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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOE LATOURELLE, Cross-complainant and Appellant. v. GLENDORA POLICE DEPARTMENT, et al., Cross-defendants and Respondents.	B276607 (Los Angeles County Super. Ct. No. KC067150)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert A. Dukes, Judge. Reversed in part, affirmed in part.

Law Office of Glenn E. Stern, Glenn E. Stern and Richard Coberly for Cross-complainant and Appellant Joe Latourelle.

Leech & Associates, D. Wayne Leech for Cross-defendants and Respondents Glendora Police Department, Timothy Staab, Lt. Egan, Mike Howell, and Casey O'Gorman.

INTRODUCTION

This appeal arises out of a dispute between a homeowner, appellant Joe Latourelle, and a water company, Cienega Springs Water Company, Inc. (CSWC) over unpaid water bills. CSWC filed a lawsuit against appellant and he cross-complained against CSWC, the Glendora Police Department (GPD), and affiliated individuals. In his cross-complaint, appellant alleged that over the course of about a month in 2014, individuals acting on behalf of CSWC trespassed repeatedly onto his property and damaged his water system; appellant further contended that these individuals were accompanied and assisted by GPD officers. This appeal concerns the claims against the GPD and its officers. The trial court sustained successive demurrers as to these claims and ultimately dismissed them without leave to amend.

We conclude that appellant has adequately alleged a claim for civil rights violations pursuant to 42 U.S.C. section 1983. We therefore reverse the judgment with respect to that cause of action. With respect to appellant's state law claims, we find that he has adequately alleged causes of action for trespass to land, nuisance, and intentional infliction of emotional distress. Moreover, these allegations are sufficient to avoid the bar of state law immunities raised by respondents. We therefore reverse the judgment with respect to those causes of action. We affirm as to the remaining claims for extortion, conversion, trespass to chattel, inverse condemnation, and negligence.

BACKGROUND

I. *Allegations*

The following allegations are taken from appellant's first-amended cross complaint (FAXC), second-amended cross complaint (SAXC), and the exhibits attached thereto: appellant owns property in a "secluded, gated community in the foothills above the City of Glendora," California. The property was not located within the Glendora city limits, but rather "in unincorporated Los Angeles County," and therefore within the jurisdiction of the Los Angeles Sheriff's Department (LASD). The property's "remote location" prevented standard municipal water service. CSWC was a "would-be utility" company that purported to provide water to a service district including his property, a claim he disputes.[1] Appellant alleged that he installed an "independent pipeline" to deliver water to his property from nearby Cienega Springs, which is located on the property of the United States Forest Service. According to appellant, he stopped paying for services from CSWC in approximately 1994, when he discovered that the entity was a "fraudulent operation"; he subsequently received "sporadic bills" from CSWC, which he did not pay.

Appellant's property "sits on a 7.75 acre lot, which is gated off from its neighbors." Water enters his property via "bypass plumbing" and is stored in a 5,000 gallon tank. There is a pump house approximately 15 feet from the tank. Both the tank and

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[1] For example, appellant disputed that CSWC was a valid company; that it owned the natural spring, any of the pipes at issue, or an easement over his property; or that it "provides water to anyone."

the pump house are located approximately 500 feet from the gates at the edge of appellant's property.

On July 21, 2014, Mohamad Tavana approached appellant's mailbox and told appellant that Tavana was "doing work for CSWC." On July 25, 2014, security cameras on appellant's property captured Tavana "trespassing on" the property and posting a notice that appellant owed CSWC $10,200 for water usage. The cameras also captured CSWC President, Dr. Timothy Ferguson, "riding an ATV" on the property and posting another notice. The same day, appellant discovered he had no water at his house. He discovered broken water valves and missing valve handles on his property. The following day, appellant discovered that "someone had been on his property and had cut a pipe attached to the tank, from where water would flow" to his home. In response to these events, appellant repositioned his security cameras to "view his water tank and pump-house." He also posted "No Trespassing" signs on his property.

On July 30, 2014, appellant's cameras recorded a white car entering his property; a GPD officer exited the car and left a card on appellant's front door. The following day, Tavana "was captured on video cutting valve stems on the PROPERTY, which cut off the water supply . . . and placed . . . Latourelle's health and safety at risk."

Appellant called the GPD on July 31, 2014 to report the events from July 25 to 31.[2] Appellant alleges that GPD Officer

[2] Appellant argued below that the GPD did not have jurisdiction over his property, as it was outside the Glendora city limits. He has not explained why, given this assertion, he called

Voors responded to the property. The incident report prepared by Voors was attached to the SAXC as an exhibit. Voors reported that he viewed video surveillance from appellant's property on July 31, 2014, which showed Tavana walking onto the property "directly past a no trespassing sign" and then cutting parts of appellant's water line with a "handheld power tool." Voors also spoke to Ferguson and Tavana at Ferguson's home, which was "just up the road" from appellant. Ferguson admitted that he had directed Tavana to destroy pipes on the property and claimed that "he and Tavana had an easement to the property for the purpose of examining water lines as an agent" of CSWC. Voors noted that Ferguson was "evasive" when pressed for details regarding how the water system worked. According to Voors, neither Ferguson nor Tavana was "able to fully explain the situation clearly." Voors informed Ferguson and Tavana that appellant "did not want them on his property and if they trespassed they would be arrested." Voors also asked for documentation supporting Ferguson's claims regarding the easement, the contract with appellant, CSWC's status, and CSWC's ownership of the pipes on appellant's land and the spring from which the water originated. Ferguson agreed to provide supporting documents. About two weeks later, Voors received CSWC articles of incorporation for CSWC from 1909, a permit to operate a pipeline "from Cienega Springs to the forest boundary," and several other documents. However, Voors noted that the provided documents did not include "any existing, or previous, contract or agreement between [CSWC] and Latourelle, nor did I find any documentation indicating ownership of the

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GPD rather than LASD after his first few encounters with Tavana. Appellant has not raised this argument on appeal.

pipes on Latourelle's property." Voors attempted to follow up with Ferguson but received no further information.

On August 13, Tavana again entered appellant's property and cut additional pipes, "including pipes to and from the pump house and pipes attached to the tank contaminating . . . and interrupting the water supply." GPD "was called" and officers Wanstrath and Henderson responded and wrote a report. The next day, appellant confronted Tavana as the latter was driving onto the property; appellant told Tavana "that he was trespassing and had to vacate the PROPERTY." Both appellant and Tavana called GPD. Officer O'Gorman responded and told appellant that Ferguson "was difficult to deal with," but that appellant should meet with him and "work things out." O'Gorman also told Tavana to stay off the property "until things are resolved."

On August 19, 2014, appellant alleges he was told by a GPD sergeant that complaints filed by both appellant and Tavana were being forwarded to the district attorney.[3] The same day, appellant called GPD to report that Tavana had been on his property, "turned off the water pump, disconnected a hose and tied said hose into a knot." Appellant alleged that a GPD officer accompanied Tavana, without a warrant.

Appellant met with GPD Chief Timothy Staab on August 22, 2014 and told Staab that the GPD was "not allowed" to enter appellant's property, that GPD officers were trespassing and did not have jurisdiction. According to appellant, Staab responded

[3] Appellant alleged that ultimately the district attorney determined the dispute "was a civil matter."

that he "was not going to stop his officers from entering the PROPERTY."[4]

On August 25, 2014, appellant's cameras captured Tavana and GPD officers "near the tank, pump house and driveway on the PROPERTY." To reach this location, they "crossed the closed gates and 'NO TRESPASSING' signs" at the edge of the property. The following day, appellant called the LASD and reported that Tavana and the GPD were trespassing and damaging his water system. Appellant alleged that LASD Deputy Fong said he spoke to a GPD watch commander, told the GPD commander that the GPD was trespassing and to stay off the property, and that Tavana and the GPD officers "should not be back."

Tavana returned to the property on August 30, 2014, accompanied by uniformed GPD Officers O'Gorman and Howell. Appellant alleged that the officers were on duty and did not have a warrant. Howell urinated "near the broken pipes and valves adjacent to the water tank." A few minutes later, Alan Young[5] arrived on the property to assist Tavana. As appellant neared

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[4] Appellant claimed that the dispute began when Richard and Rochelle Young moved into the area served by CSWC. He claimed that Richard was an officer and shareholder in CSWC and also a reserve GPD officer. Thus, appellant said, due to the GPD's relationship with Richard, "a conscious decision was made by Chief Staab to take sides in this 'civil matter' and assist CSWC/Ferguson because of [Richard] owning property [nearby] and being on the CSWC Board in spite of knowing the facts that CSWC/Ferguson had no ownership of the water, pipeline and had no easement on Latourelle's property."

[5] We refer to Richard, Rochelle, and Alan Young by first name for clarity because they share a surname; no disrespect is intended. The cross-complaints do not allege the nature of Alan's relationship to CSWC.

the group, the officers warned Alan and Tavana of his approach. Alan then picked up a saw and cut the pressurized pipe running from the pump house to the rest of the property. Appellant ordered the group to leave his property. Officer O'Gorman then told Howell, Tavana, and Alan "that they should all leave." Appellant reported the incident immediately to the LASD. The same group returned to the property approximately 30 minutes later, along with Lieutenant Egan, a GPD watch commander. Alan took photos of the property and he and Tavana continued to cut pipes and a water meter, while the GPD officers watched. Appellant protested that "all of them were trespassing and must leave."

Appellant alleged that GSD Officers O'Gorman and Howell, along with Lieutenant Egan, "watched" Tavana and Alan destroy his personal property and "protected" them "above Latourelle's protests to leave his land and not destroy his property." The damage to his water system left him without water in his home for four days.

II. *Procedural Background*

CSWC filed a complaint against appellant in September 2014, seeking over $10,000 in unpaid water usage. Appellant filed a cross-complaint in March 2015. He then filed the FAXC in November 2015.[6] The FAXC alleged the following claims: (1) trespass to land; (2) nuisance; (3) extortion; (4) conversion; (5) trespass to chattel; (6) warrantless entry onto the property in violation of 42 U.S.C. section 1983 (section 1983); (7) intentional infliction of emotional distress; (8) inverse condemnation; (9)

[6] None of the pleadings or motion practice prior to the filing of the FAXC are included in the record.

quiet title as to easement; (10) slander of title as to easement; (11) unfair competition; (12) negligence; and (13) civil conspiracy.

Appellant alleged the sixth and seventh causes of action against cross-defendants GPD, Chief Staab, Lieutenant Egan, Officer Howell, and Officer O'Gorman (collectively, respondents). He alleged the ninth, tenth, and eleventh causes of action against CSWC and several of its officers, agents, and employees, Richard, Rochelle, Alan, and Tavana (collectively, the CSWC cross-defendants). The remaining causes of action were alleged against respondents and the CSWC cross-defendants, as well as Ferguson.

Respondents filed a demurrer to the FAXC; they also requested judicial notice of a document purportedly reflecting authorization from the LASD for the GPD to act as peace officers in unincorporated areas of Los Angeles county. In addition, respondents moved to strike portions of the FAXC. Appellant opposed. The trial court sustained the demurrer with leave to amend as to the sixth cause of action for civil rights violations under section 1983 and the twelfth cause of action for negligence.[7] The remaining claims against respondents—the first through fifth, seventh, eighth, and thirteenth—were dismissed without leave to amend, although the majority of those claims remained in the SAXC against the CSWC cross-defendants.

Appellant filed the SAXC against the same thirteen cross-defendants. As relevant here, only two claims remained against respondents—the sixth cause of action for civil rights violations and the tenth cause of action for negligence. Appellant also

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[7] Although the court's order sustaining the demurrer is not in the record, the parties agree as to the outcome.

attached a number of documents to the SAXC, including articles of incorporation for CSWC and several police reports.

Respondents demurred to the SAXC, along with the same request for judicial notice. Appellant opposed. At the conclusion of the hearing on May 18, 2016, the trial court adopted its tentative ruling sustaining respondents' demurrer without leave to amend.[8] The court also granted respondents' request for judicial notice of the document authorizing GPD police authority in unincorporated county areas. The court entered judgment on the SAXC in favor of respondents; appellant timely appealed.

DISCUSSION

Appellant challenges the dismissal of his claims against respondents (the GPD and its officers), including his claim for civil rights violations pursuant to section 1983 and his state law claims for trespass to land and chattel, nuisance, extortion, conversion, intentional infliction of emotional distress, inverse condemnation, and negligence.[9] We examine each in turn.

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[8] The court overruled the demurrer filed by CSWC, Ferguson, Richard, and Rochelle. Those claims are not at issue in this appeal. Appellant and respondents both assert that appellant ultimately settled with CSWC. There is no evidence in the record as to the settlement or its terms, despite respondents' citation to a request for judicial notice on this point. We note that there is no such request for judicial notice in the record filed by either party in the trial court or on appeal. Respondents' counsel acknowledged during oral argument that the citation referred to a request for judicial notice that was never filed.

[9] Although appellant initially appealed the dismissal of his claim for conspiracy, he conceded in his reply that the claim was moot.

I. *Standard of Review*

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank–California* (1994) 27 Cal.App.4th 800, 807.) We review de novo the dismissal of a civil action after a demurrer is sustained without leave to amend. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879 (*Cantu*).) In doing so, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Ibid*.) We similarly accept as true the contents of exhibits attached to the complaint. (See, e.g., *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94 ["[E]videntiary facts found in recitals of exhibits attached to a complaint or superseded complaint . . . can be considered on demurrer."].) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) To establish that a cause of action has been adequately pled, a plaintiff must demonstrate he or she has alleged "facts sufficient to establish every element of that cause of action. [Citation.]" (*Cantu, supra*, 4 Cal.App.4th at pp. 879-880.) If the complaint fails to plead any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Id.* at p. 880.)

We review an order denying leave to amend for an abuse of discretion. "'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations.] Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]' [Citation.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; see also, e.g., *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 [liberality in permitting a party to amend a pleading is the rule if a fair opportunity to correct the defect has not already been given and the pleading's deficiency can be easily corrected].)

II. *Section 1983 Claim*

We first consider whether the factual allegations of the SAXC sufficiently stated a claim for civil rights violations under section 1983. Appellant asserts that his section 1983 claim is premised on violations of his Fourth Amendment rights caused by respondents' warrantless entries onto his property. The trial court found respondents had not violated appellant's constitutional rights and further, that respondents were entitled to qualified immunity. Based on the allegations of the SAXC, we reach the opposite conclusion.

A. *Alleged Fourth Amendment violation*

"'To state a claim under [section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.' [Citation.] "'State courts look to federal law to determine

what conduct will support an action under section 1983. [Citation.]' [Citation.]" (*Arce v. County of Los Angeles* (2012) 211 Cal.App.4th 1455, 1472-1473.)

Appellant contends that respondents violated his Fourth Amendment right to be free from warrantless searches when they trespassed on his property. Respondents argue, and the trial court agreed, that although the GPD officers entered appellant's property, they did not intrude into the curtilage of his home because they remained outside of his residence near the water tank and pump house. Respondents further assert that appellant failed to allege sufficient facts in the SAXC to demonstrate that the officers were within the curtilage. We disagree.

"'The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'" (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171-172, quoting *Payton v. New York* (1980) 445 U.S. 573, 589-590.)

The ambit of this Fourth Amendment protection also includes the "curtilage" of the home, or "'the area immediately

surrounding and associated with the home' and 'to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life[.]". . . .' [Citation.] The curtilage is thus afforded constitutional protection while 'open fields' are not. [Citation.]" (*People v. Freeman* (1990) 219 Cal.App.3d 894, 901, quoting *Oliver v. United States* (1984) 466 U.S. 170, 180 (*Oliver*).) "'[T]he term "open fields" may include any unoccupied or undeveloped area outside of the curtilage.'" (*United States v. Dunn* (1987) 480 U.S. 294, 304 (*Dunn*).)

Courts have analyzed the scope of curtilage "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." (*Oliver, supra*, 466 U.S. at p. 180.) Specifically, "curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." (*Dunn, supra,* 480 U.S. at p. 301.) However, the Supreme Court cautioned that these factors are not a "laundry list," nor are they to be construed as a formula which will yield a "correct" answer in every situation. (*Id.* at p. 301.) "Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." (*Ibid.*)

As such, a court's analysis of whether a particular area is within the curtilage of a home, and the concomitant reasonableness of the homeowner's expectation of privacy in that

area, depends heavily on the facts and circumstances of each individual case. (See *People v. Thompson* (1990) 221 Cal.App.3d 923, 942 ["'[T]he test of reasonableness is dependent upon the totality of facts and circumstances involved in the context of each case [citations] and does not turn merely upon whether a physical trespass is manifested [citations].'"].) For example, in *Dunn*, *supra,* 480 U.S. at pp. 301-303, on review of a motion to suppress evidence, the Supreme Court determined that a barn located 50 yards outside of a fence surrounding the house, used for the manufacture of controlled substances, and easily visible to observers, was not within the protected curtilage of the residence. In particular, the Court relied on the fact that an interior fence surrounded the residence and greenhouse but excluded the barns, thus setting the latter structures apart "as a distinct portion of respondent's ranch." (*Id*. at p. 302.) Additionally, the Court found it "significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home," but, rather, for drug manufacture. (*Ibid*.) Similarly, in *United States v. Traynor* (9th Cir.1993) 990 F.2d 1153, 1156-1157, overruled on other grounds by *United States v. Johnson* (9th Cir. 2001) 256 F.3d 895, the Ninth Circuit concluded that an outlying shop, 70-75 feet from the house, devoted solely to the growing of marijuana, segregated from the residence by a fence, and visible to persons standing on adjacent property, was not within the protected curtilage.

On the other hand, the court in *United States v. Depew* (9th Cir. 1993) 8 F.3d 1424, 1428, overruled on other grounds by *United States v. Johnson*, *supra*, 256 F.3d at p. 895, concluded that an officer standing in the driveway outside of a detached garage was within the curtilage of the defendant's residence.

Although the area was located 50 to 60 feet from the house and separated from the house by a low picket fence, the court noted the defendant's efforts to prevent observation by outsiders, including posting "No Trespassing" signs, and selecting a remote residence with a long driveway and a row of thick trees blocking visibility from the highway. (*Id.* at pp. 1427-1428; see also *People v. Winters* (1983) 149 Cal.App.3d 705, 707 [police entry into backyard violated Fourth Amendment because "[a] person who surrounds his backyard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy."].)

Here, appellant alleged that respondents accompanied the CSWC cross-defendants onto his property, went past his closed front gate and multiple "No Trespassing" signs, proceeding at least 500 feet from the gate to the area around his water tank and pump house, which supplied water to his home. He also alleged additional steps he had taken to protect his privacy, including installing his own water apparatus and meter, selecting a remote and secluded location, and installing security cameras. In addition, appellant alleged that his Fourth Amendment protections "extend to any lands within an enclosure surrounding the home in which one would reasonably expect privacy." Reading the SAXC as a whole and construing its allegations liberally, as we must (see Code Civ. Proc. § 452), we conclude that appellant has sufficiently alleged that the officers intruded into the curtilage of his residence. Respondents rely on the absence of allegations suggesting that the officers entered any structure, but that factor is not dispositive of the curtilage analysis.

Respondents also suggest, without citation to authority, that appellant had no reasonable expectation of privacy in this area of his property because "the water provider, CSWC, has the right to maintain the water infrastructure by coming onto the property." This contention ignores the allegations in the SAXC. Appellant specifically alleged that he owned and installed all of the water infrastructure on his property and disputed that CSWC had an easement or any other right to the water or to access appellant's water infrastructure. For the purposes of the demurrer, we accept these allegations as true.

The parties may later adduce evidence, such as the exact layout of the property, its visibility, or other indicia of the presence or absence of a reasonable expectation of privacy by appellant, which will clarify this issue. Such evidence is not before us on appeal following a demurrer.

We also reject respondents' suggestion that the officers' warrantless entry onto appellant's property was constitutional because it was done under exigent circumstances and/or with consent. As to the first contention, "exigent circumstances" are "few in number and carefully delineated." (*United States v. United States District Court* (1972) 407 U.S. 297, 318.) Such circumstances occur in the event of "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (*People v. Ramey* (1976) 16 Cal.3d 263, 276; see also *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1205-1210.) While each case must be decided on the facts known to the officers at the time of the search or seizure (*People v. Ramey, supra*, 16 Cal.3d at p. 276), "two primary considerations in making this determination are the

gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety. [Citation.]" (*Conway v. Pasadena Humane Society, supra,* 45 Cal.App.4th at p. 172.) There are no allegations in the complaint suggesting that such exigent circumstances were present here.

Similarly, respondents' contention that they had consent to enter the property on the dates in question is contrary to the allegations in the SAXC. Appellant alleged that he called the GPD to report trespassing and vandalism by the CSWC cross-defendants on July 31, August 13, 14, and 19, 2014; then, on August 22, 2014, he told Staab that the GPD was not allowed onto his property. Respondents allegedly entered the property three more times on two subsequent days, August 25 and 30, 2014. None of these entries were precipitated by a call from appellant. Notably, the claim for section 1983 violations in the SAXC is expressly limited to the final three incidents, after appellant alleges respondents knew they no longer had his consent to enter his property. Respondent also suggests, without authority, that appellant's calls to the LASD constituted consent for *any* law enforcement agent to enter the property. But according to the SAXC, appellant's calls to the LASD took place after each incident of misconduct and were made to report the incident. Respondents do not explain how those calls could grant consent for their entry after the fact. Appellant also alleged that respondents re-entered the property on August 30, 2014 after he had expressly ordered them off the property and one of the GPD officers had recognized that "they should all leave." Finally, respondents' claim that CSWC as the "water provider" was able to grant consent to allow respondents to enter appellant's property is both unsupported and contrary to the SAXC, as

previously discussed. Nor can respondents claim that they had a reasonable, good faith belief in CSWC's authority to consent (see, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 703), given the allegations in the SAXC that respondents knew CSWC did not have an easement to enter the property and had not demonstrated "that they owned any rights to the water coming from Cienega Springs." We therefore conclude that appellant has sufficiently alleged a section 1983 claim.

B. *Qualified immunity*

Appellant also contends the trial court erred in concluding respondents were entitled to qualified immunity on the section 1983 claim. The trial court found that respondents had not violated appellant's constitutional rights and, moreover, that any such right was not clearly established because, "under the circumstances, it was reasonable for the officers to believe that [CSWC's] conduct was lawful." Appellant argues this was error, as he sufficiently alleged that respondents knowingly engaged in an unlawful intrusion onto his property.

"A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." (*Carroll v. Carman* (2014) ___U.S.___, 135 S.Ct. 348, 350 (*Carroll*).) In resolving questions of qualified immunity, courts engage in a two-pronged inquiry. First, "'[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right.' [Citation.]" (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 711 [assessing qualified immunity on summary judgment].) Second, the court determines "'whether the right was clearly established. This inquiry, it is

vital to note, must be undertaken in light of the specific context of the case, not as a broad, general proposition.'" (*Ibid.*; see also *Tolan v. Cotton* (2014) ___U.S. ___, 134 S.Ct. 1861, 1865-1866.)

"A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.' [Citation.] In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.' [Citation.] This doctrine 'gives government officials breathing room to make reasonable but mistaken judgments.'" (*Carroll, supra,* 135 S.Ct. at p. 350; see *Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1108.) "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" (*Ashcroft v. al-Kidd* (2011) 563 U.S. 731, 743; see also *Carroll, supra*, 135 S.Ct. at p. 350.)

As discussed above, taken in the light most favorable to appellant, we conclude that he sufficiently alleged a violation of his Fourth Amendment rights by respondents. As such, we turn to the second prong of the inquiry, whether that right was clearly established at the time.

We find the factual record insufficiently developed at the pleading stage to determine whether respondents might be entitled to qualified immunity, because it was not clearly established whether respondents intruded into the curtilage of appellant's property and, if so, whether they had the right to do so under existing law. (See, e.g., *White v. Pauly* (2017) ___U.S.___, 137 S.Ct. 548, 550 [determining qualified immunity on summary judgment]; *Mueller v. Auker* (9th Cir. 2009) 576 F.3d 979, 982 [same].) For example, respondents' contention that they entered each time with consent from CSWC is not supported by

any allegation in the record. Further, even if we were to consider the parameters of valid consent, we agree with appellant that these parameters were well established and therefore qualified immunity is unwarranted.

The Fourth Amendment's prohibition against warrantless searches does not apply when "voluntary consent has been obtained, either from the individual whose property is searched, [citation], or from a third party who possesses common authority over the premises, [citation]." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181.) That "'[c]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes. . . .' [Citation.]" (*Ibid.*) The exception for consent also extends "to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." (*Georgia v. Randolph* (2006) 547 U.S. 103, 109.) However, as appellant notes, *Georgia v. Randolph, supra*, 547 U.S. at pp. 122-123 held that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."

In short, appellant alleged that respondents violated his constitutional rights by entering his property without a warrant, his consent, or the consent of anyone whom they could have reasonably believed possessed authority to provide such consent. He also asserts that, as least on August 30, 2014, he was physically present and objected to police entry. These consent requirements were clearly established at the time of the incidents. Accordingly, we reverse the trial court's order

sustaining the demurrer on the basis of respondents' qualified immunity from the section 1983 claim.[10]

III. *State Claims*

Appellant also alleged multiple state law claims against respondents. First, we examine the substance of appellant's allegations for each cause of action. We conclude that appellant has failed to allege sufficient facts to support his claims for extortion, conversion, trespass to chattel, inverse condemnation, and negligence. However, appellant has met his pleading burden as to his claims for trespass to land, nuisance, and intentional infliction of emotional distress. Second, with respect to the surviving claims, we find that none of the state statutory immunities asserted by respondents bar these claims, at least at this stage. We therefore reverse the judgment as to those causes of action.

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[10] We therefore do not reach appellant's alternative argument that respondents are liable on his section 1983 claim under the "special relationship" and "danger creation" doctrines (see *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 699), although we consider these issues in the following section in the context of appellant's state law claims. We also note that the parties have not raised the issue of whether the SAXC adequately alleges that the GPD, as a local governmental entity, and Chief Staab, to the extent he is sued in his official capacity, are subject to *Monell* liability under section 1983. (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 694 [local governmental entity liable under section 1983 only when official policy or custom leads to injury].)

A. *Causes of action*

1. *Trespass to land*

Appellant contends he alleged sufficient facts to state a claim for trespass to land against respondents.[11] We agree.

Trespass is an unlawful interference with possession of property. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406; see also *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233 (*Wilson*).) "[L]iability for trespass will not be imposed unless the trespass was intentional, the result of recklessness, negligence, or the result of an extra hazardous activity." (*Wilson, supra*, 32 Cal.3d at p. 233.)

Appellant's cause of action for trespass is at the heart of his claims. The FAXC[12] alleged that respondents engaged in unlawful and intentional physical intrusions onto his property on multiple occasions. These allegations are plainly sufficient to state a trespass claim. In opposition, respondents contend that CSWC had an easement and that the GPD officers were entitled to accompany CSWC onto the property to "assist in keeping the peace." Notably, respondents fail to cite to anything in the record in support of this argument. Moreover, the FAXC alleges to the contrary, and we take those allegations as true for the purposes of this appeal.

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[11] On the record before us, it does not appear that the trial court ruled on the viability of the individual state law causes of action against respondents. Instead, the court found that respondents were entitled to immunity under state law and sustained the demurrers to the state claims on that basis.

[12] Because respondents were dismissed from the FAXC without leave to amend from all of the state claims except negligence, we rely on the allegations in that pleading in our analysis of the state claims, excluding negligence.

2. *Nuisance*

Appellant also alleges that the conduct by respondents, along with the CSWC cross-defendants, constituted a nuisance. We find these allegations sufficient to state a nuisance claim.

A nuisance is defined as "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ." (Civ. Code, § 3479; see also *Wilson, supra*, 32 Cal.3d at p. 233 ["A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession."].)

In the FAXC, appellant alleged that the cross-defendants "actively created a condition . . . that was harmful to health, was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property when they damaged, or assisted others in damaging plumbing fixtures including pipes, valves and a water meter. . . ." In particular, appellant alleged that the cut pipes left him without water for several days and exposed his water system to possible contamination, including "rust and pollutants." The risk of contamination was further aggravated by Howell's alleged urination near the open pipes, which appellant contends was "especially indecent or offensive to the senses."

Respondents assert that "CSWC, not GPD, damaged the water pipes" and therefore no cause of action for nuisance may lie against respondents. We disagree. In addition to the offensive conduct allegedly committed by Howell, the FAXC alleges actions by respondents that interfered with appellant's free use of his property and assisted in the damage to his water system. These allegations are sufficient to support a nuisance claim. (See

Shurpin v. Elmhirst (1983) 148 Cal.App.3d 94, 101 ["not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages"]; ["the critical question is whether the defendant created or assisted in the creation of the nuisance. *(Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 343.)"] *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38.)

3. *Extortion*

Respondents contend that appellant has not sufficiently alleged facts to support the elements of a claim for extortion against them, particularly because they did not obtain any of appellant's property. We agree.

"Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." (Pen.Code, § 518; see also *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326; *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1169-1170 (*Chan*).) "Fear for purposes of extortion may be accomplished by a threat '[t]o do an unlawful injury to the person or property of the individual threatened or of a third person. . . .' (Pen.Code, § 519.)" (*Chan, supra*, 188 Cal.App.4th at p. 1170.)

Appellant's theory of extortion by respondents is not entirely clear. The FAXC alleged that all of the cross-defendants "used force" against his property through the destruction of his water apparatus, that respondents accompanied CSWC in order to "intimidate" appellant, and that the purpose of this intimidation was to force appellant to pay the "wrongful amount of $10,800" to Ferguson. While his allegations connect respondents' presence on the property with CSWC's destruction

of his water apparatus, they fail to do the same with the purported attempt to force appellant to pay an invalid water bill. Moreover, appellant does not allege that he was in fact compelled to make any such payment as a result of respondents' use of force, nor that he surrendered any property to *respondents*, as is required to establish an extortion claim. (See *Chan, supra*, 188 Cal.App.4th at p. 1172 ["[E]xtortion contemplates the surrender by the victim of his or her property to the extortionist as a result of the force or fear employed by the extortionist. [Citations.]"].) As such, we affirm the judgment of dismissal of this claim.

4. *Conversion and trespass to chattel*

Appellant also contends he has viable claims for both conversion and trespass to chattel against respondents. "'"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. . . .'" [Citation.]" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) Trespass to chattel, the seldom employed "little brother" to conversion, "lies where an intentional interference with the possession of personal property has proximately caused injury. [Citation.]" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567.) Thus, "'there may be recovery . . . for interferences with the possession of chattels which are not sufficiently important to be classed as conversion. . . .'" (*Ibid.*, quoting Prosser and Keeton on Torts (5th ed.1984) § 14, pp. 85–86.)

We find no basis for either claim against respondents in the FAXC. Appellant focuses these claims on the damage to his hoses, pipes, valves, and water meter, which he alleges was

committed by the CSWC cross-defendants. Although he asserts that respondents "allow[ed]" and "supervised" this conduct, he cites no authority supporting a claim for conversion or trespass to chattel on that ground. (Cf. *Lee v. Hanley, supra,* 61 Cal.4th at p. 1240 ["Lee's complaint may be construed to allege that Hanley is liable for conversion for simply refusing to return an identifiable sum of Lee's money."]; *Thrifty-Tel, Inc. v. Bezenek, supra,* 46 Cal.App.4th at p. 1566–1567 [finding hackers liable for trespass to chattel based on their unauthorized use of confidential access codes]; *Tallmadge v. County of Los Angeles* (1987) 191 Cal.App.3d 251, 254 [finding claim for conversion where the defendant county destroyed property owned by plaintiffs].)

5. *Intentional infliction of emotional distress*

Appellant also alleged that respondents' conduct on his property caused him severe emotional distress. Respondents argue that they engaged in no affirmative misconduct and therefore appellant cannot bring an emotional distress claim against them. Taking the allegations of the FAXC as true, we conclude that appellant has adequately alleged a claim for emotional distress.

In order to state a claim for the tort of intentional infliction of emotional distress, appellant must allege facts to support the following elements: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.]" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 (*Davidson*); see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497–499.) "The

California Supreme Court has set a 'high bar' for what can constitute severe distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [ ].) 'Severe emotional distress means "'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" [Citations.]' [Citations.]" (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1376, quoting *Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1004.)

Appellant alleged that respondents' conduct "goes beyond all possible bounds of decency that a reasonable person would regard as intolerable in a civilized community." As a result, he claimed that he "suffered severe emotional distress." While somewhat conclusory, we consider these allegations together with the allegations regarding respondents' conduct in the rest of the FAXC. (See *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) In particular, we note appellant's allegations that respondents entered his property armed and in uniform, and returned to his property after he told them to leave, accompanied by CSWC cross-defendants carrying saws. Further, one officer urinated near the open pipes of his water system. Based on these allegations, appellant has stated a claim for intentional infliction of emotional distress. We reject respondents' suggestion that the claim fails because, on some occasions, appellant "was not present, but viewed his security camera after the fact." This argument is unsupported and contradicts the allegations of the FAXC.

6. *Inverse condemnation*

We also find no support for appellant's claim of inverse condemnation against respondents. "A successful inverse condemnation claimant must prove that a public entity has taken

or damaged its property for a public use. [Citation.]" (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602.) "Article I, section 19 of the California Constitution has been interpreted by our Supreme Court to mean that 'any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not.'" (*Ibid*., quoting *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263–264.) The property owner has the burden of establishing that the public entity has, in fact, taken or damaged his or her property. (*Dina v. People ex rel. Dept. of Transp*. (2007) 151 Cal.App.4th 1029, 1048.)

Here, appellant did not allege that respondents took or damaged his property for a public use. (See, e.g., *Cantu v. Pacific Gas & Electric Co*. (1987) 189 Cal.App.3d 160, 164 [no liability in inverse condemnation where a utility takes or damages property for a private use].) Indeed, the basis for a claim of such a taking is unclear from the FAXC and appellant's briefs. The inverse condemnation claim in the FAXC alleged, somewhat confusingly, that the CSWC Cross-Defendants "claimed that the damaging and destruction to the pipes, hoses, valves and water meter were for the public good because Cross-Complainant LATOURELLE knows as a fact that none of the plumbing that was destroyed by CSWC had stopped any water to other residences." Appellant has not otherwise alleged any taking by respondents for public use, nor has he offered any explanation how the existing allegations could meet the elements of the claim. As such, we affirm the trial court's judgment as to this claim.

7. *Negligence*

Appellant's negligence claim against respondents is premised upon the theory that they created a special relationship when they returned to his property on August 25 and 30, 2014, thereby triggering a duty of care owed to appellant. We find no allegations sufficient to impose a duty of care based upon a special relationship between respondents and appellant.

The well-established elements of a cause of action for negligence are duty, breach of duty, proximate cause, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) As a general rule, individuals, including law enforcement officers, do not owe a duty of care to protect members of the general public. (*Williams v. State of California* (1983) 34 Cal.3d 18, 24 (*Williams*).) Therefore, law enforcement officers have no duty to come to the aid of another "unless a special relationship exists between the injured party and the officers. Such a special relationship arises if an officer's affirmative act creates the peril, or contributes to, increases, or changes the risk that otherwise exists." (*Greyhound Lines, Inc. v. Department of California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1132-1133 (*Greyhound*); see also *Davidson, supra,* 32 Cal.3d at pp. 197, 203.) Stated another way, "[l]iability may be imposed if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so [citations], or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129.)

Thus, for example, "[t]he breach of duty may be an affirmative act which places the person in peril or increases the risk of harm as in *McCorkle v. Los Angeles* (1969) 70 Cal.2d 252,

where an officer investigating an accident directed the plaintiff to follow him into the middle of the intersection where the plaintiff was hit by another car. The negligence may also constitute an omission or failure to act, as in *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, where a deputy sheriff promised to warn a decedent if a prisoner, who had made threats on her life, was released. The county was held liable when the sheriff failed to warn." (*Williams, supra,* 34 Cal.3d at p. 24.)

Conversely, recovery has been denied "for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection." (*Williams, supra*, 34 Cal.3d at p. 25 [collecting cases]; see also *Greyhound, supra*, 213 Cal.App.4th at p. 1136 ["Affirmative conduct or misfeasance on the part of [officers] that induces reliance or changes the risk of harm is required."]; *Minch v. California Highway Patrol* (2006) 140 Cal.App.4th 895, 898 ["undisputed evidence demonstrates the CHP officers did not have a duty of care toward plaintiff because they did not create or increase the risk of harm that led to plaintiff's injuries"].) Similarly, in *Davidson, supra*, 32 Cal.3d at p. 208, the court found the police had no duty of care toward the victim, who was stabbed in laundromat. The police were conducting surveillance of the laundromat in an attempt to catch a suspect from several prior stabbings. They failed to warn the victim, although they knew she was inside and saw the suspect enter the premises. (*Id.* at p. 201.) The Supreme Court found that there was no special relationship between the officers and the victim because the officers did not create the peril, their conduct did not change the

risk to the victim that would have existed in their absence, and the victim was unaware of the officers' presence and did not rely upon them for protection. (*Id*. at p. 208.)

Here, appellant has not alleged that respondents made any promises of protection upon which he relied. Nor has he alleged a situation in which respondents undertook to come to his aid but then negligently engaged in conduct which created a risk of harm. Instead, appellant contends that respondents' actions --- choosing to accompany the CSWC cross-defendants to the property and "providing armed guard service" as Tavana and Alan "vandalized" his water system—increased the risk of property damage. He further alleges that respondents "failed to use reasonable care to prevent harm" to him.

These allegations do not place respondents' conduct into the "narrow" class of cases finding a special relationship to support a negligence claim. (See *Minch, supra*, 140 Cal.App.4th at p. 905 [special relationship rule "is narrow, to be applied in a limited class of unusual cases"].) Appellant has not alleged facts to show that respondents created or increased any risks to him, as CSWC's acts of property damage began before respondents' involvement in the matter. Further, appellant's assertion that respondents failed to act to protect his property and failed to fully investigate whether CSWC had a right to enter, without more, are insufficient to create a special relationship between respondents and appellant. Although appellant alleged that respondents breached their duty of due care by deciding to accompany CSWC onto his property and failing to stop the ensuing damage, he has not alleged any precipitating acts by respondents to trigger such a duty.

We find appellant's cited cases distinguishable on their facts. In *Mann v. State of California* (1977) 70 Cal.App.3d 773, 776 (*Mann*), the police officer stopped to provide assistance to stranded motorists, pulling his vehicle behind theirs and turning on his flashing lights. After calling a tow truck, the officer withdrew without advising those present that he was leaving. As such, the officer "had undertaken to protect the plaintiff from future physical harm" and the plaintiff relied on that protection. (*Williams*, *supra*, 34 Cal.3d at p. 26; *Davidson*, *supra,* 32 Cal.3d at p. 208 [discussing *Mann*].)[13] Similarly, in *McCorkle v. City of Los Angeles, supra*, 70 Cal.2d 252, the officer who directed the plaintiff to follow him into the middle of the intersection, where the plaintiff was hit by a car, engaged in an affirmative act to place the plaintiff in peril. Appellant has alleged no such conduct here. Finally, the court in *Williams, supra*, 34 Cal.3d at p. 24 noted that a special relationship could be triggered where a police officer "voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance." However, the *Williams* court distinguished that circumstance from the case before it, finding no such relationship where the defendant officers allegedly failed to properly investigate an accident. (*Id*. at pp. 27-28.) We find that distinction persuasive, as here respondents "did not create the peril in which [appellant] found [him]self; they took no affirmative action which contributed to, increased, or

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[13] We also note that the *Mann* decision has been heavily criticized. (See, e.g., *Williams, supra*, 34 Cal.3d at pp. 25-26; *Minch, supra*, 140 Cal.App.4th at p. 903 ["although *Mann* has not been expressly disapproved, the legal foundations of its holding have since been rejected"].)

changed the risk which would have otherwise existed; . . . and there are no allegations of the requisite factors to a finding of special relationship, namely detrimental reliance by [appellant] on the officers' conduct, [or] statements made by them which induced a false sense of security and thereby worsened [his] position." (*Ibid*.)

8. *Leave to amend*

With respect to the causes of action we have affirmed, we also conclude that appellant has made no showing of an abuse of discretion by the trial court in denying leave to amend, or how he could amend his cross-complaint to state viable claims. Indeed, appellant's briefing on appeal makes no argument on this point as to his state law claims, nor has he provided any record of the basis of the trial court's ruling as to the FAXC. "'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations.]'" (*Goodman v. Kennedy, supra,* 18 Cal.3d at p. 349.) Thus, it is appellant's burden to "'show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]'" (*Ibid*.; see also *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 ["The plaintiff has the burden of proving that an amendment would cure the defect."].) Appellant has failed to sustain this burden. Therefore, we find no abuse of discretion in the trial court's denial of leave to amend as to the claims for extortion, conversion, trespass to chattel, inverse condemnation, and negligence.

B. *State immunities*

Because we find that appellant alleged sufficient facts to support his state tort claims for trespass to land, nuisance, and intentional infliction of emotional distress, we consider whether respondents can show their alleged acts or omissions were protected by one or more of California's immunity statutes with respect to those claims. (See *Easton v. Sutter Coast Hosp.* (2000) 80 Cal.App.4th 485, 490 [demurrer is properly sustained when complaint alleges facts that establish an affirmative defense of immunity]; *Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588, 1593 [demurrer may be based on defendant's absolute or qualified immunity].) Respondents have asserted immunities under six sections of the Government Code: the immunities related to discretionary acts (Gov. Code, § 820.2)[14], the execution or enforcement of laws (§ 820.4), the lawful entry onto property (§ 821.8), the failure to provide police protection (§ 845), and acts or omissions of others (§§ 815.2, 820.8).

Section 820.2 bars liability against a public employee where his or her "act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Respondents rely on *Watts v. County of Sacramento* (1982) 136 Cal.App.3d 232 to argue that this section applies to them.

In *Watts*, the plaintiffs entered into an agreement with a landowner to grow and harvest crops on the latter's land. When the plaintiffs arrived to harvest their crop, the owner ordered them off the property. (*Watts, supra*, 136 Cal.App.3d. at p. 234.) In the ensuing disagreement, the owner called the sheriff's

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[14] All further statutory references are to the Government Code unless otherwise specified.

department and informed them that he was the owner and the plaintiffs had no legal right to be on the property. The officers instructed the plaintiffs to leave, which they did, and the owner later converted the crops to his own use. (*Ibid.*) The plaintiffs sought damages for "'unlawful interference with [plaintiffs'] economic or business opportunity.'" (*Ibid.*)

The court found the claim barred pursuant to section 820.2. It reasoned: "'A decision to arrest, or to take some protective action less drastic than arrest, is an exercise of discretion for which a peace officer may not be held liable in tort.' [Citation.] Settling a disagreement as to plaintiffs' right to be on the land by ordering them to leave is clearly action short of arrest for which the officers are immune from liability." (*Watts, supra*, 136 Cal.App.3d. at p. 234.) The plaintiffs argued that the officers were liable for their failure to investigate whether the plaintiffs had a legal right to be on the property. (*Id.* at p. 235.) The court disagreed, finding that the officers' determination of how to handle the dispute was discretionary: "In order to settle the dispute the officers were obliged to exercise their discretion after they had observed what was happening and had listened to the explanation of those present. [Citation.]. . . . 'Such intrusions are . . . a regular and necessary part of police work conducted for the preservation of public safety and order,' and the decision to use this official authority on any particular occasion 'is peculiarly a matter of judgment and discretion' for which the officers (and defendant) may not be held liable in tort. [Citations.]" (*Ibid.*; see also *McCarthy v. Frost* (1973) 33 Cal.App.3d 872, 875 [the "decision of a peace officer to investigate or not investigate" was discretionary and therefore immune under section 820.2]; *Michenfelder v. City of Torrance* (1972) 28 Cal.App.3d 202, 205

[police immune for failure to act while defendants engaged in trespass and destruction of property].)

Here, respondents contend that their presence on appellant's property to "keep the peace" and assist in resolving the dispute between appellant and CSWC was an exercise of their discretionary authority and therefore immune from liability. This argument relies on *respondents*' version of events, rather than the allegations of the FAXC and SAXC. Appellant does not simply allege that respondents failed to determine whether CSWC had a right to enter the property, as it claimed, or failed to prevent CSWC from trespassing or destroying appellant's belongings while exercising their authority as police officers. Instead, he asserts that respondents actively assisted and encouraged the CSWC cross-defendants, including by "providing armed guard service." He further alleges that respondents' conduct was done repeatedly as part of an intentional effort to help CSWC because of the relationship between the water company and Richard, the GPD reserve officer. Moreover, both appellant's allegations and the police report attached to the SAXC suggest that the GPD had investigated and knew that Ferguson and Tavana had failed to provide any documentation supporting their claim of a right to enter appellant's property. Rather than discretionary conduct with the goal of settling a dispute, these allegations support appellant's claim that respondents were knowingly trespassing and assisting destruction of appellant's property when CSWC had no legal right to do so. Under these circumstances, we cannot find that section 820.2 immunity applies here. (See, e.g., *McCorkle v. City of Los Angeles, supra*, 70 Cal.2d at p. 261 [no immunity under section 820.2 "if the injury to another results,

not from the employee's exercise of 'discretion vested in him' to undertake the act, but from his negligence in performing it after having made the discretionary decision to do so"].) For the same reasons, appellant has adequately alleged facts to avoid immunity under section 820.4, which bars liability for a public employee's act or omission, "exercising due care, in the execution or enforcement of any law." Respondents' conclusory suggestion that they "exercised due care in enforcing the law" lacks citation to authority and ignores the procedural posture of this appeal from a demurrer.

Section 821.8, which bars liability for entry by a public employee "upon any property where such entry is expressly or impliedly authorized by law," is similarly inapplicable. As discussed above, appellant argues that respondents' entry onto his property was made without a warrant, consent, or exigent circumstances, in violation of his constitutional rights. Respondents' arguments to the contrary ignore the allegations of the complaint.

Respondents also contend that they cannot be liable for a "failure to provide adequate police protection" pursuant to section 845. That section provides: "Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." (§ 845.) But appellant has not alleged any such failure. Rather, he alleges respondents are liable for their trespass and assistance in the misconduct committed by CSWC. As such, section 845 does not apply.

Staab and Egan also raise an immunity claim under section 820.8, barring liability for the acts of other officers. That section

provides: "Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person." This immunity bar, however, does not apply when the public employee has some personal culpability for the injury. "Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission." (*Ibid.*; *O'Brien v. Olson* (1941) 42 Cal.App.2d 449, 463, [explaining that immunity for public employee supervisors does not apply if the superior countenanced or approved, or acquiesced in the tortious conduct]); cf. *Weaver v. State of California* (1998) 63 Cal.App.4th 188, 202–203 [affirming summary judgment where no personal involvement shown and no negligent supervision or negligent training alleged].)

Here, the SAXC alleges personal participation by Egan in the final incident on the property. As such, this section does not bar liability against him at this stage. As to Staab, respondents point out that there is no allegation he ever set foot on appellant's property and argue that he cannot be held vicariously liable for his subordinates' conduct under section 820.8. While he was not present on the property for the alleged incidents, the allegations in the SAXC assert more than vicarious liability against Staab. Instead, appellant alleges that Staab made the "conscious decision" to direct his officers to assist CSWC and continue to enter the property, despite his knowledge that CSWC had no right to be there and appellant had withdrawn his consent. Appellant also alleged that Staab ratified the actions of his officers. Based on these allegations, we cannot apply section 820.8 immunity at this time.

Finally, the GPD relies on section 815.2, subdivision (b) to bar liability against a public entity "for an injury resulting from

an act or omission of an employee of the public entity where the employee is immune from liability." Because the officers are not immune, this section is inapplicable.

DISPOSITION

We reverse the judgment as to the causes of action for trespass to land, nuisance, intentional infliction of emotional distress, and warrantless entry in violation of 42 U.S.C. section 1983. We otherwise affirm. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.