

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL LEGO and PAMELA LEGO,
Plaintiffs-Appellees,

UNPUBLISHED
March 27, 2014

v

JAKE LISS,

Defendant-Appellant.

No. 312392
Wayne Circuit Court
LC No. 12-007085-NO

MICHAEL LEGO and PAMELA LEGO,
Plaintiffs-Appellees,

v

JAKE LISS,

Defendant-Appellant.

No. 312406
Wayne Circuit Court
LC No. 12-007085-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I concur with the majority’s determination that there remained a genuine issue of material fact concerning whether plaintiff¹ and defendant were coemployees engaged in a joint enterprise for purposes of the exclusive remedy provision of the Worker’s Disability Compensation Act, MCL 418.131(1). I recognize that in *Berger v Mead*, 127 Mich App 209, 216-219; 338 NW2d 919 (1983), this Court concluded that the South Oakland Tactical Support Unit was a joint enterprise and that the plaintiff, a Royal Oak police officer, and the defendants, police officers from various other agencies, were coemployees of that joint enterprise. But unlike the facts of *Berger*, there was no single task force at issue in the present case. Instead, the documentary evidence tended to establish that the parties worked for two separate task forces operating in conjunction with one another. There were also unresolved factual questions regarding which

¹ I will use the singular word “plaintiff” to refer to plaintiff Michael Lego.

task force had the right to control the enterprise and the respective interests of each group. See *id.* at 215. I therefore agree with the majority's conclusion that factual questions remained concerning whether plaintiff and defendant were coemployees of a joint enterprise.

However, I respectfully dissent from the majority's determination that there remained a genuine issue of material fact with respect to whether defendant was entitled to immunity under MCL 600.2966, which provides in relevant part:

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

The salient question under MCL 600.2966 is whether plaintiff's injuries arose from "the normal, inherent, and foreseeable risks of [his] profession." I believe that this is a question of law for the court rather than a question of fact. For example, this Court has held that whether a government agency is engaged in the exercise of a "governmental function" within the meaning of MCL 691.1407(1) is a question of law for the court. *Ovist v Dep't of State Highways*, 119 Mich App 245, 250; 326 NW2d 468 (1982). More importantly, in *Boulton v Fenton Twp*, 272 Mich App 456, 461; 726 NW2d 733 (2006), this Court held, apparently as a matter of law, that "being struck by a motor vehicle while at the scene of an accident is a normal, inherent, and foreseeable risk of the police officer's profession" within the meaning of MCL 600.2966. Contrary to the majority's opinion, I conclude that the question whether a police officer's injuries have arisen from "the normal, inherent, and foreseeable risks" of his or her profession is one of law for the court.²

I also conclude that 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. See *Boulton*, 272 Mich App at 461. I realize that defendant's conduct in this case was inconsistent with his training and did not conform to departmental safety procedures and policies pertaining to the use of deadly force. But this fact cannot be dispositive. After all, a firefighter who strikes a police officer with his fire truck at the scene of an accident is most likely driving in a manner inconsistent with his or her training and violating departmental safety policies and procedures. Yet this Court has held that being struck in such a manner is a normal, inherent, and foreseeable risk of the police officer's profession. *Id.*

² In *Rought v Porter*, 965 F Supp 989, 994 (WD Mich, 1996), the United States District Court suggested that whether a police officer's injury had arisen from the normal, inherent, and foreseeable risks of his profession was a question of fact. The decision in *Rought* is obviously not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Moreover, the *Rought* court was analyzing the older, common-law Fireman's Rule rather than MCL 600.2966. I am not persuaded by the *Rought* court's limited reasoning on this issue.

Engaging an active shooter is a fluid and high-risk operation. It is also the type of operation that police officers are called upon 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. Not unlike the driver of the fire truck in *Boulton*, it is also foreseeable that one of those officers might violate departmental procedures and discharge his or her firearm in an unsafe manner. In my opinion, 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,” and defendant was consequently entitled to immunity under MCL 600.2966. For this reason, I would reverse and remand for entry of judgment in favor of defendant.

/s/ Kathleen Jansen