rule does not require a plaintiff officer to assume the risk for all conceivable conduct which may develop after the officer was already engaged in carrying out his duties:

> "...[U]nless we conclude that by virtue of his profession an officer assumes the risk of injury from every irresponsible act, a line must be drawn. 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 anymore 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." *Gibbons,* p. 330, citing *Kreski, supra.*

In the instant case, Liss' conduct subjected Detective Lego to an undue risk which was not present when Lego undertook the duty of apprehending Lebron Bronson outside the Verizon store. Like *Gibbons*, the risks inherent in Lego's duties did not include any and all possible risks which could conceivably develop while he was engaged in the take-down operation. Detective Lego successfully dealt with the inherent danger posed by the apprehension of LeBron Bronson;

when Bronson exited the Verizon store and pointed his gun at Detective Lego, Lego fired his weapon at Bronson, causing Bronson to drop his pistol and fall to the ground. **It would constitute an unreasonable application of the Firefighter's Rule to require Detective Lego to also assume the risk which was brought about by Liss' grossly negligent conduct, after the suspect apprehension operation was already in progress.**

Appellant's Brief argues that being shot is a normal, inherent and foreseeable risk in any police officer's profession; that the "best practice" in a shoot-out situation is to have support from other officers; and that membership in a specialized police community response team increases the risk that an officer may be shot (Appellant's Brief, p. 11). There is no evidence that that officers who serve on task forces discharge their weapons more frequently or are at any more risk of being shot on duty than an ordinary patrol officer; this writer believes just the opposite to be true. The fact that the CRT and WWN task forces' assignments were focused on the apprehension of dangerous criminal suspects was the very reason that the teams employ special tactics and received such extensive SWAT-type training. The purpose of the specialized training is to enable the task force to perform its duties while **minimizing** the likelihood that the officers, or their quarry, or innocent bystanders, will be injured in the process.

Consequently, it was all the more unforeseeable that Liss would violate the task forces' carefully practiced procedures by inserting himself in the formation behind Lego, then proceed to disregard proper stacking techniques to avoid shooting fellow officers, and finally by failing to ensure that Lego was out of the line of fire. Liss' actions were not a "normal, inherent and foreseeable risk" of the specialized and carefully planned operations conducted by the CRT and WNN task forces. Detective Lego and the other task force officers reasonably had a greater expectation that Liss would not disregard his training and succumb to a reckless desire to "get in

on the action". The fact that Liss did so unreasonably increased the risk that Detective Lego would be injured.

Appellant's Brief contends that this Court should adopt the reasoning of Judge Jansen's dissent, but Judge Jansen's dissent misconstrues both the majority's holding and the process established by this Court to determine whether the Firefighter's Rule applies. Judge Jansen stated that whether governmental immunity applied was a question of law for the court, not a question of fact (Exhibit 3, Dissenting Opinion, p. 2). But the majority did not hold that immunity was a question of fact. The majority held that immunity was a question of law for the trial court. Denying summary disposition to permit further discovery before deciding the immunity issue was consistent with the proper standard for deciding a (C)(7) motion. Furthermore, Judge Jansen's belief that the Court of Appeals should have simply ruled that being shot by a fellow officer is always within the normal, inherent and foreseeable risks is not only contrary to the plain language of MCL 600.2966, it is at odds with the rule enunciated in *Kreski/Gibbons*, that application of the Firefighter's Rule is considered on a case-by-case basis, and exceptions to the Firefighter's Rule exist in appropriate situations.

Appellant's Brief argues that "it was erroneous for the [Court of Appeals] to rely on alleged policy violations as evidence that Lego's injuries were not foreseeable. As stated by [Judge Jansen in her dissent], virtually every situation where a police officer is injured by a fellow officer will likely involve violations of policy" (Appellant's Brief, p. 18). In support of this argument, Appellant's Brief cites three Court of Appeals decisions, *Boulton v Fenton Twp.*, 272 Mich.App. 456; 726 N.W.2d 733 (2007), *Chapman v Phil's County Line Service, Inc.* 2007 WL 1163211 (2007)(unpublished) and *McGhee v State Police*, 184 Mich App 484; 459 NW 2d 67 (1990). Appellant's Brief claims that those cases "recognized" 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" (Appellant's Brief, p. 18).

In the first place, none of the cases cited by Appellant's Brief say anything about "injuries caused by fellow officers committing policy violations" being normal, inherent, and foreseeable risks of police work. In *Boulton*, Boulton was a sheriff's deputy who sued after he was struck and injured by a township-owned fire truck while investigating an accident scene. In *Chapman*, Chapman was a volunteer police officer who was riding as a passenger in a squad car driven by an Osceola County Sheriff's deputy. Chapman was injured when the vehicle hydroplaned and crashed while the officers were responding to a burglary call. In *McGhee*, McGhee was a Detroit Police Officer who sued an MSP trooper after being injured while attempting to assist the trooper in a high speed chase of a suspect vehicle that collided head-on with McGhee's police cruiser.

Although the *Boulton* and *McGhee* opinions made general references to "negligence" on the part of the defendants in those cases, none of the three opinions discussed policy violations by the defendants, let alone did they hold that "injuries caused by fellow officers committing policy violations are a normal, inherent and foreseeable risk of police work." The cases simply held that the officers' injuries were normal, inherent and foreseeable risks of the duties being performed by the officers. Moreover, none of the cases held that Michigan courts have recognized a blanket rule preventing recovery in every circumstance.

Furthermore, Judge Jansen's observation that cases in which a police officer is injured by a fellow officer will likely involve policy violations does not militate towards recognizing a blanket rule that being shot by a fellow officer is within the normal, inherent and foreseeable risks in every case. Under the view advocated by Judge Jansen, if Liss showed up to work high

on cocaine (clearly a violation of departmental rules) and as a result of his intoxication shot Detective Lego in the back during the suspect apprehension, Liss' violation of the rules would still be irrelevant and the Firefighter's Rule would bar Lego's claims. Indeed, there would be no set of circumstances under which the Firefighter's Rule would not apply. Such a result would be contrary to the statute and this Court's holding that "**the [Firefighter's Rule] does not include all risks encountered by the safety officer. The [Rule] is not a license to act with impunity, without regard for the safety officer's well-being.**" *Kreski*, pp. 372-373.

Liss cites cases out of California and New York and contends that the cases suggest this Court should adopt a rule barring recovery for being shot by a fellow officer in every case, but the cases do not help Liss' position. In *Calatayud v. State of California*, 18 Cal. 4th 1057; 959 P.2d 360 (Cal.1998)(cited at p. 19 of Appellant's Brief), the California Supreme Court considered the question of whether a statutory exception to California's firefighter's rule, permitting liability against "any person" causing injury that occurs after the person knows or should have known of the presence of a police officer, applied to fellow public safety officers. After conducting a lengthy and detailed analysis of the legislative history, the California Supreme Court concluded that the provision did not apply because the intent of the California legislature was to completely foreclose safety officers from recovering against fellow officers, *Calatayud*, p. 1069.

Calatayud does not support the case for this Court recognizing a rule in Michigan proscribing recovery under all circumstances. The California statute reflects the intent of the California legislature to preclude recovery against a fellow safety officer in **all** circumstances, irrespective of whether the conduct at issue is a normal, inherent and foreseeable risk. The California statute is inapposite to the intent of the Michigan legislature expressed by the plain

language of MCL 600.2966, specifically permitting recovery so long as the conduct at issue falls outside the normal, inherent and foreseeable risks:

> "...[G]overnmental officer[s] or employee[s]...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**." M.C.L. §600.2966

Under the Michigan statute, recovery against a fellow officer is not completely foreclosed like it is under the California statute and nothing suggests that the Michigan legislature intended to foreclose recovery against fellow officers like the California legislature.

At p. 20 of Appellant's Brief, Liss cites *Damiani v. City of Buffalo*, 198 A.D.2d 814; 603 N.Y.S.2d 1006 (NY 1993), a case out of New York. In *Damiani,* two police officers were shot and injured by fellow officers while on duty. Appellant's Brief correctly notes that in *Damiani,* the New York appellate court ruled that generally, officers cannot recover under New York's common law firefighter's rule for injuries resulting from the risks inherent in the duties they were engaged to perform (Appellant's Brief, p. 20). But the appellate court did not hold that recovery from fellow officers for being shot is barred in every instance. Furthermore, Appellant's Brief completely ignores the fact that N.Y. Gen. Mun. Law § 205-e (cited in *Diamiani*, pp. 814-815) specifically provides a statutory cause of action against fellow officers where the conduct which caused injury violated a statute, ordinance or well-established regulation:

> "In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission,

> willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any police department injured, or whose life may be lost while in the discharge or performance *at any time or place* of any duty..." N.Y. Gen. Mun. Law § 205-e (1).

See also, e.g., *Williams v. City of New York* ,2 N.Y.3d 352, 364; 811 N.E.2d 1103 (NY 2004) ("...[L]iability against a fellow officer or employer can...be based on the statutory right of action in N.Y. Gen. Mun. Law § 205-e").

Contrary to Liss' claim, *Damiani* does not stand for the proposition that New York recognizes a blanket rule under which recovery for being shot by a fellow officer is barred in every instance. *Damiani* shows that New York law is exactly the opposite. New York law specifically recognizes a cause of action against fellow officers where their conduct violates statutes, ordinances and well-established rules. In a similar vein, Michigan law recognizes that certain conduct may constitute such an egregious violation of the law or of well-established rules that the conduct falls outside the normal, inherent and foreseeable risks, and a blanket rule completely foreclosing liability would be inappropriate. It is for this reason that the Michigan legislature did not completely foreclose liability against fellow officers under MCL 600.2966. This Court should refuse to adopt Liss' unsupported interpretation of the statute.

IV. RELIEF REQUESTED

FOR THE REASONS stated above, Plaintiffs-Appellees respectfully request that this Honorable Supreme Court enter an order denying Defendant-Appellant's Application.

Respectfully submitted,

Stefani & Stefani,
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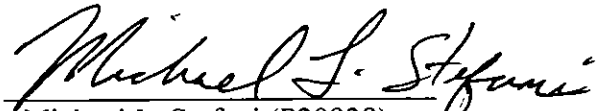
By: 

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