

**CASE NO. 15-2306**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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DEBBIE JEAN LATITS,  
Plaintiff/Appellant,

v.

LOWELL PHILLIPS  
Defendants/Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
Case No. 2:12-cv-14306-JAC-MAR  
Hon. Stephen Murphy

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**PLAINTIFF/APPELLANT'S REPLY BRIEF**

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**CERTIFICATE OF SERVICE**

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Defendant's attempt to characterize this incident as a "Hollywood-style chase" to justify killing Latits is unsupported by the video evidence. As demonstrated by the video, the chase did not create a danger to the public at large or any officers. Latits was not weaving in and out of traffic at 100 miles an hour. It was late at night, there were virtually no cars on the road, there were no pedestrians at risk, he was in a desolate area and Latits was doing nothing other than failing to stop. Despite this, Phillips decided to ram Latits's vehicle and use deadly force to terminate the chase. Latits did little more than flee at relatively low speeds which is not a justification for the use of deadly force.

**I. DEFENDANT HAS FAILED TO TAKE THE FACTS IN A LIGHT MOST FAVORABLE TO PLAINTIFF. IN FACT, HE PROVIDED FALSE FACTS.**

Defendant Phillip's brief on appeal fails to take the facts in a light most favorable to Plaintiff Latits as required by FRCP 56 and draws all inferences in his favor. Phillips claims that:

1. Latits collided with Wurm's vehicle. (Appellee Brief p. 6.) However, the video demonstrates that Wurm rammed Latits's vehicle. Additionally, Wurm was disciplined for ramming Latits. (®, 38-2, Ex. 1, Collins Dep. p. 89, ID # 1398.)
2. Latits swerved all over northbound Woodward causing Wurm to initiate

contact. (Appellee Brief p. 6.) The swerving actually occurred after the contact by Wurm which, as stated above, he was disciplined for.

3. Latits rammed Jacklic. (Appellee Brief p. 29.) As demonstrated in the video and set forth in Appellant's brief, Latits moved southbound approximately one car length towards the opening between Phillips and Wurm on a broken axle. While this was occurring, Jacklic, who was heading northbound on Woodward, and slowing down as he approached State Fair, nearly came to a stop. He then accelerated across the intersection and cut off Latits's escape route by turning his car and directing it into and ramming Latits's car. ( R. 32-5, Schalk Video 57:58.).

4. Defendant opened fire based on his perception that Latits posed an imminent risk of harm to him and his fellow officers and that he was unable to discern whether any of his fellow officers were directly behind Latits. (Appellee Brief pp. 8, 29.) However, Phillips admitted Latits was backing away from Jacklic's car. He testified he did not shoot to protect officer Schalk because he did not know where she was (she was trailing well behind the pursuit and did not arrive until after the shooting began). ( R. 32-10, Phillips Dep p. 141, ID #1140.) He also testified that he, "did not know officer Wurm was in any danger." Id.

5. Latits had proven he would do almost anything to avoid capture Defendant was “not required to aside and let latits escape. The video demonstrates that Latits did nothing more than fail to stop.

6. Phillips claims the video shows he jumps out of the way. (Appellee Brief p. 34.) The video shows nothing of the sort.

**II. FOR THE PURPOSES OF FOURTH AMENDMENT ANALYSIS IN A CAR CHASE, THE COURT MUST CONSIDER TO WHAT EXTENT THE OFFICER’S OWN ACTIONS CAUSED THE FLEEING SUSPECT’S RESPONSE.**

Defendant relies on *Greathouse v. Couch*, 433 F. App'x 370 (6th Cir. 2011) to claim that this Court should use a segmented approach to analyze the force used against Mr. Latits, selectively focusing on Defendant’s version of the events occurring immediately before the first volley of shots while ignoring Defendant’s previous actions and the second volley of shots. Appellant was unable to find any case in this circuit that applied such a segmented approach in a police chase.

When police create a situation in which their own actions cause them to use excessive force in response to force used by another person, then the police may be held liable for their use of response of force even if, taking alone, their second use of force was justified. When analyzing the excessive force claim the Court must balance “the importance of the government's interest in justifying the

intrusion.” *Galas v McKee*, 801 F2d 200, 203-04 (CA 6, 1986). Generally, with regard to high speed chases involving traffic violations, an officer "may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence." *Id* quoting 3 W. LaFare, *Search and Seizure, A Treatise on the Fourth Amendment*, § 9.2, at 32 (1978).

However, when police use deadly force to stop a chase, the courts consider the extent to which the actions of the police cause them to use deadly force in response to the actions of the motorist. *In Alexander v City & Co of San Francisco*, 29 F3d 1355, 1366 (CA 9, 1994), the plaintiff argued that police used excessive force in creating the situation which caused the defendant to take the actions he did. The court held, "Plaintiff's claim, if supported by the evidence, states a classic Fourth Amendment violation under *Graham v. Connor*". (*Id*, citation omitted.) Thus, as *Graham* instructs, the Court must consider the totality of the circumstances and an officer cannot ignore the police misconduct that creates the circumstances.

When the facts are viewed in the light most favorable to Plaintiff, at the time Wurm initially used deadly force by ramming Latits, it was garden variety chase involving a traffic violation and a sighting of a small amount of marijuana in a

medical marijuana state. Wurm's use of deadly force was not justified. Phillips's subsequent act of ramming Latits broadside and pushing him across three lanes of traffic was more extreme, more dangerous, and equally unjustified. When Latits tried to extricate himself from this use of deadly force, officer Jacklic rammed him at low speed which caused Latits to stop. Phillips then ran up to the passenger door of Latits car and as Latits tried to back away from him at low speed he pulled out his gun fired four shots. He then ran after him and fired an additional three shots as Latits continued to back away at low speed. A reasonable juror is entitled to consider the excessive force used against Latits that caused to him to try to escape in response.

Attempting to take selected facts in isolation, Defendant claims that his use of force was justified because he witnessed Latits ram another officer shortly before he shot him citing *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6<sup>th</sup> Cir, 2007): "Like the officer in Williams, Defendant observed Latits drive into his fellow officer's cruiser immediately before he opened fire." (Appellee Brief p. 40.) However, Defendant ignores the operative facts in *Williams*. In *Williams*, following a short police pursuit, an officer got out of his car and approached the suspect car after the suspect came to a stop and then backed into his patrol car. The officer got out of his car, approached the driver, and pointed



his gun at his head. The driver of that car drove off and struck the officer with his car and knocked him down. As the driver fled, the officer was still on the ground and was in danger of being run over. A second officer shot the fleeing driver to protect the fallen officer. Again, unlike the instant case, *Williams* involved an immediate, specified threat, not a future, hypothetical threat. Moreover, as previously indicated, Latits did not ram another officer, he was rammed by another officer.

**III. THERE IS COMPELLING CIRCUMSTANTIAL EVIDENCE THAT LATITS WAS SHOT WITH A SECOND VOLLEY OF THREE SHOTS WHICH OCCURRED AFTER THE FIRST VOLLEY OF FOUR SHOTS AND WHICH OCCURRED WHEN EVEN DEFENDANT ADMITS THERE WAS NO REASON TO FIRE.**

Defendant now maintains that he “recalled” firing on volley of four shots. (Appellee Brief p. 36.) However, Defendant Phillips testified unequivocally that he fired one volley of four shots and only four shots. ( R32-10, Ex. 9, Phillips Dep. pp. 102, 115 116, ID #1130, 1133.) Because seven shell casing were found on the ground, all matching Defendant’s gun, Defendant concedes the evidence supports an inference that seven shots were fired. However, he claims that the evidence does not support an inference that two volleys of shots were fired. If, as Defendant himself testified, he fired one volley of four shots only and seven shots were fired then a second volley of shots must have been fired. Moreover, the

video shows four shell casings ejecting while Phillips is in view. After Phillips, moves out of frame, no additional ejected shell casings can be seen. This evidence clearly supports an inference that a second volley of shots was fired after Phillips moved off camera.

Defendant next claims that the evidence does not support an inference that he fired a separate volley after Latits backed past him. The synchronized cameras demonstrate that Latits backed past him by the time he finished the first four shots. See Appellant Brief pp. 9-12. Moreover, Phillips's own testimony supports the inference because he testified he stopped on the fourth shot because Latits had backed past him and he was no longer at risk. Thus, not only does the evidence support this inference, it is the only reasonable inference based on the evidence.

Third, Defendant claims that the evidence does not support an inference that the second volley of shots, fired after Latits no longer posed a danger, struck and killed Latits. However, Defendant himself testified that the first volley of four shots did not appear to take effect. This would explain why Defendant pursued Latits as he backed away, and support an inference that he shot a second volley, and support an inference that those shots did take effect. The path of the bullets explained in the autopsy, front to back and right to left, also supports the inference.

IV. DEFENDANTS RELIANCE ON *MULLINEX V. LUNA* IS PLAINLY MISPLACED.

Defendant attempts to equate his case with *Mullinex v. Luna*, 136 S. Ct. 305 (2015), another Hollywood-style chase. In *Mullinex*, the decedent led police on an 18 minute high speed chase on a crowded highway at speeds from 85 to 105 miles an hour. He spoke via telephone with the police dispatcher, claimed he had a gun and twice stated that he would shoot any officer within range. Further, based on the earlier encounter and the phone calls, police believed he was drunk. The Supreme Court held based on those facts the precedent was hazy whether the right to be free from deadly force was clearly established violation and thus the defendant was entitled to qualified immunity. Conversely, the operative facts in *Latits* are not even remotely similar. As demonstrated in the multiple cases cited by Plaintiff and in the volumes of Sixth Circuit precedent, there is a clearly established right not to be subjected to deadly force based on the facts of the *Latits* case.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 2016, I electronically filed the foregoing paper **PLAINTIFF/APPELLANTS'S REPLY BRIEF** with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Kevin Ernst, T. Joseph Seward, Lindsey Kaczmarek.

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