

THE LOCAL GOVERNMENT LIABILITY BEAT



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Eleventh Circuit Holds Repeated Tasing Was Excessive Force

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On September 12, 2018, the Eleventh Circuit Court of Appeals decided *Glasscox v. City of Argo et al.*,¹ in which the court examined whether repeated use of the Taser after a vehicle pursuit amounted to excessive force. The relevant facts of *Glasscox* are as follows:

Mr. Glasscox, who lives with Type 1 diabetes, suffered a severe hypoglycemic episode while driving his pickup truck on Interstate 59 South near the City of Argo, Alabama. His condition caused him to begin driving erratically. After other drivers on the interstate reported his erratic driving, the Argo City Police dispatched Officer Moses to the scene. What followed was captured on Officer Moses's body camera.

Officer Moses began following Mr. Glasscox, who was "doing about 80" in a 70 mile-per-hour zone. Officer Moses activated his emergency lights and siren, yet Mr. Glasscox's truck began to accelerate, weaving from the fast lane onto the median of the divided highway and narrowly missing some roadside signs and a guardrail. Officer Moses followed Mr. Glasscox for approximately five miles. Eventually, the truck came to a stop, halting in the interstate's median near the northbound fast lane.



Officer Moses got out of his car and ran to the driver's side of Mr. Glasscox's truck. At that point, he was standing very close to the fast lane of the northbound interstate where cars were speeding by. He had two weapons drawn: his firearm and his taser. Pointing his weapons into the glass of the driver's side window, Officer Moses exclaimed, "Let's see your fucking hands!" Mr. Glasscox raised his hands, which were empty. Officer Moses opened the driver's side door and shouted, "Get out of the car!" Mr. Glasscox, whose seatbelt was still buckled and hands were still raised, said, "I'm sorry, man." He then said something that is difficult to decipher, but the parties agree it was either "God damn, man," or "God darn, man." Officer Moses again shouted, "Get out of the car!" At this point in the video recording, only one of Mr. Glasscox's hands is visible; he appears to be reaching toward his seatbelt. Officer Moses yelled, "Put your seatbelt off now," and Mr. Glasscox quickly unbuckled his seatbelt. Officer Moses quickly commanded, "Get out," and Mr. Glasscox began to say, "I'm going to get out if you'd shut up." Officer Moses, talking over Mr. Glasscox, warned, "Don't you reach," and immediately deployed his taser. The taser shock came before Mr. Glasscox could finish his sentence, approximately four seconds after he unbuckled his seatbelt and two seconds after Officer Moses issued his latest order to get out of the truck. The taser wires latched into Mr. Glasscox's chest and remained engaged for five seconds while Mr. Glasscox screamed, shook, and writhed in pain with his arms and hands curling toward his chest. Officer Moses holstered his firearm as the taser was being deployed.

Officer Moses admitted that after this first use of the taser, he could see both of Mr. Glasscox's hands, which the video shows were empty. Less than a second after the end of the first shock, while Mr. Glasscox's hands remained curled toward his chest and he continued to howl and writhe in pain, Officer Moses yelled, "Get out, now!" Still howling, Mr. Glasscox attempted to pull one of the taser

wires from his chest. Immediately—three to four seconds after the first taser shock—Officer Moses deployed his taser a second time, again for five seconds. During these five seconds, while Mr. Glasscox was shaking, screaming, and writhing in pain, Officer Moses yelled, "Stop it! Get out of the car!" Again, Mr. Glasscox's arms and hands can be seen curling toward his chest from shock of the taser.

Less than a second after the second shock ended, Officer Moses yelled, "I'll give it to you again! Get out of the car!" Mr. Glasscox pleaded, "I'll get out if you just leave me alone!" Within one second, Officer Moses moved closer and grabbed Mr. Glasscox's wrist with his free hand, demanded that Mr. Glasscox "get out," and tased Mr. Glasscox a third time, again for five seconds. In total, about six seconds passed between the second and third deployments. As Officer Moses tased Mr. Glasscox for the third time, Mr. Glasscox yelled, "I will!"

While the taser was still active, with Mr. Glasscox still shaking uncontrollably and writhing from the shock, Officer Moses held onto Mr. Glasscox's wrist and again yelled, "Get out of the car!" As soon as the shock ended and he could speak, Mr. Glasscox cried again, "I will!" Less than two seconds later, before Mr. Glasscox had a chance to get out of the truck, Officer Moses deployed his taser a fourth time, first aiming the taser near Mr. Glasscox's chest and then bringing the weapon to the side of Mr. Glasscox's thigh for direct contact. As he brought the taser to Mr. Glasscox's thigh, Officer Moses



yelled, “Stop it!” When Officer Moses touched the active taser to Mr. Glasscox’s thigh, Mr. Glasscox brought his hand to the taser. Officer Moses, still holding the taser to Mr. Glasscox’s thigh, shouted, “Get out of the car!” Mr. Glasscox let go of the taser and again cried, “I will!” Officer Moses released the taser, and as he did, he said, “Stop fighting! Get out!” Mr. Glasscox yelled, “Okay!”, and with Officer Moses still holding his wrist, swung his legs out of the truck and stood up on the side of the road. While holding the taser, with at least one of its wires still attached to Mr. Glasscox’s shirt, Officer Moses handcuffed Mr. Glasscox and walked him to the back of the truck on the driver’s side, still mere feet from the northbound fast lane. All the while, cars were speeding by.

After about a minute behind the truck, Officer Moses walked Mr. Glasscox to the patrol car, located on the other side of the median near the southbound fast lane. By this point, police backup had arrived. Officer Moses told the backup officer that Mr. Glasscox was “bleeding all over the place” and had taken “five rides.” Officer Moses unhooked the taser wires from Mr. Glasscox’s shirt and asked him, “What is wrong with you, sir?” Mr. Glasscox responded that he is a diabetic and his blood sugar was low. According to the emergency medical services report and Mr. Glasscox’s treating physician, his blood sugar level was indeed low, and his erratic driving resulted from a severe hypoglycemic episode. Mr. Glasscox suffered physical injuries, including bleeding from the taser probes, and psychological injuries, including possible Post-Traumatic Stress Disorder, from his encounter with Officer Moses.”ⁱⁱ

Glasscox sued the City of Argo and Officer Moses for excessive force in violation of the Fourth Amendment. The City filed for summary judgment citing that Officer Moses did not violate the Fourth Amendment and Officer Moses filed for qualified immunity. The district court denied their motions and the City and Moses appealed to the Eleventh Circuit Court of Appeals.

The court began with a discussion of qualified immunity, which is intended to protect government officials that are acting within the scope of their

discretionary authority, such as using force to make an arrest. In order to defeat qualified immunity, a plaintiff must show (1) that the officer violated a constitutional right, and (2) that the right was “clearly established” at the time of the violation such that a reasonable officer in the same situation would have known that the conduct was unconstitutional. In the Eleventh Circuit, the law can be “clearly established” by case law from Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state in which the incident occurred (in this case, Florida). The case law must be factually close enough that the unlawfulness of the conduct is beyond debate to a reasonable officer. Additionally, the law can be “clearly established” when the conduct lies so far over the “hazy border” between lawful and unlawful that every reasonable officer would know that the conduct was unlawful.

The court then set out to examine the first part of the test for qualified immunity, particularly whether Officer Moses violated the Fourth Amendment when he tased Mr. Glasscox four times after the vehicle pursuit. The court first discussed the law regarding use of force and stated

To determine whether an officer’s use of force was excessive, we ask “whether a reasonable officer would believe that this level of force is necessary in the situation at hand.” *Id.* (internal quotation marks omitted). The Supreme Court instructed in *Graham v. Connor* that “[d]etermining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” 490 U.S. 386, 396 (1989) (internal quotation marks omitted). “Fourth Amendment jurisprudence has long recognized that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Id.*

To balance the necessity of using some force in making an arrest against the arrestee’s Fourth Amendment rights, we “must evaluate a number of factors, ‘including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer[] or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’” Lee, 284 F.3d at 1197-98 (quoting *Graham*, 490 U.S. at 396). “*Graham* dictates unambiguously

that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force.” *Id.* at 1198. In deciding whether the officer’s force is excessive, we also consider as relevant the nature and extent of the arrestee’s injuries. *Id.* ⁱⁱⁱ [emphasis added]

The court also noted that, in determining whether a use of force with a Taser is reasonable, the most important time is the moment before the Taser was used through the time of the last use of the Taser. The court stated

The critical time period for purposes of determining whether” the repeated use of a taser on an arrestee “constituted unconstitutional excessive force spans . . . just before the first activation . . . through . . . the time of the [final] [t]aser deployment.” *Wate v. Kubler*, 839 F.3d 1012, 1020 (11th Cir. 2016). Even if the arrestee’s resistance justified deployment of a taser initially, if he has “stopped resisting . . . during this time period,” further taser deployments are excessive. *Id.*; see *id.* at 1021. ^{iv} [emphasis added]

The court of appeals then stated that, when viewing the evidence in a light most favorable to the plaintiff (as they must do at this stage of the litigation), Glasscox offered no resistance after the second Tasing. They then analyzed the use of force under *Graham*.

The court first examined whether Glasscox was actively resisting Officer Moses. They noted that at the time of the first Taser shock, Officer Moses said he could only see one of Glasscox’s hands, and he thought he may be reaching for a weapon. However, the court also noted that after the second Taser shock, Glasscox clearly did not resist. He kept saying “I will” in response to the officer’s verbal commands, but he was not given time to comply before the officer tased him again. The court stated that Glasscox

[W]as attempting to comply but was continuously thwarted by Officer Moses’s repeated tasings, delivered in rapid succession. Because a reasonable jury could conclude that Officer Moses’s own actions appear to have been preventing Mr. Glasscox from complying, we reject his suggestion that Mr. Glasscox “made no discernible, physical moves to get out of his vehicle” and therefore additional force was justified. A jury reasonably could infer that Mr. Glasscox made no such moves because Officer Moses never gave him enough time between

taser shocks. So, the first *Graham* factor—Mr. Glasscox’s lack of resistance—weighs heavily against Officer Moses. ^v

Second, the court examined the severity of the crimes at issue. It was noted that the officer observed Glasscox drive reckless, dangerous and appear to attempt to elude his effort to stop him. Therefore, the officer was clearly justified in arresting Glasscox and using some force to effect the arrest. However, after the resistance stopped (after the second Tasing), the severity of the crime does not support the officer’s actions because he was no longer dangerous.

Third, the court examined whether Glasscox posed a threat to the officer or others. The officer stated the location of the stop on the side of interstate posed a threat. However, once Glasscox offered no resistance, this argument fails. Further, after the first Taser shock, both of Glasscox’s hands were visible, and he offered no resistance after the second shock. Thus, Glasscox posed little threat for the third and the fourth shocks, and this weighed in his favor.

The final factor was nature and extent of Glasscox’s injuries. The court noted that on the scene, the officer told another officer that Glasscox was “bleeding all over the place.” Further, the treating doctor stated that he suffered psychological injury and possibly PTSD.

The court then held

Applying the *Graham* factors to the evidence viewed in Mr. Glasscox’s favor yields only one possible conclusion: that he was no longer resisting at least after the second taser shock and was attempting to comply with commands; thus, Officer Moses’s repeated firing of his taser, which caused Mr. Glasscox injury, “was wholly unnecessary, and grossly disproportionate to the circumstances.” *Wate*, 839 F.3d at 1021. As our precedent makes clear, “[t]he use of a taser beyond the arrestee’s complete physical capitulation repeatedly in a short period where an arrestee was mostly cooperative and made no attempt to flee would be excessive.” *Manners*, 891 F.3d at 974 (alteration adopted) (internal quotation marks omitted). This is such a case. Mr. Glasscox stopped his truck; turned it off; held his hands where Officer Moses could see them; removed his seatbelt at the officer’s command; at least after the second taser shock, made no attempt to resist or flee; and repeatedly voiced his intention to cooperate.

Yet Officer Moses tased him again and again. And as to Officer Moses’s argument that Mr. Glasscox’s failure to get out of the truck quickly put him in danger from nearby traffic, the additional, rapid deployments of the taser under these circumstances only prolonged Officer Moses’s exposure to that danger. Under the circumstances as construed in Mr. Glasscox’s favor, any reasonable officer in Officer Moses’s position would have believed that continued taser shocks were unnecessary; a jury could find that Officer Moses’s repeated tasing of Mr. Glasscox amounted to excessive force. See *Lee*, 284 F.3d at 1197 (noting that reasonableness of use of force depends on “whether a reasonable officer would believe that this level of force is necessary in the situation at hand.”^{vi}

Thus, the court held that the plaintiff satisfied the first part of the test to defeat qualified immunity.

The court next set out to determine if the law was clearly established such that a reasonable officer would have known that his conduct was unlawful. After examining Eleventh Circuit case law, the court stated that the law was clearly established “that a police officer’s use of force on a “previously threatening” arrestee after the arrestee ceased any resistance was excessive.”^{vii}

The court also held that the law was also clearly established based on the “obvious clarity” test, in that the officers conduct was so far over the hazy border between lawful and unlawful conduct that any reasonable officer would have known he was acting unlawfully. The court stated

[U]nder the unusual circumstances of this case, it would be obviously clear to any reasonable officer that the display of force was excessive. It is clear from precedent that “gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.” *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008). “We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.” *Saunders*, 766 F.3d at 1265 (citing cases decided before Mr. Glasscox’s arrest,

including one, *Priester*, in which the suspect was subdued but not restrained). Accepting the evidence in the light most favorable to Mr. Glasscox, we conclude that, because Officer Moses used gratuitous and excessive force on an arrestee who was not resisting arrest, “no particularized preexisting case law was necessary for it to be clearly established that what [Officer Moses] did violated [Mr. Glasscox’s] constitutional right to be free from the excessive use of force.” *Priester*, 208 F.3d at 927; see also *Oliver*, 586 F.3d at 908 (holding that the facts of the plaintiff’s case fell within the obvious clarity rule); *Smith*, 127 F.3d at 1420 (same).^{viii}

Therefore, the court of appeals affirmed the denial of qualified immunity to the officer and the denial of summary judgment to the City.

Citations

- i. No. 16-16804 (11th Cir. v. Id. at 15-16
Decided September 12, 2018) vi. Id. at 18-19
- ii. Id. at 3-8 vii. Id. at 25
- iii. Id. at 12-13 viii. Id. at 26
- iv. Id. at 13-14

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This Issue . . .

Repeated Tasing and Excessive Force

