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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES COX,

Plaintiff and Appellant,

v.

CITY OF EL CAJON,

Defendant and Respondent.

D061097

(Super. Ct. No.
37-2009-00094747-CU-PA-CTL)

JAMES COX,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, DEPARTMENT
OF TRANSPORTATION,

Defendant and Respondent.

D062059

(Super. Ct. No.
37-2009-00094747-CU-PA-CTL)

APPEALS from judgments of the Superior Court of San Diego County, Richard E.

L. Strauss, Judge. Affirmed.

Plaintiff James Cox was injured when the bicycle he was riding through an intersection struck a car, driven by Ms. Cockrell, as her car turned left across the intersection. Cox's personal injury action included claims against defendants State of California and the California Department of Transportation (together CALTRANS) and City of El Cajon (City) alleging there was a dangerous condition at the intersection permitting recovery against the governmental entities under Government Code¹ section 835. The trial court entered summary judgment against Cox and in favor of CALTRANS, finding as a matter of law the intersection did not constitute a dangerous condition. The trial court also entered summary judgment against Cox and in favor of City, finding as a matter of law the intersection did not constitute a dangerous condition and that City's adjoining bike lane was not a dangerous condition.

I

FACTUAL BACKGROUND²

A. The Intersection

The intersection Cox claimed was a dangerous condition (the intersection) is where drivers on El Cajon Boulevard enter the onramp to go westbound on Interstate 8. At the intersection, there are four westbound lanes on El Cajon Boulevard, the left three

¹ All further statutory references are to the Government Code unless otherwise specified.

² Our factual background, drawn from the papers filed in support of and opposition to the motion for summary judgment, is stated most favorably to Cox. (*LLP Mortgage, Ltd. v. Bizar* (2005) 126 Cal.App.4th 773, 775-776 [court must consider evidence and inferences in the light most favorable to party opposing summary judgment].)

of which are dedicated to entering the onramp (the onramp lanes). These three onramp lanes (which feed into the three corresponding lanes after a left-turning driver clears the intersection and begins ascending the onramp) are controlled by a left turn traffic signal.

At the intersection, there is also a single oncoming eastbound lane, from which the eastbound driver can either turn right (onto the westbound onramp lanes) or can pass straight through the intersection to continue going eastbound on El Cajon Boulevard. This eastbound lane is controlled by a traffic signal that works in conjunction with the left turn signal for the westbound onramp lanes.

There is striping that designates a bicycle lane (the bicycle lane) for bicyclists traveling eastbound on El Cajon Boulevard. The bicycle lane striping ends before the bicycle lane enters the intersection and resumes on the far side of the intersection.

CALTRANS's Responsibility for the Intersection

The intersection was designed by CALTRANS and built by CALTRANS in 1986. CALTRANS retained exclusive control over the intersection, including control over the traffic signals, the traffic signal actuators, and the traffic signal timing regulating the intersection.

City's Responsibility for the Bike Lane

In 1989, City striped a bicycle lane for bicyclists traveling with traffic in the eastbound lane of El Cajon Boulevard.

The Traffic Signals

The intersection is controlled by traffic signals triggered by actuators. When a vehicle crosses over loops embedded in the roadway, it trips the actuator, sending a signal

to the controller, which responds based on a designated sequence programmed into the controller.³ Prior to 1999, the signals had been programmed to "rest in green" (green rest), which means the signal would remain green for the last "phase" (the last direction that triggered and obtained a green light) until there was an opposing call. Under this green rest programming, once the controller received a signal from opposing traffic, the opposing traffic would not receive an immediate green signal but would have to wait until the prior green signal had finished cycling through its yellow phase and turned red.

In 1999, Mr. Bauer, a traffic signal technician in CALTRANS, reprogrammed the controller to have all signals "rest in red" (red rest). Under the red rest programming, after there had been no traffic in any direction for some period of time, all signals would turn red and stay in red rest. All signals would then remain red until the first vehicle to arrive triggered the outer detector, at which point the signal would turn green for the direction of that first-arriving-vehicle without having to wait for the opposing signal to finish cycling through its yellow phase and turn red.

B. The Accident

On August 4, 2008, just after 10:00 p.m., Cox was on his bicycle traveling eastbound on El Cajon Boulevard. Cockrell was traveling westbound on El Cajon Boulevard. Cockrell, traveling in the Number 1 left turn lane at the intersection, turned left to enter the onramp. While Cockrell was still traversing the intersection, Cox

³ When CALTRANS designed and built the intersection, it did not install traffic signal actuators at the intersection to detect bicycle traffic.

collided with the right front corner of Cockrell's vehicle. Cockrell did not see Cox until his head hit her windshield.

Cockrell testified she had a green light before she began making her left turn.⁴ There was no testimony from Cox or any other percipient witness concerning whether Cox entered the intersection while the eastbound light was still yellow. However, Cox's accident reconstructionist, noting the CHP's report showed Cox's bicycle hit Cockrell's vehicle just a few feet before Cox would have finished traversing the intersection and reached the safety of the far side of the intersection, testified it was possible for Cox to have first entered the intersection while the eastbound light was still yellow, and that the eastbound yellow light remained yellow for up to .33 seconds before turning red and (concomitantly) for Cockrell's oncoming vehicle to first receive a green signal, and Cox could still have been traversing the intersection during the time it took for the westbound light to turn green and for Cockrell to then turn left and move to the point in front of Cox where the impact occurred.⁵

⁴ Cockrell testified the light had been green for some time before she even reached the intersection and began making her left turn. She recalled there was a car ahead of her by approximately two car lengths that preceded her through the green light and onto the onramp, and a car to her immediate right and slightly ahead of her that also turned onto the onramp. However, plaintiff's expert surmised she was mistaken both as to the length of time the light had been green and as to the other cars being present.

⁵ The accident reconstructionist relied, in part, on the testimony of Mr. Smith, who heard (but did not see) the collision. Mr. Smith was a passenger in a car driven by Mr. Michel traveling on El Cajon Boulevard in the same direction as (but some distance ahead of) Cox. Mr. Smith was "pretty sure" the light was green when Michel's car went through the intersection, but could not recall whether Michel's car had the green light as they approached the intersection or whether Michel's car had to stop before proceeding.

II

PROCEDURAL BACKGROUND

A. Cox's Complaint and Theory of Liability Against CALTRANS and City

The Complaint

Cox filed a complaint against CALTRANS and City alleging liability for creating or maintaining a dangerous condition on public property.

The Theories of Liability

Cox's claim against CALTRANS rests on his contention that the intersection constituted a dangerous condition because of the red rest timing of the traffic signal.⁶

At some time after traversing the intersection, Smith heard the collision, but he could not estimate how far they had traveled before the sound alerted him to the accident. A second assumption forming the basis of the expert's opinion was that Cockrell's car did not slow to 6 mph as she approached the limit line to begin her turn, as would be expected of drivers accustomed to a green rest signal setting (and would therefore know to slow down to allow the light to complete its cycle), but instead she could have been traveling at 20 mph when she reached the limit line, anticipating the red rest setting would give her the green signal at the moment she reached the limit line to permit her to continue her turn without slowing. The expert constructed a chain of events in which Cockrell could have reached the limit line and received the green signal at the moment she reached the limit line, permitting her to turn without slowing and thereby cut in front of Cox's oncoming bicycle.

⁶ There was no claim the signals were malfunctioning, such that both directions had green signals simultaneously. There was also no claim that the yellow phase for eastbound drivers was too abbreviated to provide reasonably prudent eastbound drivers or bicyclists approaching the intersection with enough time to come to a stop behind the limit line before the eastbound light turned red. Finally, although Cox's second amended complaint appeared to allege the intersection was dangerous because the green and yellow phases for eastbound bicyclists was so rapid that eastbound bicyclists who entered the intersection *during* the green phase did not have enough time to clear the intersection before left-turning cars received a green light, it does not appear Cox maintained that theory in opposition to the summary judgment motions.

Cox's theory is that the red rest timing trained or conditioned westbound drivers such as Cockrell to anticipate that a red left turn signal would almost immediately turn green once the car passed over the outer actuator, thereby inducing those drivers to approach the left turn light and navigate through the left turn at a much faster speed than they would if the green rest timing were in effect, because the green rest timing would condition those drivers to know that a red left turn signal would not immediately turn green once the car passed over the outer actuator but would instead await the cycling through of the yellow and red signals controlling eastbound traffic. Because Cox theorizes that westbound drivers are thus conditioned to approach and navigate through the left turn at a much faster speed, these westbound drivers also move through the intersection more quickly, which causes westbound drivers to cut off the path of eastbound drivers and bicyclists who had prudently entered the intersection during the yellow phase but who had not yet cleared the intersection ahead of the path of the left-turning cars.

Although Cox's claim against City is more opaque, it appears to rest on his foundational contention that the intersection with the red rest timing constituted a dangerous condition. From that predicate, Cox argues City was liable under an "adjacent property" theory: that City's bicycle lane leading up to (and resuming after) the intersection encouraged bicyclists to enter and pass through an intersection City knew or

should have known was dangerous because of the signal timing and the absence of actuators to detect bicycle traffic.⁷

B. The Summary Judgment Motions

City's Motion and Ruling

City moved for summary judgment. City argued (1) it had no duty of care with regard to the intersection because it exercised no control over the traffic signals or layout of the intersection, (2) there was no evidence the intersection posed a substantial risk of harm to bicyclists who exercised due care because this was the first bicycle-versus-car collision ever reported at the intersection, and (3) there was no evidence City had notice the intersection posed a substantial risk of harm because, despite heavy traffic at this intersection between 2002 and 2008, this was the only bicycle-versus-car collision reported at the intersection. Cox opposed the motion, arguing that although City did not control the traffic signals or layout of the intersection, it created an adjacent dangerous condition by (1) creating a bicycle lane without placing bicycle-sensitive actuators on the intersection and without asking CALTRANS to coordinate signal timing to accommodate bicyclists, and (2) by deviating from CALTRANS's striping plan because City restriped

⁷ Cox also appears to assert the configuration of the bicycle lane is an additional dangerous condition of City property because City retained rather than altered the tapered striping scheme created by CALTRANS, and this taper somehow forces bicyclists further out into the intersection. Again, however, this argument appears to assume that being *within* the intersection is dangerous because oncoming left-turning drivers can collide with eastbound bicyclists, and there is no evidence City placed any bike lane striping within the danger zone.

the roadway to narrow the width of the bike lane at the southeast corner of the intersection.

The court granted City's motion. The court found it was undisputed that City had no control over the intersection, and therefore could not be liable for any dangerous condition allegedly created by the signal timing of the intersection and, absent the ability to control and remedy these conditions, City could not be liable under section 835. The court also concluded Cox had not shown the intersection itself posed "a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used" within the meaning of section 830, subdivision (a), because City submitted evidence that between, 2002 and 2008, over 44 million cars turned left at the intersection and there were no prior bicycle-versus-car collisions at the intersection, and Cox had raised no material issue of fact as to these statistics. The court concluded this evidence was an adequate basis for concluding any danger to bicyclists posed by the signal timing or striping at the intersection was minor or trivial rather than substantial. Accordingly, the court granted City's motion for summary judgment.

CALTRANS's Motion

CALTRANS subsequently moved separately for summary judgment, arguing (1) there was no evidence the dangerous conditions alleged by Cox posed a substantial danger to users of the intersection, and (2) there was no evidence the dangerous conditions alleged by Cox caused the present accident. CALTRANS noted Cox's theory was that the intersection was rendered dangerous because the condition of the signal

timing changed the behavior of westbound drivers approaching the left-turn signal.

CALTRANS argued there was no evidence this condition in the intersection posed a substantial risk of harm to bicyclists who exercised due care because this was the first bicycle-versus-car collision reported at the intersection in the nine years since the condition was first created, despite the fact that approximately 47 million vehicles had passed through the intersection between 2002 and 2008 and approximately 138,000 bicycles had passed through the intersection during roughly the same period.

CALTRANS also asserted there was no evidence the condition cited by Cox as dangerous--the red rest timing of the lights--contributed to the accident because the only evidence from percipient witnesses showed the light was *not* resting in red immediately before the accident: Cockrell testified the left-turn light was already green when she first saw it, and another car preceded her through the intersection.

Cox opposed the motion, arguing that by changing the traffic signal from green rest to red rest, CALTRANS created a dangerous condition because drivers experienced with the intersection will alter the speed at which they approach and navigate through the intersection. Cox theorized that, under the green rest timing, drivers learn that a red left turn signal would *not* immediately turn green once the car passed over the outer actuator (because it would instead have to await the cycling through of the yellow and red signals controlling eastbound traffic) and therefore drivers would know to approach the red light more slowly. However, Cox's theory also posits the red rest timing taught westbound drivers such as Cockrell to anticipate that a red left turn signal would almost immediately turn green once the car passed over the outer actuator, thereby inducing such drivers to

approach and navigate through the left turn at a much faster speed, thereby reducing the time in which an eastbound driver or bicyclist can clear the intersection. Cox argued it was undisputed that Cockrell frequently traversed that intersection and was trained to expect an immediate green on passing over the actuator.⁸ Based on his expert's surmise that Cockrell drove in accordance with her expectation that the red light she was facing would immediately turn green, Cox argued her high rate of speed on approaching the red light at the intersection and then turning across the intersection was a substantial cause of the accident. Cox argued the paucity of prior similar accidents is only one factor in evaluating the presence or absence of a dangerous condition, was not dispositive here, and the presence or absence of a dangerous condition should be for the trier of fact to determine. Similarly, Cox argued that whether or not the signal timing and concomitant altered driver behavior was a cause of the accident should be a factual question for the trier of fact to determine.

The court granted CALTRANS's motion. The court found it was undisputed that between 2002 and 2008, over 44 million cars turned left at the intersection and there were no prior similar bicycle-versus-car collisions at the intersection, much less any similar bicycle-versus-car collisions in which the signal timing or actuators at the intersection played any causal role. The court concluded Cox had not shown the intersection itself

⁸ Cox suggests on appeal, consistent with his theory that drivers speed through the turn because they are conditioned to expect an immediate green light at the left turn on passing over the actuator, that Cockrell "testified in her deposition that if the westbound light at the intersection is red as she approaches, by the time she reaches the intersection it will be green." We have reviewed the page of the record on appeal cited in support of that statement and find no support for his characterization of Cockrell's testimony.

posed "a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used" within the meaning of section 830, subdivision (a), and the evidence provided an adequate basis for concluding any danger to bicyclists posed by the signal timing or striping at the intersection was minor or trivial rather than substantial. Accordingly, the court granted CALTRANS's motion for summary judgment.

III

ANALYSIS

A. Standard of Review

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc. § 437c, subd. (c).) When evaluating a defendant's motion for summary judgment, "the statute instructs that such a party 'has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.'" (Code Civ. Proc. § 437c, subd. (p)(2).)" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1346 (*Cerna*).

An appellate court reviews de novo a trial court's decision to grant a summary judgment motion. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) In

independently reviewing the propriety of an order granting summary judgment, the appellate court reviews the ruling of the trial court, rather than its rationale. (*Aaitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1373.)

B. General Principles Concerning a Dangerous Condition of Public Property

Section 835 provides that a public entity is "liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

The element at issue here is the existence of a dangerous condition. A "[d]angerous condition" is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) Although the existence of a dangerous condition is ordinarily a question of fact, the issue of whether a condition posed a trivial or insignificant risk within the meaning of the statutory scheme governing public liability "can be decided as a matter of law if reasonable minds can come to only one conclusion" (*Cerna, supra*, 161 Cal.App.4th at p. 1347), including by way of a motion for summary judgment (*Davis*

v. City of Pasadena (1996) 42 Cal.App.4th 701, 704-706 [configuration of stairs and handrail determined a trivial defect as matter of law on summary judgment] (*Davis*); *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 397-399 [walkway edge three-fourths of an inch higher determined a trivial defect as matter of law on summary judgment]), or by nonsuit (see *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 481-485 [affirming grant of nonsuit based on determination that traffic control, lighting, traffic volume and "geometrics" of certain intersection not a dangerous condition as a matter of law] (*Antenor*)), or on demurrer (*Bartell v. Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, 496-498 [complaint alleged school ground was dangerous condition; order of dismissal after demurrer sustained because not dangerous condition as a matter of law affirmed on appeal]).

Importantly, when reviewing this issue after a grant of summary judgment, the fact the plaintiff found an expert witness to conclude the alleged condition constitutes a significant risk and a dangerous condition does not relieve this court of its statutory task, pursuant to section 830.2, to decide whether the risk created by the condition was minor, trivial or insignificant rather than substantial. (*Davis, supra*, 42 Cal.App.4th at p. 705; *Antenor, supra*, 174 Cal.App.3d at p. 484.) Instead, we must determine as a matter of law whether "in view of the surrounding circumstances . . . no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (§ 830.2.)

C. Analysis of Claim Against CALTRANS

We first evaluate Cox's claim against CALTRANS alleging the intersection was in a dangerous condition. Cox has identified the physical defect comprising the dangerous condition of the intersection as the change of the settings for the lights controlling the intersection from a green rest setting to its present red rest setting.⁹ Cox theorizes the danger is created because drivers are trained to approach and navigate through the intersection at a much faster speed than if they were trained to expect (under the green rest setting) that their light will delay turning green (e.g. until after the eastbound light has finished cycling through its yellow phase to turn red), thereby putting westbound drivers into the intersection in conflict with eastbound drivers who also properly entered the intersection on a green or yellow light.

As thus distilled, it is not the red rest timing that alone creates the dangerous condition.¹⁰ Instead, it is Cox's theory of driver "learned behavior" that allegedly poses

⁹ A plaintiff alleging a dangerous condition " 'may not rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition.' [Citation.] A plaintiff's allegations, and ultimately the evidence, must establish a physical deficiency in the property itself. [Citations.] A dangerous condition exists when public property 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself,' or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users." (*Cerna, supra*, 161 Cal.App.4th at pp. 1347-1348, italics omitted.)

¹⁰ Under the red rest timing, all directions are red after some period of nonuse and therefore *both* directions approaching the light face a red light, requiring that *neither* direction enter the intersection. It is only when one of those lights *changes* that one direction is permitted into the intersection. Because the other direction concomitantly *remains* red, it would preclude that direction from a conflicting entry into the intersection.

the requisite "substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) However, Cox's theory of driver "learned behavior" does not convince us the intersection poses a substantial risk of injury because it is based on an unstated predicate that lacks evidentiary support: it presumes drivers generally, and Cockrell in particular, engage in *selective* learning. It presumes westbound drivers have learned how prudently to approach the intersection based on how the light behaves when there is *no* oncoming eastbound traffic (e.g., driving quickly based on the timing of the westbound light after both lights have gone into red rest), but have not *also* learned how prudently to approach the intersection based on how the light behaves when there *is* oncoming eastbound traffic (e.g. to drive more slowly based on the timing of the westbound light after the eastbound light is effectively in green rest), as Cox's theory of dangerousness necessarily presumes.¹¹ There is no evidentiary support for this selective learning theory, and speculation does not suffice to preclude the entry of summary judgment. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525-526.)

Alternatively, to the extent Cox's theory of dangerousness is not based on this unsupported selective learning and attendant behavior theory, his theory of

¹¹ Cox's theory of dangerousness necessarily presumes eastbound drivers such as himself have properly entered the intersection while their light was either green (as it would be in a green rest mode) or was beginning its yellow cycle (as would occur if the eastbound direction had been in green rest before an opposing call from westbound traffic was received by the controller), rather than having entered the intersection while the eastbound light was in red rest.

dangerousness necessarily presumes Cockrell and other westbound drivers do know to more slowly approach the intersection when there *is* oncoming eastbound traffic, as there was here,¹² but disregard that knowledge and instead speed up to the light and through the intersection as though there is no opposing traffic that might have started the green cycle for eastbound drivers. However, public entities are liable only for conditions that create a substantial risk for persons who foreseeably use the property *with due care* (*Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384), and "even though it is foreseeable that persons may use public property *without* due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Ibid.*) In *Davis, supra*, 42 Cal.App.4th 701, the court affirmed summary judgment under analogous facts. There, a plaintiff fell as she descended a stairway; the stairway was constructed so two sets of stairs rose at right angles to each other and each step met each corresponding step at a right angle. Along the line of convergence was a handrail, which went down diagonally. (*Id.* at pp. 702-704.) Rejecting the plaintiff's theory that the combination of converging stairs and diagonal handrail "invites" a person to descend at that location, and constituted a dangerous condition for the reason that induced persons to descend at an

¹² Cox's theory of dangerousness necessarily presumes there *was* oncoming eastbound traffic that triggered (or at a minimum took advantage of) an eastbound green light, because they introduced evidence that Michel's car preceded Cox's bicycle through the intersection and theorized Cox's bicycle similarly took advantage of that green cycle to properly enter the intersection. Moreover, because Cox's theory appears to assume he was on his bicycle trailing Michel's car through the intersection during the same green and yellow cycle for eastbound cars, Cockrell must have (or at a minimum should have) seen that eastbound car (e.g. Michel's car) pass her on her left side as she approached the light.

oblique angle to the stairs, the court reasoned that "[t]he very language of 'invitation' used by plaintiffs illustrates that involved here is not a defective set of steps, but rather a choice to descend them at an angle." (*Id.* at p. 704.) Affirming the trial court's order granting summary judgment, the appellate court (after noting there were no reports of similar accidents) concluded it was the plaintiff's choice of how to utilize the staircase (because there were perpendicular handrails available) rather than the staircase itself that was the alleged dangerous condition, and the stairs themselves posed at most the type of trivial, insignificant risk contemplated by sections 830, subdivision (a), and 830.2, rather than a dangerous condition. (*Id.* at pp. 704-705.)

Similarly, here the allegedly dangerous condition was Cockrell's alleged choice to approach the limit line and traverse the intersection at a rate of speed that might have been prudent when no oncoming traffic was present on the road but was inconsistent with her knowledge of how the light operated when oncoming traffic (e.g. Michel's passing car) *was* present. However, a public entity is not liable for accidents caused solely because its property was used without due care (§ 830, subd. (a)), and the public entity is not liable merely because it could have taken measures to guard against dangers created by negligent third parties.¹³ (See, e.g., *Belcher v. City and County of San Francisco*

¹³ For this reason, we reject Cox's arguments that triable issues of fact were present because CALTRANS changed the signal timing without considering or studying allegedly safer alternatives, or whether the change in timing caused the accident because Cockrell entered the intersection more quickly than she would have had the signal setting been left on green rest or set on recall, or whether the change in timing caused the accident because Cox might have had time to clear the intersection had the signal setting been left on green rest or set on recall.

(1945) 69 Cal.App.2d 457, 463; accord, *Callahan v. City and County of San Francisco* (1967) 249 Cal.App.2d 696, 702 [" 'Under the present statutory definition, however, "even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons" or others exposed to risk of harm by reason of their negligence' "].)

The absence of any other similar accidents in the intersection in the nine years following the change in signal timing confirms our conclusion that, as a matter of law, no reasonable person would conclude the changed signal timing created a substantial--as opposed to an insignificant--risk of injury when the intersection is used with due care, within the meaning of section 830.2. (*Aitkenhead v. City and County of San Francisco* (1957) 150 Cal.App.2d 49, 51 [whether the defect was trivial or substantial can be decided as matter of law]; *Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43 [same].) Although several cases have appeared to hold that a long history of accident-free use is dispositive of the presence of a dangerous condition,¹⁴ we conclude the evidence here of a nine-year history of accident-free use is at a minimum a significant consideration when examining whether no reasonable person would conclude the

¹⁴ See, e.g., *Callahan v. City and County of San Francisco* (1971) 15 Cal.App.3d 374, 377-380 [four and one-half year period without similar accidents]; cf *McKray v. State of California* (1977) 74 Cal.App.3d 59, 62-63 [claim that absence of guard rail rendered road dangerous rejected because of five-and-one-half-year period without accidents; additional claim that defective striping caused dangerousness rejected because record conclusively established driver's negligence was sole cause of plaintiff's injury because driver was more than 22 feet outside the obvious lane line when accident occurred]).

condition created a *substantial*--as opposed to insignificant--risk of injury when the property is used with due care. (See, e.g., *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 243 [affirming summary judgment against complaint for dangerous condition based in part on evidence showing absence of prior accidents over five years' use of the park]; *Antenor, supra*, 174 Cal.App.3d 477 [affirming grant of nonsuit against complaint for dangerous condition based in part on evidence showing no pedestrian versus auto accidents]; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 733 [accident history "is properly one of those factors which the court should consider when deciding whether it should rule on the question of dangerousness [as a matter of law] or whether the issue should go to the jury"].) We concur with the trial court that, considering the absence of any evidence contradicting CALTRANS's showing there had not been a single previous bicycle-versus-car accident in the nine years following implementation of the red rest setting,¹⁵ no reasonable person would conclude the red

¹⁵ Here we part company with *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337 (*Lane*), which plaintiff cites for the proposition that public property may be found to be in a dangerous condition notwithstanding a long prior accident-free history. In *Lane*, the city moved for summary judgment and produced evidence averring there had been no accidents at the intersection over the prior seven-year period. The *Lane* court dismissed this evidence, concluding that merely because "someone acting on behalf of the city's claims administrator had searched a computerized database of claims submitted to the city for records of claims involving the center divider . . . but found none . . . [without any evidence on] how the database was created or maintained, or how the search of the database was conducted" was insufficient to determine whether the evidence "constituted a complete and accurate record of claims submitted to the city, let alone for determining that the search the unidentified person conducted retrieved all of the pertinent records within the database." (*Id.* at p. 1345.) Moreover, *Lane* went on to state that "even assuming the city's evidence was sufficient to establish an absence of claims . . . , an absence of claims is not the same thing as an absence of accidents," and it was

rest setting of the traffic lights created a substantial--as opposed to insignificant--risk of injury when the intersection is used with due care by westbound motorists and eastbound bicyclists.

We are unpersuaded by Cox's claim that *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749 requires a different result. *Cole* involved a two-lane street bounded by a gravel area used both as a parking area for an adjacent city park and by eastbound drivers to pass on the right cars stopped to make left turns against oncoming traffic. (*Cole, supra*, at pp. 754-755.) The town "encouraged" parking in the gravel area, and tacitly approved of the common practice of parking cars at an angle (*id.* at pp. 759-760), even though this "'de facto parking area' . . . failed in numerous respects to conform to governing laws and standards." (*Id.* at p. 762.) *Cole* also appeared to conclude the design of the road encouraged or permitted eastbound drivers, permitted by law to pass on the right in the initial part of the passing maneuver, to continue the passing maneuver using the gravel area in conflict with the parked cars. (*Ibid.*) After concluding the town had in effect *abandoned* any claim that this set of circumstances did *not* amount to a

possible there had been accidents that went unreported. (*Ibid.*) However, *Lane's* decision to ignore the moving party's undisputed evidence of an accident-free history, by speculating the evidence might have been incomplete, or might have not reflected whether there had been accidents that were simply unreported, appears incompatible with the ordinary rules governing summary judgment motions. (See, e.g., *Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481 [moving party submitted records supporting summary judgment and opponent cannot avoid summary judgment based on "speculation, imagination, guesswork, or mere possibilities" that records were incomplete]; accord, *Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 181 [where moving party's showing supports summary judgment, opposing party cannot defeat summary judgment based on assertion that credibility of movant's evidence is jury question].)

dangerous condition (*id.* at pp. 767-769), and instead claimed the town was contesting liability based on the causation and notice elements of the plaintiff's cause of action, *Cole* concluded there was ample competent evidence both types of behavior were common (*id.* at p. 760) and that the accident was in fact caused because of those conflicting behaviors (*id.* at pp. 754-755), and therefore there were triable issues of fact precluding summary judgment. (*Id.* at pp. 769-778.)

Cole is not controlling for numerous reasons. First, unlike in *Cole*, CALTRANS is directly challenging the dangerous condition issue. Second, in contrast to *Cole's* observation that the parking area "failed in numerous respects to conform to governing laws and standards," there is no claim that employing a red rest rather than a green rest setting at this intersection does not conform to governing laws. Third, unlike *Cole*, the theory of dangerousness (e.g., the "altered behavior" theory) in this case is based on surmise rather than (as in *Cole*) on the testimony of percipient witnesses. Finally, in *Cole* (unlike here) there was evidence that a similar accident had occurred at the site four years earlier, and there was evidence that a complaint about the danger had been lodged three years before the accident. (*Cole v. Town of Los Gatos, supra*, 205 Cal.App.4th at pp. 779-780.) We conclude *Cole* has no application in the present case.

D. Analysis of Claim Against City

Cox's claim against City appears to be dependent on his claim against CALTRANS: that City's bicycle lane was a dangerous condition because it induced bicyclists to enter an intersection dangerous to them. Because we conclude summary judgment was properly entered in favor of CALTRANS because the intersection was *not*

in a dangerous condition, and Cox has not identified any viable theory against City unconnected to the alleged dangers posed by the intersection itself, we conclude summary judgment was properly entered in favor of City.

DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.