

1 property and the police's failure to return it to him. Defendants' are not immune from liability and
2 their demurrer to the Complaint should be denied.

3 4 **STATEMENT OF FACTS**

5 While on vacation in 1994, plaintiff James Blair ("Blair") suffered a serious neck injury from
6 a driving accident, which left him fully paralyzed with muscle spasms so severe that he had to be
7 strapped down to a gurney or chair twenty-four hours a day. (Complaint ¶ 17) At the suggestion of a
8 friend, Blair tried marijuana to control his muscle spasms and it helped him regain his ability to walk.
9 Today, Blair is a qualified medical marijuana patient who uses marijuana to control the involuntary
10 muscle spasms and pain he continues to suffer. (Complaint ¶ 17)

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12 To obtain the medicine he needs for this purpose, Blair cultivates marijuana in his apartment,
13 since for-profit purchases of marijuana, even for medical use, remains illegal under California law.
14 (Complaint ¶ 19; see Cal. Health & Safety Code § 11362.765(c).) Indeed, this is just what the voters
15 intended when they enacted the Compassionate Use Act. (See Cal. Health & Safety Code §
16 11362.5(d)) However, despite being well aware of Blair's status as a qualified medical marijuana
17 patient, his landlord reported his marijuana cultivation to the police who, in turn, obtained a warrant
18 which they used to ransack Blair's apartment, seize his thirty marijuana plants and cultivation
19 equipment, and forcibly arrest him. (Complaint ¶¶ 20-22) One officer tore down Blair's medical
20 marijuana recommendation from the wall of his grow room, crumpled it into a ball, and tossed it into
21 a corner. (Complaint ¶ 23) None mentioned Blair's medical marijuana recommendation or his status
22 as a medical marijuana patient in their police reports or their return to the search warrant. (Complaint
23 ¶ 24) Blair spent the next twelve hours in jail and a complaint was issued against him for marijuana
24 cultivation and possession. (Complaint ¶¶ 25-26)
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1 In the next several weeks, Blair's attorney informed the prosecutor of Blair's status as a
2 qualified medical marijuana patient and his physician faxed over a copy of his medical marijuana
3 recommendation, which prompted the prosecutor to dismiss all charges filed against Blair.
4 (Complaint ¶ 28) On April 20, 2004, Blair filed a motion for the return of his property, which was
5 granted by Superior Court Judge Brosnihan that same day. (Complaint ¶¶ 29 & 30) When Blair
6 presented the court order to Emeryville Police Department Sergeant Collier on April 21, 2004,
7 however, Sergeant Collier refuses to return it to him. (Complaint ¶ 31) Two months later, on June
8 28, 2004, the EPD notified Blair by letter that the City of Emeryville was the victim of a burglary
9 resulting in the loss of some of Blair's property, but it was now prepared to return the remainder to
10 him. (Complaint ¶ 32)

13 On September 23, 2004, Sergeant Collier returned a small fraction of the marijuana plants
14 taken from Blair with most of the usable plant matter having been cut from them. (Complaint ¶ 33)
15 Furthermore, the police notified Blair that it had lost most of his expensive cultivation equipment.
16 (Complaint ¶ 33) On December 9, 2004, Blair filed the instant Complaint for declaratory and
17 injunctive relief, and damages, asserting ten causes of action for conversion, takings, unreasonable
18 search and seizure, abuse of process, false arrest/imprisonment, violation of due process, violation of
19 the Bane Civil Rights Act, negligence, and intentional infliction of emotional distress. Defendants
20 demurrer to the Complaint on or about March 7, 2005.

23 LEGAL STANDARDS

24 A demurrer tests the legal sufficiency of the complaint, not the evidence or the facts alleged,
25 and will be sustained only where the pleading is defective on its face. (*City of Atascadero v. Merrill*
26 *Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459). To the extent that there are
27 factual issues in dispute, the court must assume the truth not only of all facts properly pled, but also
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1 of those facts that may be implied or inferred from those expressly alleged in the complaint. (*White*
2 *v. Davis* (1975) 13 Cal.3d 757, 765; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th
3 1397, 1403; *Rose v. Royal Ins. Co.* (1991) 2 Cal.App.4th 709, 716). If upon a consideration of these
4 facts it appears that the plaintiff is entitled to any relief at the hands of the court against the
5 defendants, the complaint will be held good, although the facts may not be clearly stated, or the
6 plaintiff may demand relief to which she is not entitled. (*Matteson v. Wagenor* (1905) 147 Cal. 739,
7 742). “While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic
8 principle of the code system in this state is that the administration of justice shall not be embarrassed
9 by technicalities, strict rules of construction, or useless forms.” (*Buxbom v. Smith*, 23 Cal.2d 535,
10 542).

13 ARGUMENT

14 I. DEFENDANTS ARE NOT STAUTORILY IMMUNE FOR THEIR MISCONDUCT

15 A. *Government Code Section 821.6 Does Not Apply to Plaintiff's Claims for False* 16 *Arrest/Imprisonment and the Related Claim for Intentional Infliction of Emotional* 17 *Distress*

18 To evade liability for their wrongful actions, defendants contend that the individual officers
19 are immunized from liability by Government Code section 821.6, which immunizes from damage
20 actions injuries caused by public employees by their instituting or prosecuting any judicial or
21 administrative proceeding within the scope of their employment. In *Scott v. County of Los Angeles*
22 (1994) 27 Cal.App.4th 125, however, the court admonished: “An immunity is, after all, a license to
23 *harm*. Thus, it should not extend beyond those functions which are so necessary to the public good
24 that the public benefit from the free exercise of discretion in such functions plainly outweighs the
25 private harm that may flow from misfeasance.” (*Ibid.* at 144) To this end, the California Supreme
26 Court has held that while Government Code section 821.6 shields police officers from damage
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1 actions for malicious prosecution, it does not immunize them for claims of false arrest and
2 imprisonment. (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 752-53 [citing Government
3 Code § 820.4]; *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720-22.) Thus, plaintiff's
4 claims for false arrest/imprisonment (sixth cause of action), and his related claim for intentional
5 infliction of emotional distress (tenth cause of action) should survive.
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7 *B. The Government Code Immunity Provisions Do Not Apply to Plaintiff's Statutory or*
8 *Constitutional Claims*

9 As to Blair's constitutional claims for takings/inverse condemnation (second cause of action),
10 unreasonable search and seizure (third cause of action), false arrest/imprisonment (fifth cause of
11 action), and violation of due process (seventh cause of action), the court held in *Young v. County of*
12 *Marin* (1987) 195 Cal.App.3d 863, that Governmental immunities do not defeat invasions of
13 constitutional rights. (*Ibid.* at 869-70). This holding was based on the Legislative Committee
14 Comment to Section 815, wherein the Legislature recognized: "This section abolishes all common
15 law or judicially declared forms of liability for public entities, *except for such liability as may be*
16 *required by the state or federal constitution ... In the absence of a constitutional requirement, public*
17 *entities may be held liable only if a statute ... is found declaring them to be liable."* (Emphasis added.)
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20 To like effect, Government Code section 815.2(b) expressly states that a public entity is
21 immunized from liability only "[e]xcept as otherwise provided by statute," so the public entity
22 defendants are not immune from Blair's eighth cause of action for violation of the Bane Civil Rights
23 Act. Neither can the individual officer defendants shield themselves from this statutory liability,
24 since the application of such immunity would frustrate the purposes served by that Act. (Cf.
25 *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1425)

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1 C. *Government Code Section 821.6 Does Not Apply to Torts That Occurred After the*
2 *Judicial Proceeding Has Been Completed or Prior to the Institution of the*
3 *Investigation*

4 Furthermore, the immunity provided by Government Code section 821.6 does not apply to
5 torts that occur after the judicial proceeding has been completed. (*Ogborn v. City of Lancaster*
6 (2002) 101 Cal.App.4th 448, 463; *Tallmadge v. County of Los Angeles* (1987) 191 Cal.App.3d 251,
7 253-55) In *Tallmadge, supra*, for instance, the court held that plaintiff properly stated a cause of
8 action for conversion, which was not defeated by the immunity provided by Government Code
9 section 821.6, based on the police's destruction of plaintiff's firearms without prior notice to him,
10 since the prosecution had ended by the time of the destruction. (*Tallmadge, supra*, 191 Cal.App.3d at
11 254-55) Here, similarly, the charges against Blair were dismissed in February of 1994 and the police
12 failed to return his property to him subsequent to that time. While it is not known by plaintiff when
13 his property was lost or destroyed by the police, such loss or destruction almost certainly occurred
14 after his prosecution had ended. Just as in *Tallmadge*, Blair has properly pled a cause of action for
15 conversion (first cause of action), which is not defeated by the section 821.6 immunity.
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18 Similarly, Blair's ninth cause of action for negligence is based on defendants' failure to
19 properly train the police who engaged in misconduct against Blair. Because this failure in training
20 predates any investigation of Blair, it is not subject to the immunity provided by section 821.6.
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22 In any event, the immunity provisions cited by the defendants do not have any bearing on any
23 of plaintiff's claims insofar as they seek declaratory and injunctive relief. (*See* Government Code §
24 814 ["Nothing in this part affects liability based on ... the right to obtain relief other than money or
25 damages against a public entity"]).
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1 **II. THE COMPLAINT PROPERLY STATES A CAUSE OF ACTION FOR VIOLATION**
2 **OF DUE PROCESS**

3 For similar reasons, plaintiff's seventh cause of action for violation of due process should not
4 be dismissed in its entirety. Although no cause of action for damages exists to remedy a violation of
5 Article I, Section 7(a) of the California Constitution (*Katzberg v. Regents of University of California*
6 (2002) 29 Cal.4th 300, 303), Blair is not seeking monetary damages through this case of action;
7 rather, he is seeking only declaratory and injunctive relief. Such remedies are available to remedy a
8 violation of due process. (*Ibid.* at 342-43)

10 **III. THE COMPLAINT STATES A VALID CAUSE OF ACTION FOR INVERSE**
11 **CONDEMNATION**

12 Turning to plaintiffs' claim for inverse condemnation, defendants contend that no such action
13 exists under Article I, Section 19 of the California Constitution in cases where law enforcement
14 exercise their police powers. In *House v. Los Angeles County Flood Control District* (1944) 25
15 Cal.2d 384, by sharp contrast, the court held that "[w]hile the police power is very broad in concept,
16 it is not without restriction in relation to the taking or damaging of property. When it passes beyond
17 proper bounds in its invasion of property rights, it in effect comes within the purview of the law of
18 eminent domain and its exercise requires compensation." (*Ibid.* at 388; *see also Rose v. City of*
19 *Coalinga* (1987) 190 Cal.App.3d 1627, 1634 ["The second situation authorizing an action in inverse
20 condemnation is where a governmental body, in the exercise of its police power to protect the public
21 health, destroys an owner's property in the absence of an emergency and compelling necessity
22 without according to the owner due process"]). Whether a police action is essential or reasonably
23 necessary to safeguard public health, safety, or morals depends on the particular facts of each case.
24 (*Hunter v. Adams* (1960) 180 Cal.App.2d 511, 523; *see also Echevarrieta v. City of Palos Verdes*
25 (2001) 86 Cal.App.4th 472, 479 ["The process for evaluating the constitutionality of a governmental
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1 [taking] involves an examination of its ‘justice and fairness,’ for which there is no set formula, and
2 the inquiry is ‘essentially ad hoc and fact intensive’” [quotation omitted]; *Blue Jeans Equities West*
3 *v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 168 [“there is no set formula for
4 determining what constitutes a ‘taking’; the courts rely instead on ad hoc, factual inquiries into the
5 circumstances of individual cases”]).

7 Seeking to avoid this fact-specific inquiry, defendants cite to *Customer Co. v. City of*
8 *Sacramento* (1995) 10 Cal.4th 368, 371, which held that an action for inverse condemnation will not
9 lie for incidental damages caused by the negligent actions of police officers seeking to avert an
10 impending peril. In reaching this holding, the court applied the traditional emergency exception to
11 the takings clause in light of the facts presented and, in so doing, emphasized that “[a]lways the
12 question in each case is whether the particular act complained of is without the legitimate purview
13 and scope of the police power. If it be, then the complainant is entitled to injunctive relief or to
14 compensation.” (*Ibid.* at 386 [quoting *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 638-39];
15 *see also ibid.* [“[T]his doctrine of noncompensable loss comes into play . . . only under ‘emergency’
16 conditions”] [quoting *Holtz v. Superior Court*, 3 Cal.3d 296, 305]). Thus, whether the emergency
17 exception applies to the facts of this case is a fact-specific inquiry, which is not amenable to
18 resolution on a demurrer. (*See, e.g., Committee on Children’s Television, Inc. v. General Foods*
19 *Corp.* (1983) 35 Cal.3d 197, 213; *see also Customer, supra*, 10 Cal.4th at 388 [citing examples of
20 legitimate exercises of police powers which might constitute takings]).

24 In any event, *Customer* is distinguishable for another reason. Crucial to the holding in
25 *Customer* was the fact that the damage caused by the police was the result of negligence; it was not
26 deliberate. (*See ibid.* at 382-85). In holding that the “action by the authorities did not constitute a
27 taking of *Customer*’s property within the meaning of section 19, because it constituted, at most, an
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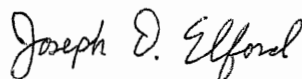
1 act of 'routine negligence,'" (*Customer, supra*, 10 Cal.4th at 385), the court was simply following a
2 long line of authority which distinguishes intentional invasions of property interests, which are
3 potential takings, from incidental or consequential injuries inflicted through negligence, which are
4 not. (*See, e.g., Ridge Line, Inc. v. United States* (Fed. Cir. 2003) 346 F.3d 1346, 1355 [collecting
5 cases]). This case, by sharp contrast, does not involve mere negligence, but, rather, the intentional
6 and calculated efforts of the defendants to deprive Blair of his property. This is a paradigmatic
7 example of a taking. (*Cf. House v. Los Angeles County Flood Control District, supra*, 25 Cal.2d at
8 389 & 391 ["there is recognized the incontestable proposition that the exercise of the police power,
9 though an essential attribute of the sovereignty for the public welfare and arbitrary in its nature,
10 cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights
11 as to the inviolateness of private property" "It is a principle of universal law that wherever the right to
12 own property is recognized in a free government, practically all other rights become worthless if the
13 government possesses an uncontrollable power over the property of the citizen"]]).

17 CONCLUSION

18 For the foregoing reasons, defendants' demurrer to the Complaint should be denied.

19 DATED: April 11, 2005

Respectfully submitted,

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23 Attorney for Plaintiff
24 JAMES BLAIR
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CERTIFICATE OF SERVICE

I am a resident of the State of California, not a party to this action, and over the age of eighteen years. My business address is 1322 Webster St., Suite 208, Oakland CA 94612. On April 11, 2005, I served the within document(s):

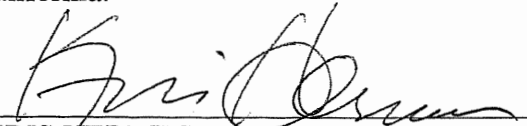
PLAINTIFF'S OPPOSITION TO DEFENDANTS' DEMURRER TO COMPLAINT

Via facsimile transmission and first-class mail to:

Dale L. Allen
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 11 day of April, 2005, in Oakland California.


KRIS HERMES