UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10295

THE ESTATE OF THOMAS JEWELL PHILLIPS, ET AL.,

Plaintiffs-Appellees,

VERSUS

WILLIAM H. LOWRY, Ph.D.,
Superintendent, Mexia State School, ET AL.,

Defendants,

MARY HACKERSON, Case Manager,
Mexia State School, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-2758-D)

March 28, 1995

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Appellants appeal from a jury verdict holding them liable for civil rights violations for their failure to provide reasonable safety to Thomas Jewell Phillips. The sole issue on appeal is whether appellants are entitled to qualified immunity. Because

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

they have failed to provide a trial transcript, we have no basis upon which to determine error *vel non*. Accordingly, we **AFFIRM**.

I.

Because we were not provided the transcript, the following facts are taken from the appellee's summary judgment evidence: Phillips was born in 1953 and was diagnosed in adolescence as mentally retarded. In 1981, he was involuntarily committed to the Mexia State School of the Texas Department of Mental Health and Mental Retardation. Throughout his residence there, Phillips frequently left the school grounds without permission. In 1986, he was transferred to the Sandy Lane Group Home in Ellis County, Texas, a less structured "community-based" facility operated by the Mexia State School.

At Sandy Lane, Phillips continued to leave the grounds unattended, and in 1989, Phillips' treatment plan was modified, at his request, to permit him to leave the grounds by himself. Approximately one week later, Phillips was found with serious second-degree burns. According to Phillips, they were inflicted by residents in the area of the facility.

Following this incident, Phillips was restricted from leaving the facility alone. Even so, he ran away several times, often returning with scratches on his body. Finally, on January 27, 1990, Phillips was found hanging by his neck from a tree behind the facility, naked, with his hands tied behind his back and a sock in his mouth. He was pronounced dead shortly thereafter.

In December 1990, the administrator of Phillips' estate filed a 42 U.S.C. § 1983 action against various employees of the Mexia State School, claiming a violation of Phillips' constitutional right to be free from unsafe conditions. The defendants moved for summary judgment on the basis of qualified immunity; the motion was granted in part, but denied as to appellants. In December 1993, a jury found that appellants were not entitled to qualified immunity, and awarded compensatory and punitive damages.

II.

Appellants challenge the determination that they were not entitled to qualified immunity. Primarily, they contend that an involuntarily committed mentally retarded individual's constitutional right to reasonable safety, established in ***Youngberg v. Romeo***, 457 U.S. 307, 322 (1982), is not "clearly established" as applied to a "community home" patient such as Phillips.

As noted, appellants were denied summary judgment; the case was tried to a jury. We, therefore, must look not to the summary judgment evidence, but to the evidence at trial. Appellants, however, have failed to provide a trial transcript. Although the primary question is one of law, we cannot answer it without being able to review the evidence presented at trial.

The qualified immunity analysis presents two questions: (1) was the allegedly violated constitutional right "clearly established", and (2), if so, was the defendant's conduct objectively unreasonable. *E.g.*, ***Brewer v. Wilkinson***, 3 F.3d 816, 820 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1081 (1994).

Obviously, the second question is always fact-bound. But here, the first question is as well. Whether the "community home" in issue is of such a nature as to shield it from the ***Youngberg*** standard is a legal conclusion to be drawn from the evidence presented at trial. Without the trial transcript, we have an insufficient basis for review.[2]

III.

In view of the foregoing, the judgment is

AFFIRMED.

[2] Fed. R. App. P. 10(b)(2) provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." *See* ***United States v. Giarratano***, 622 F.2d 153, 156 n.4 (5th Cir. 1980).