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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID S. LINDLEY et al.,

Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B281143

(Los Angeles County  
Super. Ct. No. BC576886)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Flurer, Judge. Affirmed.

Law Office of Michael J. Curls, Michael J. Curls and Nichelle D. Jones for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Michael A. McClain, Caroline E. Chan and Edward E. Ward, Jr. for Defendants and Respondents.

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## INTRODUCTION

In this wrongful death action, David S. Lindley (Lindley) and Maureen Sennhauser, the parents of decedent David W. Lindley (David), appeal from a judgment after a jury verdict in favor of the City of Los Angeles (City), related government agencies, and various entities and individuals involved in the construction of the Culver City station of the Los Angeles Metro Rail Expo Line. Lindley and Sennhauser alleged the defendants created a dangerous condition at the intersection of Venice Boulevard and Robertson Boulevard in West Los Angeles that contributed to an accident that killed their 17-year-old son as he crossed the street.

Lindley and Sennhauser argue the trial court erred by excluding evidence of subsequent remedial measures at the intersection. They contend the evidence was admissible to impeach the testimony of two City employees and to show it was feasible for the defendants to have made the intersection safer. Because the trial court did not abuse its discretion in excluding this evidence, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Accident*

On the morning of November 4, 2014, Lindley dropped off David and his sister, N'FINITY, at a bus stop so they could take the bus to a station on the Expo Line. The two siblings took the train to the Culver City station, which at the time was the last stop on the Expo Line, and planned from there to walk to school.

The Culver City train station is located near the intersection of Venice and Robertson Boulevards. The intersection is a five-point intersection through which Robertson Boulevard, Venice Boulevard, and Exposition Boulevard run.

At the time of the accident, the area around the intersection was undergoing construction related to the second phase of the Expo Line's expansion to Santa Monica. To protect the heavy volume of pedestrians, the designer of the Culver City Metro station implemented a traffic control plan, approved by the City's Department of Transportation, that used white concrete barriers, known as K-rails (see *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1552), and metal fences to channel pedestrian traffic through the area.

After getting off the train, N'FINITY went a separate way while David proceeded to the southeast corner of Robertson Boulevard and Venice Boulevard. Jessica Flores, who was on her way to work, stood next to him. Flores testified that, after waiting at the red light for approximately one minute, David lurched back to gain momentum and then ran into the street. Jocelyn Pitts, who was standing behind David, testified David ran out into traffic even though the pedestrian walk box displayed a do-not-walk red hand. David was only able to take two northbound steps before he was hit by a car traveling eastbound on Venice Boulevard. The impact threw David into the air, and a second car ran over him. David died as a result of his injuries.

After the accident, the City investigated and determined that the traffic control devices were proper and consistent with the traffic control plan. The City also sent a traffic signal electrician to confirm the traffic signal on the corner of Robertson

and Venice was working properly. Los Angeles Police Officer Robert Kim also tested the traffic signal and pedestrian call button and found that both were working as intended.

B. *Pretrial*

Lindley and Sennhauser brought an action for wrongful death and dangerous condition of public property against the City, the California Department of Transportation, the Los Angeles County Metropolitan Transportation Authority, Exposition-Metro Line Construction Company, Skanska-Rados Expos 2 Joint Venture, and Kimley-Horn and Associates, an engineer on the project. They also sued the drivers of both cars that hit their son, although they settled with the drivers and with Kimley-Horn and Associates before trial. Also before trial, the trial court granted a motion in limine to exclude all evidence of subsequent remedial measures absent leave of court and an offer of proof.

C. *Trial*

Lindley and Sennhauser called seven witnesses to testify at trial, none of whom saw the accident occur. David's special education teacher testified that David had higher functioning autism, Lindley testified that he dropped David off at the bus stop and that he taught his son not to cross the street against a red hand sign, and N'FINITY testified that she took the train with her brother. Lindley and Sennhauser also called Anthony Ponce, who heard a car hit David but did not see the actual impact, and Gokhan Esirgen, who testified he had complained to the City 10 months before the accident that pedestrians often forgot to push the crosswalk button, or did not push it hard enough, and

had encouraged the City to install an automatic pedestrian recall to eliminate the need to push a button to cross the intersection. Esirgen also told the City that the speed limit sign was not clearly posted and that the K-rails were too close to the street. The two other witnesses were the most relevant to the issue of subsequent remedial measures: Johnny Brewer, a senior construction inspector for the City of Los Angeles, and Daniel Mitchell, an assistant general manager and chief engineer for the Department of Transportation.

Brewer supervised the inspectors who inspected Metropolitan Transit Authority projects, including the Culver City Metro station. Brewer testified that, although he saw people jaywalking on Exposition Place, the street east of the intersection that led into the train station's parking lot, he never saw anyone jaywalking at the intersection of Robertson and Venice. On at least one occasion, however, he saw a person jump over a K-rail. Brewer never told anyone what he saw and he did not know what measures the City may have taken to address jaywalking.

Brewer also testified that after the accident he went to the location and verified the traffic control devices described in the traffic control plan were in the appropriate locations. He confirmed that the purpose of the traffic control plan was to keep pedestrians from jaywalking and that pedestrians were expected to stay within the control areas for their safety. He stated pedestrians who jumped a K-rail or jaywalked on Exposition Boulevard near the parking lot were issues for law enforcement or the Expo Authority.<sup>1</sup> Brewer emphasized that, as an inspector, he did not have the responsibility or authority to

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<sup>1</sup> The Expo Authority was responsible for hiring the contractor and overseeing the construction of the project.

design the traffic control plan. He stated he did not know if the designers could have modified the plan to reduce jaywalking because that was a design issue. Brewer testified that, although the inspectors could ask the contractor to correct items that did not meet certain standards, they did not have authority to modify the traffic control plan or investigate whether the plan was appropriate.

Mitchell testified that his duties included transportation planning, project design, and operations. Although he did not personally review traffic control plans, his staff reviewed them to ensure the plans met state requirements and operated according to the design. Mitchell stated he did not have authority to question the contractor's traffic control plan but could only ensure that it met all the rules and regulations. When asked if he could change the traffic control plan, Mitchell stated that he could ask for a change in the plans but the contractor did not have to make the change. Mitchell also stated that the existence of traffic or pedestrian congestion did not necessarily indicate an unsafe condition.

Mitchell testified the intersection of Robertson and Venice was a complex intersection, but it was not confusing because there were push buttons and traffic controls that provided a clear right of way assignment. He also stated that, when the light was green for vehicles going eastbound on Venice, it was impossible for the pedestrian crosswalk signal to show a walking man because a conflict monitor prevented electricity from running to both at the same time.

During the testimony of Brewer and Mitchell, Lindley and Sennhauser sought to introduce evidence of five subsequent remedial measures at the intersection. The measures, which

Mitchell indicated in his deposition (but not at trial)<sup>2</sup> would make the intersection “even more clear and reduce the interactions between pedestrians and drivers,” were (1) changing the traffic signal timing for northbound Robertson and southbound Exposition Boulevard, (2) installing a right turn flashing yellow arrow for cars traveling northbound on Robertson Boulevard and turning right on Venice Boulevard, (3) installing a sign to remind pedestrians to push the pedestrian button, (4) later placing the signal on pedestrian recall, and (5) dispatching a traffic officer to the intersection to prevent pedestrians from jumping over the K-rails on the north side of Venice Boulevard. Lindley and Sennhauser sought to introduce evidence of these subsequent remedial measures to impeach the testimony of Brewer and Mitchell and to show the feasibility of preventative measures. The trial court excluded the evidence.

The defendants called several witnesses to testify at trial, including the drivers of the two cars that hit David and witnesses who saw David run into the street. In addition, Andrew Levitt, an accident reconstruction expert, testified that neither driver was speeding and that the two cars entered the intersection on a green light traveling eastbound on Venice Boulevard. Mr. Levitt also opined that the intersection had sufficient warnings, that David darted out into the street, and that David could have prevented the accident. Ed Nahabedian, an expert on civil and traffic control engineering, testified that the design of the intersection conformed to state and federal guidelines and standards and that, in his opinion, David darted out into the

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<sup>2</sup> The deposition transcript is not in the record. Lindley and Sennhauser have attached portions of the deposition transcript to their opening brief.

street. Finally, Officer Kim testified that the call button and traffic signal were working at the time of the accident.

D. *Verdict*

The jury returned a verdict in favor of the defendants. The jury found that, although the intersection was a dangerous condition, David was 100 percent responsible for the accident.

## DISCUSSION

Lindley and Sennhauser argue that the critical issue is whether the intersection at Robertson and Venice was maintained in a safe condition regardless of any action taken by David. As stated, they argue the trial court abused its discretion in excluding evidence of remedial measures taken after the accident because it was relevant to impeach the testimony of Brewer and Mitchell and to show that the defendants could have made the intersection safer for pedestrians.

A. *Standard of Review*

“Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion.” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) “While trial judges ordinarily enjoy broad discretion with respect to the admission and exclusion of evidence in ruling on motions in limine [citation], a court’s discretion is limited by the legal principles applicable to the case.” (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294.) Thus, a ruling ““that transgresses the confines of the applicable principles of law is outside the scope of



discretion and we call such action an “abuse” of discretion.””  
(*Sargon Enterprises, Inc. v. University of Southern California*  
(2012) 55 Cal.4th 747, 773.) We review a ruling excluding  
evidence of subsequent remedial measures for abuse of discretion.  
(*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th  
664, 667.)

B. *Subsequent Remedial Measures*

Evidence Code section 1151 states: “When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.” Evidence Code section 1151 codified well-settled law that liability for negligence should be based on what a defendant did or knew before an accident and not on what occurred after the accident. (See *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 118-119.) In addition, as a matter of public policy, “exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident has occurred.” (*Id.* at p. 119.)

Not all evidence of subsequent remedial measures is inadmissible. Such evidence may be admissible “when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.” (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1169; see *McIntyre v. The Colonies-Pacific, LLC*, *supra*, 228 Cal.App.4th at p. 673 [same]; *Pierce v. J.C. Penney Co.* (1959) 167 Cal.App.2d 3, 7 [“in appropriate circumstances evidence of subsequent precautions or repairs may properly be admitted

when it tends to impeach the testimony of a witness”]; *People v. Lockheed Shipbuilding & Constr. Co.* (1975) 50 Cal.App.3d Supp. 15, 35-36 [evidence of subsequent remedial measures may be admissible “for impeachment purposes,” “to prove control of the premises by the defendants,” or “to show the possibility or feasibility of eliminating the cause of an accident”].)<sup>3</sup>

C. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of the Subsequent Remedial Measures To Impeach Brewer and Mitchell*

Lindley and Sennhauser argue that, because Brewer and Mitchell testified the intersection functioned as designed, evidence of subsequent remedial measures at the intersection was admissible to impeach their testimony by showing that it was feasible to make the intersection safer for pedestrians. The trial court excluded the evidence under Evidence Code section 1151 because Lindley and Sennhauser did not make an offer of proof that Brewer or Mitchell ever testified the intersection could not have been made safer. (See *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1165 [“[i]t is

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<sup>3</sup> Lindley and Sennhauser sought to introduce evidence of the remedial measures to prove the City had control over the intersection. The City, however, stipulated it controlled the intersection, including the speed of traffic, the timing of the lights, the traffic signal phasing, the traffic design, and the direction of pedestrians. (See *People v. Lockheed Shipbuilding & Const. Co.*, *supra*, 50 Cal.App.3d Supp. at p. 36 [“[s]uch exception is also not applicable here as the defendant . . . has never denied that it was in control of the premises”].) Over the objection of Lindley and Sennhauser, the court accepted the stipulation and instructed the jurors accordingly.

the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise””].)

Contrary to the assertion by Lindley and Sennhauser, Brewer never testified “there was nothing that could have been done to make the intersection safer.” Brewer testified that his job was to make sure the traffic control plan was implemented as designed and that he did not have the authority to make changes to that plan. He also testified he did not know if increasing the amount of time to cross the street would alleviate jaywalking. Brewer never testified about the safety of the intersection, whether the City could make any modifications to make it safer, or that he ordered the subsequent remedial measures. The evidence concerning subsequent remedial measures Lindley and Sennhauser sought to introduce would not have impeached any testimony by Brewer about the feasibility of making the intersection safer because he gave no such testimony. (See *Sanchez v. Bagues & Sons Mortuaries* (1969) 271 Cal.App.2d 188, 192 [“the fact that after the accident some unidentified person *other than the witness* directed or authorized alterations affords no basis for the utilization of the method of impeachment” with evidence of subsequent remedial conduct].)

Similarly, contrary to the assertion by Lindley and Sennhauser, Mitchell never testified “there was nothing that the City could do to make [the intersection] safer.” Mitchell testified the intersection was “operating as designed,” by which he meant there were clear traffic control devices, functioning push buttons, and visible traffic signal indicators. Mitchell never stated the City could not make modifications to the intersection, and he admitted the City had a maintenance agreement to operate the intersection. He also testified that the traffic control devices

were meant to assign right-of-way, that pedestrians had the responsibility to obey the traffic controls, and that he did not recall making any observations about the interaction between drivers and pedestrians. Although Mitchell did approve some of the subsequent remedial measures at the intersection, he never testified that the City implemented these changes because he thought the intersection was unsafe or that he changed his mind about whether the intersection was operating as designed. (Cf. *Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 809-810 [after the witness indicated nothing was wrong or unusual with the waxed floor where the plaintiff fell, the plaintiff could impeach the witness by showing that he “changed his mind” by ordering the floor should not be waxed].) As with Brewer’s testimony, there was nothing in Mitchell’s testimony that evidence of the subsequent remedial measures would have impeached. As the trial court stated, “Until they’ve said it, you can’t impeach” them.

D. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of the Subsequent Remedial Measures To Show Feasibility*

Lindley and Sennhauser argue the trial court should have allowed them to present evidence of the subsequent remedial measures to show the feasibility of taking precautions that would have prevented the accident. It is true that “such evidence is relevant and admissible . . . on the possibility or feasibility of eliminating the cause of the accident.” (*Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573; see *People v. Lockheed Shipbuilding & Constr. Co.*, *supra*, 50 Cal.App.3d Supp. at p. 36 [same].) But the defendants contested feasibility on the grounds that the two cars that struck

David never traveled on Exposition Boulevard and that David was entirely at fault for the accident.

Installing the right turn flashing yellow arrow for cars turning right from northbound Robertson Boulevard to eastbound Venice Boulevard and changing traffic signal timing for northbound Robertson Boulevard and southbound Exposition Boulevard would not have prevented the vehicles from hitting David as they entered the intersection on a green light while traveling eastbound on Venice Boulevard. The accident did not involve cars traveling on Robertson or Exposition Boulevards. Similarly, installing a pedestrian recall or reminding pedestrians to push the button would not have prevented David from running into traffic while the solid red hand signal was illuminated and heavy traffic traveled eastbound on Venice Boulevard. There was no evidence the pedestrian button had not been pushed before David ran into the street, and just after the accident Officer Kim confirmed the button was working properly. Similarly, there was no evidence a pedestrian recall would have shortened the time David waited at the corner; indeed, depending on when during the cycle David arrived at the corner, a pedestrian recall system may have increased David's wait at the light.

Lindley and Sennhauser correctly point out that a traffic control officer was dispatched to the area several weeks after the incident. The Los Angeles Police Department, however, sent the officer to remedy a different problem: Pedestrians were jumping over K-rails and using closed crosswalks on the north side of Venice Boulevard to cross Robertson and Exposition Boulevards. David ran into the street from the southeast corner of Venice and Robertson Boulevards into eastbound traffic. None of the

subsequent remedial measures, even if feasible, would have prevented the accident.

### **DISPOSITION**

The judgment is affirmed. Defendants are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.