

2nd Civil No.

IN THE  
Court Of Appeal  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION \_\_\_\_\_

JAMES ELIASON,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF LOS ANGELES,

Respondent.

JAMES MINISTERI, JR.

Real Party in Interest.

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Hon. David M. Schacter, Judge  
Superior Court of Los Angeles County  
Order entered May 27, 2005, L.A.S.C. Case No. EC040322

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**PETITION FOR WRIT OF MANDAMUS;  
MEMORANDUM OF POINTS AND AUTHORITIES**

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## **I. Introduction**

### **A. Nature of the Proceeding**

Plaintiff James Ministeri, Jr., an employee of the County Department of Public Works, sued Defendant James Eliason, another employee of the County Department of Public Works, for injuries allegedly sustained from fumes in a County vehicle while Ministeri was performing work duties. The Superior Court overruled Eliason's demurrer to the complaint, which had argued that failure to comply with the Torts Claims Act and workers compensation preemption barred the cause of action. This Court should issue a writ of mandamus directing the Superior Court to set aside its determination and sustain the demurrer without leave to amend, because there is no question that Ministeri's claim is barred. Allowing this action to continue wastes judicial resources, and subjects Eliason to unnecessary expense and inconvenience.

### **B. Why Relief by Writ Is Warranted**

This Court should grant this Petition to prevent a needless and wasteful trial. If the Petition is denied, Petitioner will be forced to incur the cost of preparing for a trial, even though there is no legal merit to any of the causes of action alleged in the Complaint. In such circumstances, Petitioner's only adequate remedy is a writ.<sup>1</sup>

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<sup>1</sup> *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; *California Physicians' Service v. Superior Court* (1992) 9 Cal.App.4th 1321, 1330.

## **II. Petition**

By this verified Petition, Petitioner shows:

1. On February 14, 2004, Ministeri filed his complaint. A true and correct copy of the complaint is attached as Exhibit 1 to this Petition.

2. On April 20, 2005, 2005, Eliason filed his demurrer to the complaint. A true and correct copy of the demurrer is attached as Exhibit 2 to this Petition.

3. On May 18, 2005, Ministeri filed his opposition to the demurrer. A true and correct copy of the opposition is attached as Exhibit 3 to this Petition.

4. On May 20, 2005, Eliason filed his reply in further support of the demurrer. A true and correct copy of the reply is attached as Exhibit 4 to this Petition.

5. On May 27, 2005, the Superior Court conducted a hearing on the demurrer. A true and correct copy of the reporter's transcript of the proceedings on the hearing is attached as Exhibit 5 to this Petition.

6. At the conclusion of the hearing on May 27, the Superior Court overruled Eliason's demurrer. A true and correct copy of the minute order that overruled the demurrer is attached as Exhibit 6 to this Petition.

7. Unless an appropriate writ is granted, Petitioners will be forced to incur the costs of further proceedings and a full trial on the merits even though there is no legal basis for Ministeri to proceed with his claim. Petitioners has no adequate remedy at law or equity other than a writ.

WHEREFORE, Petitioner prays that this Court:

1. Issue a peremptory writ in the first instance directing the Superior Court to vacate its order of May 27, 2005 and enter an order sustaining the demurrer without leave to amend.

2. Alternatively, first issue an alternative writ directing the Superior Court either (a) to vacate its order of May 27, 2005, and enter an order sustaining the demurrer without leave to amend, or, in the alternative, (2) to show cause why it should not do so; and thereafter issue a peremptory writ directing the Superior Court to vacate its order of May 27, 2005, and enter an order sustaining the demurrer without leave to amend.

3. Award Petitioner his costs in this proceeding.

4. Grant such other and further relief as the Court may deem just and proper.

June \_\_\_\_, 2005

GUTIERREZ, PRECIADO & HOUSE, LLP  
Calvin House  
Nohemi Gutierrez Ferguson  
Eduardo Montelongo

By \_\_\_\_\_  
Calvin House  
Attorneys for Petitioners

### III. Verification

STATE OF CALIFORNIA        )  
  ) ss.  
COUNTY OF LOS ANGELES    )

I, Calvin House, am one of the attorneys for Petitioners in connection with this writ proceeding. I have personally reviewed and am familiar with the records, files and proceedings described in and the subject of the present Petition, and know the facts set forth in the Petition to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed: June \_\_\_\_, 2005

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Calvin House

## **IV. Memorandum of Points and Authorities**

### **A. Essential Facts Alleged in the Complaint**

Plaintiff James Ministeri, Jr. works for the County Department of Public Works. Defendant James Eliason also works for the Department of Public Works as a foreperson and Ministeri's supervisor. The alleged incident occurred on or near the Hansen Yard facility. This facility is a Flood Maintenance Yard operated by the Department of Public Works.<sup>2</sup>

In late October 2003, Ministeri complained to Eliason (in his capacity as a foreperson) that a co-worker was routinely smoking in a County vehicle that Ministeri had to use regularly.<sup>3</sup> A few days later, Ministeri retrieved that same County vehicle from a Department parking lot for a work project.<sup>4</sup> He got in, rolled up the windows, and started up the air conditioning. The cabin filled with noxious fumes that irritated Ministeri's eyes and the exposed areas of his skin, and made him dizzy and nauseous.<sup>5</sup> The fumes came from a type of toilet bowl deodorant used at Department work sites.<sup>6</sup>

When Ministeri was unable to locate the deodorant, he asked Eliason, his supervisor, to remove it. Eliason smirked and laughed, and then removed the source of the fumes.<sup>7</sup> Eliason had hidden the deodorant brick in the County

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<sup>2</sup> Ex. 1, ¶¶ 1-4, 7.

<sup>3</sup> Ex. 1, ¶ 7.

<sup>4</sup> Ex. 1, ¶ 8.

<sup>5</sup> Ex. 1, ¶¶ 8-11, 13, 15.

<sup>6</sup> Ex. 1, ¶ 12.

<sup>7</sup> Ex. 1, ¶ 14.

vehicle, knowing that Ministeri would use it in the course of his work duties, and intending to make the noxious fumes contact Ministeri's body.<sup>8</sup>

On February 14, 2005, Ministeri filed an action for battery. He did not allege that he filed a claim for damages with the County.

## **B. Proceedings in the Superior Court**

Eliason demurred to the complaint on the grounds that the Tort Claims Act and the Workers Compensation Act barred the cause of action. The Superior Court overruled the demurrer by minute order after a hearing on May 27, 2005, on the ground that the alleged injuries did not occur from conduct within the scope of employment.<sup>9</sup>

During the hearing, the Court expressed the view that a battery or intentional tort is always outside the scope of employment, unless the employee is a truck driver,<sup>10</sup> and then went on to say:

The law does not say the extent of it has to be just that you do something, intent to harm somebody else. You can cause harm, and you did cause harm. And that would be outside the scope of employment because no company would allow acts that would cause physical harm to a co-employee so that's where we are.<sup>11</sup>

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<sup>8</sup> Ex. 1, ¶ 16

<sup>9</sup> Ex. 6.

<sup>10</sup> Ex. 5, pp. 1:23-2:19 (“if he’s a truck driver, we expect him to punch people out, but everyone else, we don’t expect that”).

<sup>11</sup> Ex. 5, pp. 5:24-6:1.

## C. Argument

### 1. *The Tort Claims Act bars Ministeri's claim for personal injury allegedly caused by a public employee acting within the scope of his employment*

The Tort Claims Act requires an injured party to present a claim for damages as a condition precedent to commencing an action either against a public entity or against one of its employees for an act or omission in the scope of the employee's employment.<sup>12</sup> The courts "view 'scope of employment' broadly to include willful and malicious torts as well as negligence."<sup>13</sup> Courts interpret scope of employment under the Tort Claims Act as broadly as they do the same concept in private tort litigation.<sup>14</sup>

Compliance with the claims filing requirement is an essential element of the cause of action, and must be alleged in the complaint.<sup>15</sup> Failure to allege

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<sup>12</sup> Gov. Code, §§ 945.4, 950.2.

<sup>13</sup> *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1751 (actions amounting to malicious prosecution fell within scope of employment); *Bailargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 682 (claim for intentional infliction of emotional distress was within scope of employment); *Tietz v. Los Angeles Unified School Dist.* (1965) 238 Cal.App.2d 905, 911 (the requirement to file a claim "on its face includes actions for either negligence or intentional torts").

<sup>14</sup> *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.

<sup>15</sup> *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239; *Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1119; *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613.

facts demonstrating or excusing compliance with the claim requirement subjects a complaint to a demurrer for failure to state a cause of action.<sup>16</sup>

There was no dispute in the Superior Court about the effect of Ministeri's failure to allege compliance with the claims requirement. The only question was whether Eliason's actions were in the scope of his employment. The Superior Court ruled that they were not, apparently in the erroneous belief that intentional conduct amounting to a battery could not fall within the scope of employment.<sup>17</sup> Court of Appeal decisions make clear that "scope of employment" includes intentional actions that cause injuries far more severe than those alleged by Ministeri. Two cases illustrate the point well:

1. In *Carr v. Wm. C. Crowell Co.*,<sup>18</sup> defendant contractor's employee got in a dispute with plaintiff, an employee of a subcontractor, over the timing of certain work at a construction site. The contractor's employee became upset when the plaintiff kicked a plate that the contractor's employee was tacking in place. In retaliation, the contractor's employee "threw his carpenter's hammer at plaintiff, striking him on the head and seriously injuring him."<sup>19</sup> The Supreme Court ruled that the action of throwing the hammer was in the scope of

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<sup>16</sup> *State of California, supra; City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.

<sup>17</sup> See Ex. 5:2:15-18 ("This was an overt act, a physical act, because something physically was done to cause harm—I'm just giving you broad words—to cause harm to the plaintiff, and it's an intentional tort"), 5:13-17 ("What I'm trying to get at is it was a reprisal for something that the guy did causing to hurt him, and it's still a battery, and that's not condoned, and that's not in your working limitations or work policy").

<sup>18</sup> (1946) 28 Cal.2d 652.

<sup>19</sup> *Id.* at p. 653.

employment, explaining that the nature of the defendant's business required its employees to associate with third parties, "attended by the risk that someone might be injured."<sup>20</sup>

Such associations "include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional makeup. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. ... These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment."<sup>21</sup>

In the present case, working for the County brought Ministeri and Eliason together, and created friction between them, resulting in fun-making and an emotional flare-up that were inseparable from the fact that the two worked together. The fun-making that resulted from Eliason's emotional flare-up, the insertion of a deodorizing device into a County vehicle in response to a complaint about a co-worker's smoking, carried with it a risk of injury to anyone who would react adversely to the resulting fumes. But, that risk was inherent in the working environment.

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<sup>20</sup> *Id.* at p. 656.

<sup>21</sup> *Ibid.*, quoting from *Hartford Accident & Indemnity Co. v. Cardillo* (D.C. Cir. 1940) 112 F.2d 11, 15.

2. The Supreme Court determined that a state police officer was acting within the scope of his employment when he pulled over a motorist and subjected her to a field sobriety test, and then, instead of placing her under arrest, drove her home, where he raped her.<sup>22</sup> The determinative question was whether, “in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.”<sup>23</sup> It did not matter that the police officer was not engaged in the ultimate object of his employment when he assaulted the motorist. The dispositive decisive factor was that the rape “was committed in the course of a series of acts of the [police officer] which were authorized by the [State].”<sup>24</sup>

Likewise here, it is not unusual or startling that a supervisor might overreact to one employee’s complaint about the conduct of another employee. There is no question that Eliason was acting in the scope of employment when he fielded the complaint as Ministeri’s supervisor, and contemplated how to respond to it. Eliason was also acting in the scope of employment when he removed the deodorant after Ministeri asked him as a supervisor to remove it. Eliason placed the deodorant in the car in the course of a series of acts that the County authorized Eliason to perform in his capacity as a supervisor.<sup>25</sup>

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<sup>22</sup> *Mary M.*, *supra*.

<sup>23</sup> *Mary M.*, *supra*, 54 Cal.3d at p. 209.

<sup>24</sup> *Id.* at p. 219.

<sup>25</sup> Many other courts have held that intentional actions that cause harm are in the scope of employment. See *Fields v. Sanders* (1947) 29 Cal.2d 834

Since the facts that Ministeri affirmatively alleged in his complaint establish that Eliason was acting in the scope of his employment, it would be futile to permit an amendment. This Court should direct the Superior Court to grant Eliason's demurrer without leave to amend.<sup>26</sup>

**2. *The Workers Compensation Act provides the exclusive remedy for Ministeri's claim for personal injury allegedly caused by a co-worker while both were performing work duties***

An employee who sustains an industrial injury arising out of and in the course of the employment is limited to recovery under the Workers Compensation Act.<sup>27</sup> The exclusivity of the workers compensation remedy extends to claims against fellow employees acting within the scope of their employment, even if "horseplay" caused the injury.<sup>28</sup>

Although the standards are not exactly the same, courts determine whether an act is within the scope of employment under the Workers Compensation Act by using principles similar to those used to determine scope of employment in tort actions. Under those standards, "willful, malicious and

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(during a traffic dispute one driver struck another twice with a wrench, knocking him unconscious); *Ruppe v. City of Los Angeles* (1921) 186 Cal. 400 (city meter-setter assaulted an apartment building owner's agent when she objected to his entry); *Jones v. City of Los Angeles* (1963) 215 Cal.App.2d 155 (assault and battery by police officers).

<sup>26</sup> See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186 (where facts alleged did not support the legal theory relied on, plaintiff should not be given leave to amend to assert legal conclusions).

<sup>27</sup> *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001.

<sup>28</sup> *Id.* at pp. 1002, 1006

even criminal torts” may be committed within the scope of employment.<sup>29</sup> “To be within the scope of employment, the incident giving rise to the injury must be an outgrowth of the employment, the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer’s enterprise.”<sup>30</sup> “Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to ‘physical act[s] of aggression.’”<sup>31</sup>

Considering, as we may, the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay. Any doubt upon that subject, under the recent decisions of this court, must be resolved in favor of compensability. Accordingly, an injury sustained by a nonparticipating employee through the horseplay of fellow workers arises ‘out of’ and ‘is proximately caused by the employment’ within the meaning of section 3600 of the Labor Code.<sup>32</sup>

Ministeri’s injury arose from exactly those risks that the Supreme Court has identified as inherent in the workplace. He and Eliason both worked for the County. The incident arose from Ministeri’s complaint to his supervisor that a co-worker routinely smoked in a County vehicle that Ministeri used for work. The fumes that caused the injury were from a type of toilet bowl deodorant used at County work sites. When Ministeri complained to Eliason as his supervisor about the fumes, Eliason removed the deodorant. The Superior

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<sup>29</sup> *Id.* at p. 1008.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Id.* at p. 1009.

<sup>32</sup> *Pacific Employers Ins. Co. v. Industrial Accident Com.* (1945) 26 Cal.2d 286, 294.

Court's notion that the claim fell outside workers compensation exclusivity because "no company would allow acts that would cause physical harm to a co-employee"<sup>33</sup> is plainly wrong. Workers compensation is generally the exclusive remedy for "injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee."<sup>34</sup>

Although Ministeri argued that workers compensation was not his exclusive remedy because the alleged battery was caused by a willful and unprovoked act of aggression under Labor Code section 3601, subdivision (a)(1), that exemption from exclusivity does not apply here. That exception requires proof of "aggressive physical conduct,"<sup>35</sup> and "an intent to inflict injury or harm."<sup>36</sup> The facts that Ministeri alleged do not establish either element:

1. Ministeri alleges that Eliason placed a toilet deodorizer in the County vehicle that Ministeri used for work. That act does not involve any aggressive physical conduct toward Ministeri. It was done outside Ministeri's presence and does not constitute physical conduct under the common sense meaning of the term. The complaint does not satisfy the standard that "a physical act causing a reasonable fear of harm must be pleaded and proved."<sup>37</sup>

2. There is nothing in the complaint that would reasonably lead a reader to find an intent to injure. The complaint alleges that defendant hid a deodor-

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<sup>33</sup> Ex. 5, pp. 5:26-6:1.

<sup>34</sup> *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 714.

<sup>35</sup> *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 225.

<sup>36</sup> *Torres, supra*, 26 Cal.4th at p. 1005.

<sup>37</sup> *Iverson, supra*, 143 Cal.App.3d at p. 225.

ant bar in a County vehicle and then laughed at plaintiff. This is not enough. Importantly, the hiding of a deodorant bar in a County vehicle is not an overt act which arose out of a series of hostile, verbal, psychological, and physical acts that caused a quarrel and elicited the ultimate injury. At most, the complaint alleges a prank—not a “willful and unprovoked physical act of aggression.” Under these circumstances, the Workers Compensation Act provides the exclusive remedy.

Although the complaint also alleges an indifference to the safety of plaintiff, that is not enough to take the claim outside workers compensation exclusivity. The Legislature has eliminated the exception to workers compensation exclusivity for a co-employee’s act that evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee.<sup>38</sup>

The affirmative allegations of Ministeri’s complaint establish beyond question that the Workers Compensation Act provides his exclusive remedy for the injuries claimed. This Court should direct the Superior Court to grant Eliason’s demurrer without leave to amend.

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<sup>38</sup> *Torres, supra*, 26 Cal.4th at p. 1002, fn. 4.

## **V. Conclusion**

The Superior Court overruled Eliason's demurrer in the mistaken belief that alleging intentional conduct that caused harm was sufficient to exempt the claim from the Tort Claims Act and the exclusive remedy provisions of the Workers Compensation Act. Since the law is clear that intentional torts are within the scope of employment, Ministeri's battery claim is barred both for failure to file a claim for damages as required by the Tort Claims Act, and by workers compensation exclusivity.

June \_\_\_\_, 2005

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## **VI. Certificate of Counsel**

Counsel of record hereby certifies that, pursuant to Rule 14(c)(1) of the California Rules of court, the enclosed Petition for Writ of Mandamus was produced using 13-point Times New Roman type style and contains approximately 3,329 words. In arriving at that estimate, counsel has relied on the word count function of Microsoft Word 2003, which was used to prepare the document.

June \_\_\_\_, 2005

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