

FEB 15 2008

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

**ESTATE OF DAVID VIERA; LYDIA  
VIERA; MICHELLE AMAYA; D.  
VIERA, JR., Denise Espadas, Guardian  
Ad Litem for D. Viera Jr.; RIENA  
VIERA; JESSICA VIERA,**

Plaintiffs - Appellants,

v.

**CITY OF EL MONTE; SANTOS  
HERNANDEZ,**

Defendants - Appellees,

and

**RALPH BATRES,**

Defendant.

No. 06-55793

D.C. No. CV-04-06082-MMM

**MEMORANDUM\***

Appeal from the United States District Court  
for the Central District of California  
Margaret M. Morrow, District Judge, Presiding

Submitted February 8, 2008\*\*  
Pasadena, California

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Before: **KOZINSKI**, Chief Judge, **O'SCANNLAIN** and **W. FLETCHER**,  
Circuit Judges.

Plaintiffs complain that the district court refused to permit evidence that David Viera was unarmed when he was shot and killed by Lieutenant Hernandez. But this information has no bearing on whether the officer's conduct was objectively reasonable for purposes of 42 U.S.C. § 1983, because the jury's (and the officer's) post hoc knowledge that Viera was unarmed would not have changed what the officer knew when he decided to use deadly force. See Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001). Even if the evidence would somehow have been relevant to plaintiffs' wrongful death claim, the district court did not abuse its discretion by excluding it under Fed. R. Evid. 403. The statements in defense counsel's closing argument suggesting that Viera was armed were cured by the district court's prompt instructions. See Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1270–71 (9th Cir. 2000) (strong presumption that the district court's curative instructions cured any prejudicial effect).

**AFFIRMED.**

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\*\* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).