STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL LEGO and PAMELA LEGO, Plaintiffs-Appellees, v JAKE LISS, Defendant-Appellant.	UNPUBLISHED March 27, 2014 No. 312392 Wayne Circuit Court LC No. 12-007085-NO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.

PER CURIAM.

Defendant appeals by right from the trial court order denying his motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity pursuant to MCL 600.2966. We granted defendant leave to appeal the denial of summary disposition under MCR 2.116(C)(8) and (10) based on the workers' compensation exclusive remedy provision, MCL 418.131(1). For the reasons set forth below, we affirm.

Plaintiff and defendant are both police officers; plaintiff is employed by Plymouth Township and defendant by the Michigan State Police. During their work on an anti-crime task force in western Wayne County, defendant fired his weapon at a crime scene and wounded plaintiff.

Because defendant is a government employee, MCL 600.2966 rather than MCL 600.2967 applies. *Boulton v Fenton Twp*, 272 Mich App 456, 461; 726 NW2d 733 (2006). The "Fireman's Rule," codified in part as MCL 600.2966, provides that government employees 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 profession. The plain language of MCL 600.2996 does not, however, provide blanket governmental immunity from suits by firefighters or police officers.

Defendant 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 plaintiff's allegations, defendant 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, defendant 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 plaintiff in the back and the suspect lay mortally wounded on the ground. Defendant's motion was filed prior to any substantial discovery and we are unwilling to hold that, if plaintiff's allegations are true, a jury could not reasonably find that defendant's actions were outside the "normal, inherent, and foreseeable risks" of police work within the meaning of MCL 600.2966. Accordingly, the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(7) at this juncture. See *Dextrom v Wexford Co*, 287 Mich App 406, 428-433; 789 NW2d 211 (2010).[1]

Our decision is supported by that of the federal district court in *Rought v Porter*, 965 F Supp 989 (WD Mich, 1996). In that case, the plaintiff was a Kalamazoo County narcotics officer assigned to a multi-jurisdictional task force led by the plaintiff, a Michigan State Police Lieutenant. *Id*. at 990. During the execution of a search warrant, the defendant shot the plaintiff three times. *Id*. at 991. The defendant had not been listening to his radio, where a fellow officer had been stating that he believed the individual the defendant fired at to be the plaintiff. *Id*. Another fellow officer testified that the defendant fired four times at the plaintiff without first determining that he was shooting at an armed suspect, not a fellow officer. *Id*. at 991.

The *Rought* plaintiff brought various claims and the defendant moved for summary disposition in part arguing that he was protected by governmental immunity. *Id*. at 994. Under facts sufficiently similar to those in the instant case, the court denied the motion, stating:

> The [Fireman's] Rule makes a great amount of sense in that the injuries usually suffered by police officers are expected in a dangerous profession and are usually

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[1] Under *Dextrom*, the factual findings necessary to determine whether defendant 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. 287 Mich App at 431-432. Thus, if and when defendant again moves for summary disposition on the grounds of governmental immunity, the trial court must make factual findings sufficient to support its conclusion that plaintiff's injuries did or did not arise from the "normal, inherent, and foreseeable risks" of being a police officer under MCL 600.2966.

> compensated through the worker's compensation system. Nevertheless, the Rule is limited by case law to "injuries arising from the normal, inherent, and foreseeable risks of the chosen profession." *McGhee v State Police Dep't*, 184 Mich App 484, 486; 459 NW2d 67 (1990). 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 the use of deadly force is a "normal" risk of performing one's duties. Accordingly, summary judgment on this ground is denied. [*Id*. (citation omitted).]

Defendant also sought summary disposition under MCR 2.116 (C)(8) and (C)(10) pursuant to the workers' compensation exclusive remedy provision. The Worker's Disability Compensation Act (WDCA), MCL 418.301 *et seq.*, is an employee's exclusive remedy against an employer for personal injury, except as the result of an intentional tort. MCL 418.131(1). This exclusive remedy provision applies to actions against coemployees as well as employers. MCL 418.827(1); *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). It does not apply to actions against a defendant who was not the plaintiff's employer or coemployee. *Kenyon v Second Precinct Lounge*, 177 Mich App 492, 499; 442 NW2d 696 (1989).

The issue is whether plaintiff and defendant were coemployees in a joint venture. See *Berger v Mead*, 127 Mich App 209, 214-219; 338 NW2d 919 (1983). A joint venture has the following six elements: an agreement showing an intention to undertake a joint venture, a joint undertaking, a single project, involving the contribution of skills or property by the parties, involving community interest, and control over the subject matter. *Id.* at 215; see also *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90, 103; 295 NW 571, amended 296 Mich 733 (1941).

Employment is determined by the economic reality test, which considers control of duties; payment of wages; the ability to hire, fire, and discipline; and the performance of duties as an integral part of the employer's business toward accomplishing a common goal, with no single factor being more important. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 276; 330 NW2d 397 (1982); *Nichol v Billot*, 406 Mich 284, 299; 279 NW2d 761 (1979). Whether it is an issue of law for the trial court or an issue of fact for the jury depends on whether facts are at issue or whether different inferences could be reasonably drawn from the facts. *Nichol*, 406 Mich at 306, quoting *Flick v Crouch*, 434 P2d 256 (Okla, 1967); see also *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 690; 594 NW2d 447 (1999). Dual employment is possible. *Id.*; *Berger*, 127 Mich App at 217.

In the present case, the parties were not members of the same task force; rather, defendant and members of his task force were assisting plaintiff's task force. Defendant offered an affidavit suggesting that one task force operated under the umbrella of the other; however, that assertion was not reflected by the written agreements. Moreover, plaintiff and defendant were employed by different government entities – Plymouth Township and the State of Michigan. Factual questions remained regarding whether the parties were engaged in a joint venture and were coemployees. Therefore, the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10).

Affirmed. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Douglas B. Shapiro

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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 plaintiff[1] 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*.

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[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