

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL LEGO AND PAMELA LEGO,

Supreme Court No. _____

Plaintiffs-Appellees,

Court of Appeals No. 312406, 312392

v

Wayne Circuit Court No. 12-007085-
NO

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

J. Galtis

Defendant-Appellant.

MICHIGAN STATE POLICE DETECTIVE SPECIALIST JAKE LISS'S
APPLICATION FOR LEAVE TO APPEAL

149246-7

APPL

613

AG # 2331

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Joseph T. Froehlich (P71887)
Assistant Attorney General
Attorneys for Defendant-Appellant
Public Employment, Elections & Tort
Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Dated: May 7, 2014

FILED

MAY 7 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities.....	ii
Statement of Question Presented.....	iii
Statutes Involved	iv
Statement of Judgment / Order Appealed from and Relief Sought	1
Introduction	2
Statement of Facts	3
Proceedings Below.....	6
Argument.....	8
I. Friendly fire is a normal, inherent and foreseeable risk of apprehending dangerous criminals.	8
A. Issue Preservation	8
B. Standard of Review.....	8
C. Analysis.....	9
1. Applicable legal standard	9
2. Even accepting the complaint allegations as true, Lego's injuries resulted from a normal, inherent, and foreseeable risk of his work.....	10
3. This Court should adopt the dissent's reasoning and hold that Lego was injured by a normal, inherent, and foreseeable risk of police work.....	17
4. Other jurisdictions have determined that the Firefighter's Rule applies under circumstances similar to those presented in this case.....	19
Conclusion and Relief Requested.....	21

INDEX OF AUTHORITIES

Page

Cases

<i>Abela v Gen Motors Corp</i> , 469 Mich 603; 677 NW2d 325 (2004)	15
<i>Boulton v Fenton Twp</i> , 272 Mich App 456; 326 NW2d 468 (2006).....	9, 10, 12, 13
<i>Calatayud v State of California</i> , 18 Cal 4th 1057; 77 Cal Rptr 2d 202; 959 P.2d 360 (1998).....	19
<i>Damiani v City of Buffalo</i> , 603 NYS2d 1006; 198 A2d 814 (1994).....	20
<i>Duffy v Michigan Dep't of Natural Resources</i> , 490 Mich 198; 805 NW2d 399 (2011)	9
<i>Kreski v. Modern Wholesale Electric Supply Co</i> , 429 Mich 347; 415 NW2d 178 (1987)	9
<i>McGhee v State Police Department</i> , 184 Mich App 484; 459 NW2d 67 (1990).....	12, 13, 18
<i>Odom v Wayne County</i> , 482 Mich 459; 760 NW2d 217 (2008)	9
<i>Rought v Porter</i> , 965 F Supp 989 (WD Mich, 1996)	8, 15

Statutes

MCL 600.2965	6, 9
MCL 600.2967	6, 10

Rules

MCR 2.116(C)(7).....	6
----------------------	---

STATEMENT OF QUESTION 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. Is friendly fire—being accidentally shot by a fellow officer—a normal, inherent, and foreseeable risk of the police profession in general, and especially where the plaintiff is a member of a specialized task force that regularly engages in high-risk operations?

Appellant's answer: Yes.

Appellees' answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

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. . . .”

**STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

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. Liss seeks review of only the portion of the Court of Appeals decision that concerns the Michigan Firefighter Statute, MCL 600.2966. 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 Liss's favor.

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 situations are rapidly evolving, high-risk, and require 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, and are therefore within the scope of Michigan’s Firefighter’s Statute.

While being shot is a normal, inherent, and foreseeable risk for any police officer, membership in a specialized task force carries with it the increased risk that an officer may be shot—especially where dangerous criminal apprehension, the combat of violent crime, and the justified use of deadly force are ordinary duties.

Here, Plaintiff-Appellee police officer Michael Lego was accidentally shot by Defendant-Appellant Detective Specialist Jake Liss of the Michigan State Police during the apprehension of an armed and dangerous felon. The felon actively engaged the officers by pointing a firearm at the officers, placing the lives of Lego, Liss, and other officers in immediate danger. There is no question that the use of deadly force by Lego and Liss was justified. Likewise, there is no question that Lego’s claims are barred under the circumstances presented in this case.

Michael Lego and Michigan State Police Detective Specialist Liss were co-employees in a joint enterprise. (Exhibit E, Defendant Liss's Mot for Summ Disposition.)

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. (Exhibit F, Order dated August 28, 2012.)

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. 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. In support of their position, the majority relied on the decision of the

Liss's application for leave to appeal should be granted because:

- The scope of Michigan's Firefighter's Statute is issue is of significant public interest that could affect all police officers and municipalities and units of government that employ police officers. Only the police have the duty and authority to apprehend dangerous felons with the justified use of deadly force. And only public officers face the type of liability adjudicated in this case.
- The legal principles involved are of major significance. Police officers engaged in the dangerous business of protecting the public are entitled to the full breadth of governmental immunity conferred by the jurisprudence of this state.
- The Court of Appeals' decision is clearly erroneous and will cause material injustice. Police officers, and especially specialized task force members, should not face liability for injuries arising from risks that are a normal, inherent, and foreseeable part of their work. It is normal, inherent, and foreseeable that multiple police officers will be present where justified deadly force is being used, that they will discharge their weapons while in close proximity to each other, and that an officer could make a mistake in judgment during such a fluid and rapidly evolving situation.

Holding Liss liable for Lego's inherent and foreseeable injuries was clearly erroneous and should be reversed. Accordingly, Liss asks this Court to grant his application for leave to appeal.

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 Liss's October 29, 2009 accidental shooting of 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.

Lego states that at the time of the events giving rise to the complaint, he was an 18-year veteran of the Plymouth Police Department in Plymouth, Michigan. (Exhibit A, Pls' Compl, ¶ 5.) Lego asserts that 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. (Ex A, ¶ 6.) Lego claims that 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. (Ex A, ¶ 7.)

Lego states that in October of 2009, CRT was investigating a series of armed robberies occurring in and around Canton, Michigan. (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, members of WWN, including Liss, joined CRT in the investigation of Bronson. (Ex A, ¶ 15.)

On October 29, 2009, Lego, along with members of CRT and WWN, 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.) Lego and other members of CRT and WWN, including 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 Lego; Lego then shot Bronson twice in the chest. (Ex A, ¶¶ 22-23.)

The Legos claim that:

As 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. [Ex A, ¶ 24.]

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. (Ex A, ¶ 27.)

The Legos concede that Liss's shooting of Lego was accidental and that Liss did not intentionally shoot Lego. (Ex A, ¶ 30.)

But in Count I, the Legos allege that Defendant Liss was grossly negligent in shooting Lego. (Ex A, ¶¶ 28-32.) They alleged that 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. [Ex A, ¶ 30 subparts (a)-(g).]

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. (Ex A, ¶¶ 33-38.)

PROCEEDINGS BELOW

On September 2, 2011, the Legos filed a complaint in the United States District Court for the Eastern District of Michigan. (Exhibit B, Pls' Compl in the U.S. District Court for the Eastern District of Michigan, Case No. 11-13834.) 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. (Exhibit C, Defs' Mot to Dismiss in USDC ED No. 11-13834.) 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. (Exhibit D, Op & Order Granting Defs' Mot to Dismiss in USDC ED No. 11-13834.)

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

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.”

But the dissent determined that there was no genuine issue of material fact with respect to whether 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 with the meaning of the statute.

This application for leave to appeal deals only with the proper application of the Michigan Firefighter’s Statute, MCL 600.2966.

ARGUMENT

I. Friendly fire is a normal, inherent and foreseeable risk of apprehending dangerous criminals.

A. Issue Preservation

The issue of governmental immunity regarding the Michigan Firefighter’s Statute was raised below and is preserved for appeal.

B. 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" within the meaning of 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).

C. Analysis

Lego's injuries arise from a risk that is inherent, normal, and foreseeable where police officers are using justified deadly force against an engaged shooter. Even accepting Lego's complaint allegations as true, his claims are barred by the Michigan Firefighter's Statute, MCL 600.2966.

1. Applicable legal standard

The common-law firefighter's rule was first adopted in Michigan in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347; 415 NW2d 178 (1987). The rule generally stated that "a fire fighter or police officer may not recover damages from a private party for negligence in the creation of the reason for the safety officer's presence." *Id.* at 358. The Michigan Legislature codified the rule by enacting MCL 600.2965 to MCL 600.2967, effective November 30, 1998.

MCL 600.2965 abrogates the common-law rule.

The common law doctrine that precludes a firefighter or police officer from recovering damages arising from the normal, inherent, and foreseeable risks of his or her profession is abolished.

MCL 600.2967 provides in pertinent part:

(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

MCL 600.2967 (emphasis added). The remainder of the provision prescribes the circumstances under which a firefighter or police officer may recover.

As indicated in the emphasized language at the beginning of MCL 600.2967(1), recovery is then limited by MCL 600.2966, which 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. . . .

Liss, as a governmental officer and employee, and Lego, as a police officer, both fall within the limiting language of § 2966. So, the only inquiry is whether Lego's injury arose from a normal, inherent, and foreseeable risk of being a police officer, and especially, a member of a specialized task force that regularly engages in high-risk operations. This is a question of law for this Court to decide. *Boulton*, 272 Mich App at 461.

2. **Even accepting the complaint allegations as true, Lego's injuries resulted from a normal, inherent, and foreseeable risk of his work.**

In the complaint, Lego states that he was assigned to a "specialized unit" known as the Western Wayne County Community Response Team (CRT). (Ex A, ¶

6.) Lego claims that the primary are of responsibility of the Response Team “was to provide a concentrated effort to investigate violent crimes such as armed robbery and assaults and the affect the arrest of the perpetrators of those crimes.” (Ex A, ¶

8.) Lego states that he 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.) Further, Lego discloses that he was the “point man” in the Bronson apprehension, and the individual who Lego shot Bronson. (Ex A, ¶¶ 18; 23.)

Being shot is a normal, inherent, and foreseeable risk in any police officer’s profession. On any given day, the average police officer may confront dangerous, armed criminals, creating the risk of a shoot-out situation. And given that the best practice in this type of situation is to have support from other officers, the police officer has to worry not just about being shot by the criminal, but also about friendly fire. Moreover, membership in a specialized community response team increases the risk that an officer may be shot, especially where dangerous criminal apprehension and the combat of violent crime are ordinary duties. Here, Lego admits that the situation giving rise to this case was so dangerous that the use of deadly force was justified, and that he himself discharged a firearm.

In short, Lego was assigned to a task force where encounters with dangerous felons were common place, and guns and shooting were regular occurrences. As such, being shot was a normal, inherent, and foreseeable risk of Lego’s membership

in CRT and as a police officer generally. Accordingly, his claims are barred under a plain reading of MCL 600.2966.

Michigan appellate case law supports the conclusion that Lego's injuries arise out of a normal, inherent, and foreseeable risk of his profession. In *Boulton v Twp of Fenton*, 272 Mich App 456, 458; 726 NW2d 733 (2006), 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. 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.* at 459. The Court of Appeals affirmed, stating that the trial court properly determined that the injuries arose from a normal, inherent, and foreseeable risk, and that MCL 600.2966 does not violate the title-object clause or principles of equal protection. *Id.* at 461, 464-469.

Similarly, in *McGhee v State Police Department*, 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. *Id.* at 484. 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) (Exhibit G), 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. *Id.* 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 demonstrate that 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 assume that the defendants in all three cases were violating department mandated policies about the safe operation of motor vehicles.

This case is analogous. Lego was injured when Liss made a split-second mistake in judgment during a deadly force situation. Even assuming 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 quite 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.

Furthermore, the policy rationales behind MCL 600.2966 support application of immunity to Liss. The foundational rationale behind the Firefighter's Statute is that the purpose of having professional police officers is to confront danger and that fellow officers should not be held liable for injuries occurring in the performance of the very function the officers are intended to fulfill. *Kreski*, 429 Mich at 368. Moreover, worker's compensation benefits are available to police officers injured in the course of their employment. *Id.* at 366.

These policy rationales are applicable in this case. In holding that MCL 600.2966 passes constitutional muster, the Court of Appeals in *Boulton* 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. [272 Mich App at 468 (internal citation omitted).]

The trial court erred in denying Liss's motion for summary disposition, and the Court of Appeals erred in affirming that decision. Lego's injuries were an inherent risk of his work as a specialized task force member. The majority panel of

the Court of Appeals incorrectly held that "being shot by another officer is [not] always, as a matter of law, a normal, inherent, and foreseeable risk of being a police 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. 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. Thus, being accidentally shot by a fellow officer is a normal, inherent and foreseeable risk of Lego's profession. The case law and the policy rationale behind the Michigan Firefighter's Statute support this conclusion.

The Court of Appeals majority's reliance on *Rought v Porter*, 965 F Supp 989 (WD Mich, 1996), in support of their position was erroneous. 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 the version of the Rule codified at MCL 600.2966.

Third, on the merits *Rought* is distinguishable. That case involved a situation where a police officer intentionally shot another police officer thinking that the other officer was a criminal. There, the defendant 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. *Id.* at 993. The testimony of other

officers at the scene suggested that the defendant barely looked at his target before firing four shots at him. *Id.* In addition, the defendant's actions were adjudicated criminal. *Id.* In short, the defendant in *Rought* violated the constitutional prohibition against the use of deadly force without probable cause, and failed 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 exited 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.

Furthermore, the policies violated by the defendant in *Rought* involved whether the use of deadly force was justified in the first instance—and not the manner in which deadly force is used. The policies violated by the defendant in *Rought* require an officer to determine, before using deadly force, that an assailant is armed (i.e. that the assailant has the ability to shoot), that the assailant is in firing range of the officer (i.e. that the assailant has the opportunity to shoot), and that the officer is “in jeopardy” of being shot by the assailant (i.e. there is some likelihood that the assailant will shoot the officer). *Id.* at 990. These policies are constitutionally mandated policies about whether, in the first instance, the use of deadly force is justifiable under the circumstances.

In contrast here, Liss is alleged to have violated policies about *how* deadly force is used, not policies about *whether* deadly force should be used at all. *Rought*

is a case about a police officer who intentionally shot someone under circumstances where the use of deadly force was not even remotely justified. But the present case is about a police officer who accidentally shot another officer during a rapidly evolving situation where the use of deadly force was absolutely justified. *Rought* has no application to this case.

Even so, *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. 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.

The Court of Appeals decision denying Liss immunity under MCL 600.2966 was erroneous and should be reversed.

- 3. This Court should adopt the dissent’s reasoning and hold that Lego was injured by a normal, inherent, and foreseeable risk of police work.**

The dissent correctly recognizes the dangerous job that Lego and Liss have, and the normal, inherent, and foreseeable associated risks in such a line of work. As stated by the dissent, “being shot by a fellow police officer while engaging an

active shooter is one of 'the normal, inherent, and foreseeable risks of . . . [a] police officer's profession' within the meaning of MCL 600.2966." In reaching this conclusion, the dissent recognized that

"engaging 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."

This is precisely the circumstance presented in this case.

Furthermore, it was erroneous for the majority to rely on alleged policy violations as evidence that Lego's injuries were not foreseeable. As stated by the dissent, virtually every situation where a police officer is injured by a fellow officer will likely involve violations of policy. 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*, 184 Mich App at 486-87; *Boulton*, 272 Mich App at 461; *Chapman*, Docket No. 269150.

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 Lego and 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 Lego, Liss, and other police officers. Both Liss and Lego had to make a split-second decision. Friendly fire is an unfortunate

reality of different law enforcement work. Mistakes in judgment are inherent especially one where split-second, life-and-death decisions are being made.

4. Other jurisdictions have determined that the Firefighter's Rule applies under circumstances similar to those presented in this case.

Appellate Courts in both New York and California have held that an accidental shooting of a police officer by another police officer are barred by the Firefighter's Rule.

In *Calatayud v State of California*, 18 Cal 4th 1057, 1059-61; 77 Cal Rptr 2d 202; 959 P.2d 360 (1998), for example, the California Supreme Court addressed factual circumstances similar to those in this case and concluded that the firefighter's rule did not permit a police officer to sue another agency's officer who accidentally shot him during a joint law enforcement operation. There, two California Highway Patrol officers responded to a reported shooting and on arrival at the scene attempted to detain the suspect. Pasadena Police Officer Calatayud responded to an "officer needs assistance" call, drove to the scene, and during his assistance of the Highway Patrol officers in detaining the suspect was accidentally shot by one of the Highway Patrol officers. *Id.*

Officer Calatayud sued the State of California and the Highway Patrol officer who accidentally shot him. The defendants unsuccessfully asserted California's Firefighter's Rule as a bar to liability in the trial court, and the jury returned a verdict that resulted in a \$400,000 judgment. The California Court of Appeal

affirmed the judgment, holding that a statutory exception to the Firefighter's Rule was applicable.

The California Supreme Court granted review to determine the scope of the Firefighter's Rule. *Id.* 18 Cal 4th at 1061. After considering the statutory language and public policy considerations, the California Supreme Court reversed; concluding that the California Firefighter's Rule applied to bar actions by one public safety officer against another in joint public safety operations. *Id.* at 1068–1072.

Similarly, in *Damiani v City of Buffalo*, 603 NYS2d 1006; 198 A2d 814 (1994), the New York Supreme Court Fourth Appellate Division – addressing factual circumstances similar to those in this case – also found that the Firefighter's Rule did not allow police officers to bring claims after being accidentally shot by fellow officers. In *Damiani*, two City of Buffalo police officers were accidentally shot by fellow police officers while responding to a report of vicious dogs. *Id.* at 1007. The two plaintiffs filed separate actions for common-law negligence against the City of Buffalo. *Id.* The trial court dismissed the plaintiffs' complaints on summary judgment. *Id.* The Appellate Division affirmed the dismissal because the plaintiffs' claims were barred by the New York "fireman's rule." The Appellate Division noted that "police officers, like firefighters, generally cannot recover for injuries resulting from the special risks inherent in the duties they are engaged to perform." *Id.* (citations omitted).

These cases demonstrate that being accidentally shot by a fellow officer is a normal, inherent, and foreseeable risk of police work. While such situations are

unquestionably unfortunate, friendly fire is a reality of the police profession—that may be why we have all heard of the term “friendly fire.” This Court should reverse the Court of Appeals, holding that being accidentally shot by a fellow officer is a normal, inherent, and foreseeable risk of the police profession, and especially of Lego’s work as a member of a specialized task force that regularly engaged in high-risk operations.

CONCLUSION AND RELIEF REQUESTED

Being accidentally shot by a fellow officer is a normal, inherent, and foreseeable risk of the police profession—even more so where the officer is a member of a specialized task force that regularly engages in high-risk operations. 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 Lego, Liss, and other officers in immediate danger. There is no question that the use of deadly force by Lego and Liss was absolutely justified. The accidental shooting of Lego by Liss is a normal, inherent, and foreseeable risk of this type of situation.

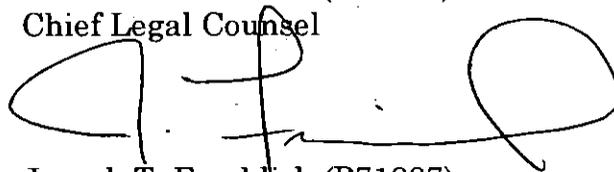
Defendant-Appellant Detective Specialist Jake Liss of the Michigan State Police respectfully requests that this Court reverse the March 27, 2014 decision of the Court of Appeals for the reasons stated in the dissenting opinion, and remand this case to the trial court for entry of judgment in Liss's favor.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

A handwritten signature in black ink, appearing to read 'J. Froehlich', is written over the printed name of Joseph T. Froehlich.

Joseph T. Froehlich (P71887)
Assistant Attorney General
Attorneys for Defendant-Appellant
Public Employment, Elections & Tort
Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Dated: May 7, 2014