UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1467

(Summary Calendar)

GERALD ANDERT, Individually
and as Next Friend of Shane
Lealos and Travor Lealos, ET AL.,

Plaintiffs-Appellants,

versus

GREG BEWLEY and
LARRY TRAWEEK,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
CA4 91 68 A

July 21, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Gerald Andert and his co-plaintiffs appeal the district court's final judgment of their 42 U.S.C. § 1983 (1988) suit against defendants Larry Traweek and Greg Bewley.[1] Finding neither

---

[*] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Traweek and Bewley were sued in their individual capacities as police officers of the City of Grapevine, Texas. *See* Record on Appeal vol. 1, at 6-10.

error nor abuse of discretion, we affirm.

Traweek and Bewley executed a search warrant at the plaintiffs' residence, during which Bewley struck Andert in the head with a flashlight.[2] The plaintiffs alleged in their complaint that the one and one-half hour search and seizure was unreasonable, in violation of their civil rights under the Fourth and Fourteenth Amendments, and that the force exerted by Bewley was excessive.

The defendants filed an answer in which they asserted, *inter alia,* the defense of qualified immunity. The district court ordered the parties to file a joint status report in thirty days, which would include "[a] brief statement of the nature of the case, including the contentions of the parties." Record on Appeal vol. 1, at 22. After the parties submitted a joint status report, the district court set December 31, 1991, as a cut-off date for discovery and for any motions for leave to amend pleadings.

A pretrial conference was held on January 22, 1992. At the conference, counsel for plaintiffs announced that plaintiffs were alleging supervisory liability against Traweek, the supervisor of the task force conducting the search. Although the district court requested briefing on the supervisory-liability issue, on the date of trial the district court sustained the defendants' motion in limine to exclude all evidence that Traweek was liable for damages in his supervisory capacity because the plaintiffs' complaint failed to state that theory of liability. Thus, the district court

---

[2] Probable cause for the warrant was established in part through the detection of chemical odors in the neighborhood indicating the manufacture of amphetamine. *See id.* at 145.

limited the evidentiary focus at trial to the individual conduct of Traweek and Bewley.

The evidence at trial failed to connect Traweek's individual conduct with any of the particular acts described in the complaint. At the close of the plaintiffs' evidence, the district court granted Traweek's motion for a Fed. R. Civ. P. 50(a) judgment as matter of law on the issue of liability, ruling that the plaintiffs failed to present evidence that Traweek was liable for any damages suffered by plaintiffs.[3] The plaintiffs' excessive-force claims against Bewley were considered by the jury,[4] which returned a verdict for Bewley on the issue of qualified immunity. *See* Record on Appeal vol. 2, at 467. The district court subsequently issued a final judgment for the defendants. The plaintiffs filed a timely notice of appeal.

II

A

---

[3] The district court also ruled that, because Traweek's conduct was neither "grossly disproportionate to the need for action under the circumstances," nor "inspired by malice," his conduct was objectively reasonable under the excessive force standard set forth in *Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. Unit A Jan. 1981). *See id.* vol. 2, at 474. The court therefore concluded that Traweek was qualifiedly immune. *See Mouille v. City of Live Oak, Tex.,* 918 F.2d 548, 551 (5th Cir. 1990) ("Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law.").

[4] The court denied Bewley's motion for judgment as a matter of law, on the issue of Bewley's affirmative defense of qualified immunity. *See id.* vol. 4, at 222.

The plaintiffs first contend that the district court erred in excluding evidence of Traweek's liability in his supervisory liability. *See* Brief for Andert at 6-15. We review a district court's evidentiary rulings for abuse of discretion. *United States v. Liu,* 960 F.2d 449, 452 (5th Cir.), *cert. denied,* ___ U.S. ___, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992). "If abuse is found, the error is reviewed under the harmless error doctrine." *Id.*

The parties seeking relief in civil actions are normally bound to the theory or theories of relief stated in the complaint. *See Simpson v. James,* 903 F.2d 372, 375 (5th Cir. 1990) (stating that Fed. R. Civ. P. 8 requires a plaintiff to "plead sufficient facts to put the defense on notice of the theories on which the complaint is based"); *see also Wellborn v. Sears, Roebuck & Co.,* 970 F.2d 1420, 1425 (5th Cir. 1992) (citing with approval *Simpson*). After reviewing the complaint in open court, the district court concluded that the plaintiffs failed to allege liability for Traweek in his supervisory capacity. *See* Record on Appeal vol. 4, at 17-23. We agree.[5] Consequently, we conclude that the court did not abuse its

---

[5] The complaint provides:

> 14. All Plaintiffs named herein allege that their rights to be free from unreasonable seizure, as protected by the Fourth Amendment to the United States Constitution, were violated by the nonconsentual [sic] detention of their persons by Defendant Traweek (and others) for the approximate one and one-half hour period of time after which an objectively reasonable person would have ascertained beyond a reasonable doubt that the suspicion or probable cause, if any, which provided a basis for the search of the Lealos residence was unfounded. *Hill v. McIntyre,* 884 F.2d 271, 278 (6th Cir. 1989) (detention of "half an hour to an hour" presents jury question on "whether detention of this

duration was reasonable."); *cf., McConney v. City of Houston,* 863 F.2d 1180, 1185 (5th Cir. 1989) (observing that detention becomes unconstitutional under Fourth Amendment once seizing officer "ascertains beyond a reasonable doubt that the suspicion which forms the basis for the privilege to arrest is unfounded").

. . . .

Liability Alleged Against Defendant Traweek

19. When the United States Congress enacted Title 42, it intended to create a remedy in damages in favor of any person who has been subjected to the deprivation of a federal constitutional or statutory right by another person, or a governmental entity, who when violating the United States Constitution or laws has acted "under color of law." All Plaintiffs named herein allege Defendant Traweek is liable to them for the right to be free from unreasonable seizure protected by the Fourth Amendment, as alleged herein at paragraph 14. These Plaintiffs base their right to recovery from Defendant Traweek on the remedy created by the United States Congress when it enacted Title 42, United States Code, Section 1983.

20. All Plaintiffs herein further allege that Defendant Traweek was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Traweek was therefore acting "under color of law" when he violated the Plaintiffs' constitutional rights.

21. For the purpose of satisfying the pleading requirement of the United States Court of Appeals for the Fifth Circuit requiring plaintiffs to anticipate possible assertions of an affirmative defense based on qualified immunity, referred to herein at paragraph 17, the Plaintiffs alleging liability against Defendant Traweek would respectfully allege further that under clearly established law in existence when Defendant Traweek took the actions challenged by Plaintiffs, that a reasonable officer would have known that to detain and interrogate individuals inside a private residence for one and one-half hours, after discovering beyond a reasonable doubt that no legal basis existed for such

discretion by excluding evidence which was irrelevant to any theory stated in the plaintiffs' complaint.

B

The plaintiffs also contend that the district court erred in instructing the jury on the standard for excessive force, for the purpose of determining whether Bewley was qualifiedly immune. *See* Brief for Andert at 17-18. We review jury instructions for abuse of discretion. *United States v. Clinical Leasing Serv., Inc.,* 982 F.2d 900, 902 (5th Cir. 1992). "If the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate." *Id.* (attribution omitted).

The plaintiffs concede that *Shillingford* was the applicable law governing excessive force claims at the time of Bewley's conduct, and that the district court's instruction was consistent with that law. They argue, however, that *Graham v. Conner,* 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 263 (1989), should be applied retroactively to this case.[6] We disagree. We have

---

> detention or interrogation, would likely "give rise to liability for damages." *Melear v. Spears,* 862 F.2d 1177, 1183 (5th Cir. 1989).

See id. vol. 1, at 6, 9-10.

[6] Bewley's conduct occurred on January 30, 1989. The Supreme Court did not issue its decision in *Graham* until May 15, 1989. Prior to *Graham,* the *Shillingford* standard set forth the appropriate standard for determining the reasonableness of an officer's use of force in a qualified immunity context. *Mouilee v. City of Live Oak, Tex.,* 977 F.2d 924, 928 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 2443 (1993). The *Shillingford* standard required proof that the force exerted by Bewley was "inspired by malice," a requirement removed by *Graham. See id.,* 490 U.S. at 399, 109 S. Ct. at 1873.

previously held that the "objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question." *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1185 (5th Cir. 1990) (stating "[t]he reason for this rule is that an official c[an]not reasonably be expected to anticipate subsequent legal developments");[7] *see also Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We therefore find no merit in the plaintiffs' second point of error.[8]

III

For the foregoing reasons, we **AFFIRM.**

---

[7] The plaintiffs' request for en banc consideration of the issue decided by *Pfannstiel*))i.e., whether *Graham* should be applied retroactively when assessing the validity of a qualified immunity defense))does not comply with established procedures in this circuit for granting en banc hearings. *See* Fed. R. App. P. 35(c); Loc. R. 35.2.

[8] To the extent that our decision in *Martin v. Thomas,* 973 F.2d 449, 455 (5th Cir. 1992), holds that *Graham* should be applied retroactively, notwithstanding *Pfannstiel,* we note that *Thomas* is distinguishable on its facts as it did not involve the defense of qualified immunity. *See id.,* 973 F.2d at 455.