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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF GABINO BENJAMIN FLORES, through Benjamin Flores, Jr., decedent's successor-in-interest; et al., Plaintiffs - Appellants, v. TERRANCE LEE BRYAN; et al., Defendants - Appellees.	No. 03-57156 D.C. No. CV-01-01353-IEG MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted September 14, 2005**
Pasadena, California

Before: SILVERMAN and CALLAHAN, Circuit Judges, and DUFFY***, District Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

The Estate of Gabino Benjamin Flores and Benjamin Flores Jr. appeal the district court's judgment in favor of defendants, the City of San Diego and San Diego police officers Terrance Lee Bryan and Anthony Zeljeznjak, after a seven day jury trial that resulted in defense verdicts on appellants' 42 U.S.C. § 1983 excessive force claim and related state law claims.

Appellants argue that the district court erroneously granted Officer Zeljeznjak qualified immunity for the deployment of a police canine against Gabino Benjamin Flores, and that this and other pre-trial rulings prevented them from presenting a theory of liability to the jury under *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002). Appellants also challenge the district court's rulings allowing criminalist Jennifer Shen to testify as an expert without proper notice, and a post-judgment order by the district court taxing costs on appellants.

A. Qualified Immunity and *Billington*.

The district court granted Officer Zeljeznjak's motion for summary adjudication on appellants' cause of action challenging the deployment of the police canine, concluding that Officer Zeljeznjak was entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001), establishes a two-pronged test for determining whether an officer is entitled to qualified immunity. The threshold inquiry is whether the facts, viewed in a light most favorable to the party asserting

injury, show that the officer violated a constitutional right, and the secondary inquiry is whether the right was clearly established. *Id*. at 201. The district court determined that the facts alleged by appellants established a constitutional violation, but concluded that Officer Zeljeznjak nevertheless was entitled to qualified immunity under the second prong of *Saucier* because existing case law did not give fair warning to him that his deployment of the canine under the circumstances was unreasonable.

We review the district court's decision to grant summary adjudication on the ground of qualified immunity de novo. *See Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003), and we hold that Officer Zeljeznjak was entitled to qualified immunity for the use of the canine against Flores. Assuming without deciding that the district court correctly determined that appellants established a constitutional violation, we agree with the district court that Officer Zeljeznjak is entitled to qualified immunity under the second prong of *Saucier*.

Appellants' argument–that Officer Zeljeznjak's conduct was so unreasonable that guidance from the courts speaking to the conduct is unnecessary–fails because the facts before the district court at summary judgment, even when viewed in a light most favorable to the appellants, do not describe

conduct that is "patently violative" of the constitution.[1] *See Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001) (holding that the law is clearly established when an officer's conduct is so patently violative of the constitution that the offending officer would know without judicial guidance that the action was unconstitutional, and that lack of case law prohibiting the particular conduct does not preclude a conclusion that the law is clearly established).

Billington v. Smith held that when an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, the officer may be held liable for his otherwise defensive use of deadly force. 292 F.3d at 1189. *Billington* explains that the basis for liability for the subsequent use of force is the initial constitutional violation. *Id*. at 1190. Because Officer Zeljeznjak's deployment of the canine here is protected by qualified immunity, as a matter of law liability cannot be established under *Billington*. Therefore, we find no merit to appellants' argument that the district

[1] The record contains testimony describing Flores as holding scissors in a threatening manner when the officers entered the house, and as being completely non-responsive to Officer Zeljeznjak's numerous requests to drop the scissors. Moreover, Officer Zeljeznjak described Flores as being defiant to police officers, and as being in control of his faculties enough to threaten somebody. Officer Bryan described Flores, after sustaining three very hard baton blows to his right wrist, as remaining in an aggressive stance against the officers.

court erred by making pre-trial rulings that emasculated their *Billington* theory of liability at trial.

B. Criminalist Jennifer Shen's Testimony.

Evidentiary rulings, including the decision to admit expert testimony, are reviewed for an abuse of discretion. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). We hold that the district court did not abuse its discretion by allowing Jennifer Shen to testify, or by qualifying Shen as an expert in fiber comparison under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Appellants acknowledge that they were provided with Shen's trace evidence report sometime prior to November 1, 2001, and that on September 16, 2003, they were aware of the substance of Shen's proposed testimony. On October 3, 2003, the district court informed counsel that if Shen was going to testify as to her conclusions, then she would be considered an expert. At the same time, the court announced that it would conduct a *Daubert* hearing to determine whether Shen qualified as an expert.

Appellants were on notice of Shen's report for almost two years and never pursued their own investigation of the report. In mid-September, 2003, when appellants realized the gravity of Shen's intended testimony, they failed to depose

Shen or to request a continuance to obtain their own expert. Nor did appellants take any remedial action when, four days before trial, the district court put counsel on notice that it would be conducting a *Daubert* hearing. The district court did not abuse its discretion by allowing Shen to testify under these circumstances.

The district court also considered the proper *Daubert* guidelines, and reasonably concluded that Shen's failure to exclude possible other sources of the fibers found on the scissors did not require an adverse ruling. *See Kumho Tire Co., Ltd.*, 526 U.S. 150-51 (noting that the *Daubert* test is flexible, and *Daubert's* list of specific factors does not necessarily or exclusively apply to all experts or in every case).

C. The Post-Judgment Order Taxing Costs.

We dismiss for lack of jurisdiction appellants' challenge to the order taxing costs because appellants failed to file a notice of appeal or an amended notice of appeal from this order.[2]

The district court's November 7, 2003, judgment is

AFFIRMED.

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[2] On August 23, 2005, we issued an order to show cause directing the parties to be prepared to discuss at oral argument the court's jurisdiction over this post-judgment order. At oral argument, appellants' conceded that their failure to perfect an appeal from this order deprives us of jurisdiction to review the order.