CASE NO. 94077005

Part ____ of ____ Parts

In The Circuit Court for Baltimore City

CIVIL

In the Matter of

KENNETH FITCH, ETAL

VS.

FREDERICK W. DEJONG, ETAL

C
L

1776675

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * *

MEMORANDUM FOR RULE 2-507 (E) HEARING

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Plaintiffs, by their attorney, David B. Shapiro, files this Memorandum for Rule 2-507 (E) Hearing:

(a) Plaintiffs work at the Department of General Services' Saratoga Center. Defendant DeJong was Superintendent of the Saratoga State Center and supervised the Plaintiffs. Plaintiffs claim that DeJong made use of recording devices at the Saratoga Center facility and monitored these devices, intercepting oral communications and making unauthorized tape recordings of Plaintiffs' conversations. Also, DeJong engaged in abusive behavior towards the Plaintiffs, including the use of intimidation and harassment, threatening arbitrary firings, and forcing employees to have their fingerprints and photographs taken. Until 1996, Saratoga Center was in poor condition and working there posed serious health problems to the Plaintiffs.

In December 1992, Plaintiff Fitch submitted his resignation to the State Personnel Department and demanded an immediate investigation about improper activities at Saratoga Center. In January 1993, the Maryland State Police conducted an

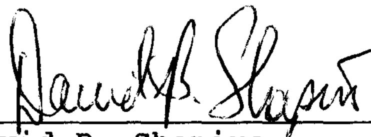
investigation at the Saratoga Center and recovered recording equipment used by DeJong; he was promptly relieved of his duties and immediately thereafter left State service. Plaintiffs filed their Complaint on March 14, 1994.

(b) Discovery has not been completed. At the last of two chambers conference before the Honorable Hilary D. Caplan the parties were to attempt to reach a settlement and report back to Judge Caplan. However, due to Judge Caplan's retirement from the bench, the parties agreed to wait until this case was reassigned to another judge. No further effort was made by either side to continue with discovery.

(c) Defendants' Partial Motion to Dismiss Amended Complaint filed on or about November 14, 1994 has not been answered as the parties were engaged in settlement discussions and Plaintiffs' attorney had the belief that all parties would not continue to litigate this matter until a new judge was assigned to this case or a settlement was reached, whichever occurred the sooner. Unfortunately, neither of these possibilities occurred.

(d) Estimated length of trial: 3 days.

(e) Aside from the issues of wages to be paid these state employees when they are on-duty but away from their work site, demand of money is not central to these proceedings.



David B. Shapiro
1101 St. Paul St., Suite 407
Baltimore, Maryland 21202
410-576-9100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of April, 1996, a copy of the foregoing Memorandum for Rule 2-507 (E) Hearing was hand-delivered to Andrew H. Baida, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202 and John H. Thornton, Assistant Attorney General, Department of General Services, 300 West Preston Street, Room 403, Baltimore, Maryland 21202, Attorneys for Defendants.

David B. Shapiro

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 03/20/96

PRESIDING JUDGE Joseph H. H. Kaplan

COURTROOM CLERK

STENOGRAPHER

ASSIGNMENT FOR TUESDAY APRIL 02, 1996 P12 830

CASE NUMBER - 94077005
CASE TITLE - FITCH, ETAL DEJONG, ETAL CL177675 CL
CATEGORY - OTHER TORT
PROCEEDING - MOTION GENERAL RULE 2-507 (3)

*MARYLAND DEPT OF GENERAL SERVICES	DEFENDANT	
SAIDA, ANDREW H	DEFENSE ATTORNEY	576-6318
THORTON, JOHN H	DEFENSE ATTORNEY	225-4990
SHAPIRO, DAVID	PLAINTIFF ATTORNEY	576-9100

The State Defendants have cured the environmental ~~XXXXXX~~ problems and have modified or are modifying the beeper policy, and Frederick W. DeJong is no longer an employee of the involved agency. Accordingly, there is nothing that remains in this case. ~~and it is Dismissed Without Prejudice. Plaintiffs to pay the costs.~~ Good cause for suspension of Rule 2-507 not having been shown, the case is Dismissed Without Prejudice. Plaintiffs to pay the costs.

TYPE OF PROCEEDING: (JURY) (NON-JURY) (OTHER)

DISPOSITION (CHECK ONE)

(SETTLED)	(CANNOT SETTLE)	(NEXT COURT DATE)
(VERDICT)	(REMANDED)	(X NON PROS/DISMISSED)
(JUDGEMENT NISI)	(ORDER/DECREE SIGNED)	(OTHER) PLEASE EXPLAIN:
(JUDGEMENT ABSOLUTE)	(ORDER/DECREE TO BE SIGNED)	
(POSTPONED)	(MOTION GRANTED)	
(SUB CURIA)	(MOTION DENIED)	

JUDGE SIGNATURE DATE April 2, 1996

JUDGE JOSEPH H. H. KAPLAN

KENNETH FITCH, *et al.*,	: IN THE
Plaintiffs	: CIRCUIT COURT
vs.	: FOR
FREDERICK W. DEJONG, *et al.*,	: BALTIMORE CITY
Defendants	: CASE NO. 94077005/CL177675

: : : : : : : : : : : :

MEMORANDUM OF DEFENDANTS
ON MOTION TO DEFER DISMISSAL

Frederick W. DeJong, the State of Maryland, and the Maryland Department of General Services, Defendants, submit this Memorandum on Motion to Defer Dismissal as required by the scheduling notice issued January 22, 1996.

I. Statement of Facts in Support of Each Defense

A. COUNT I - Invasion of Privacy, and COUNT II - Intentional Infliction of Emotional Distress (Based on allegations of wiretapping and surveillance by Defendant DeJong)

1. No wiretapping or surveillance occurred. (See the affidavit of Maryland State Police Sgt. James S. Wright: "My investigation failed to develop probable cause to support allegations that Frederick DeJong (1) conducted unlawful wiretapping or other unlawful electronic surveillance of any telephone conversations of any employees...; (2) used electronic devices...; or (3) made unauthorized tape recordings.... No wiretapping or electronic listening devices or equipment and no unauthorized tape recordings... were found.")

2. The same claims were made in Counts III and IV of Plaintiffs' original complaint and these claims were dismissed with prejudice as to the State and DGS by the Court's Memorandum Opinion and Order of October 3, 1994. The Court said, "Plaintiffs cannot recover from the State or DGS [on the grounds] raised in Counts...

III and IV under any statement of facts or theory of law."

3. The State has sovereign immunity against any wiretapping or unlawful surveillance by Defendant DeJong. Such acts by definition would have been committed with malice or gross negligence and would not have been within scope of Defendant DeJong's employment.
4. Plaintiffs' sole remedy for any physical injuries or conditions resulting from the alleged acts by Defendant DeJong would be by way of a claim for Worker's Compensation.
5. Plaintiffs failed to exhaust administrative remedies (the mandatory grievance procedure established by law for State employees).
6. Defendant DeJong is immune from liability if his acts were merely negligent.

B. COUNT III - Strict Liability (Unhealthy Work Environment)

1. The identical claim was presented in Count V of Plaintiffs' original complaint. As to Defendant DeJong, it was dismissed with prejudice because Defendant DeJong was not responsible for Plaintiffs' work environment. As to the State and DGS, it was dismissed because "Plaintiffs' only remedy for such injury is under the [Workers' Compensation Act]" (Memorandum Opinion and Order of October 3, 1994 at 21) and because Plaintiffs failed to exhaust their mandatory administrative remedy under the State's grievance procedure.
2. The work environment was not unhealthy.

C. COUNT IV - Breach of Contract (No Compensation for Carrying Pagers)

1. The identical claim was presented in Count VI of Plaintiffs' original complaint. As to Defendant DeJong, it was dismissed with prejudice because there was no contract between Plaintiffs and Defendant DeJong, their supervisor. As to the State and DGS, the claim was dismissed with leave to amend to allow Plaintiffs to allege the existence of a written contract between Plaintiffs and the State (the State has sovereign immunity against contract claims based on implied contracts). However, the Amended Complaint fails to allege the existence of such a written contract with either the State or Defendant DeJong.
2. Plaintiffs are entitled to no compensation for carrying pagers. There were no substantial restrictions on Plaintiffs' activities or movement while they were carrying pagers while off-duty.
3. Plaintiffs failed to exhaust their mandatory, exclusive administrative remedy, the grievance procedure established by State law.

C. AS TO ALL COUNTS

Defendants will contest and disprove the nature, extent, and dollar value of injuries and damages allegedly incurred by Plaintiffs.

II. Status of Discovery

On or about October 7, 1994, Defendants served on Plaintiffs Interrogatories which have not yet been answered. Plaintiffs have sent no discovery requests to Defendants.

III. Status of Pretrial Motions other than Discovery

On or about November 14, 1994, Defendants filed a Partial Motion to Dismiss Amended Complaint. This motion seeks dismissal of all counts as to the State and DGS and of Counts III and IV as to Defendant DeJong.

Plaintiffs and Defendants agreed to allow Plaintiffs an extension of time until January 2, 1995 to answer this motion in order for the parties to continue settlement discussions. In approximately March of 1995 the parties through their attorneys orally agreed to a settlement which Plaintiffs in April of 1995 refused to complete. Since then Plaintiffs have not answered Defendants' motion for partial dismissal and the court has not ruled on it.

IV. Estimated Length of Trial

One week.

V. Plaintiffs' Lowest Demand to Date; Defendants' Highest Offer to Date

The parties had orally agreed to settlement on the following terms:

A. Plaintiffs would dismiss with prejudice and release all claims against all parties except Plaintiffs reserved the right to file Workers' Compensation claims (and the State and DGS reserved all defenses to such claims).

B. DGS would revise its policy concerning the carrying of pagers while off-duty to clarify that the employees need not restrict their activities (the language of the policy was agreed on by the parties).

C. DGS would attempt to obtain funding for the completion of certain heating, ventilation, and air conditioning ["HVAC"] work in Plaintiffs' workspace and upon the availability of funding would proceed promptly to procure a contractor and complete the HVAC work. (DGS in fact did obtain this funding, the work has started, and it should be completed by May 1, 1996 if there are no delays.)

D. DGS would pay for one medical evaluation of each Plaintiff per year by the State Medical Director, starting from the date of the settlement agreement and ending one year

following completion of the HVAC work in Plaintiffs' workspace.

E. DGS would give Plaintiffs copies of any statements they signed concerning the inquiry into Defendant DeJong's management of the Saratoga State Center.

Plaintiffs subsequently backed out of this oral agreement before signing the written agreement. They have since made two additional demands on Defendants: (1) that DGS agree to compensate Plaintiffs either in cash or compensatory time for carrying pagers while off-duty; and (2) that the State pay for medical evaluations for two years (rather than one) following completion of the HVAC work.

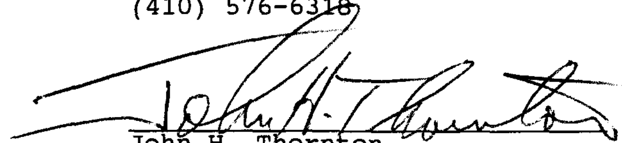
The State is prohibited by State law from granting Plaintiffs cash or compensatory time for carrying pagers while off-duty (because there is no substantial restriction on Plaintiffs' activities). Therefore, Plaintiffs have requested that DGS agree that in the event of an emergency at Saratoga State Center, DGS will rotate emergency calls not just among the Saratoga State Center employees but also among employees from the 301 W. Preston Street State Office Complex or from other State buildings. However, DGS cannot agree to this. First, in the event of an emergency DGS would have to call in personnel familiar with the equipment involved (i.e., the workers who work with it daily) rather than workers from some other complex. Second, and more importantly, the workers at Saratoga are funded through the Department of Human Resources while the employees at other State buildings are funded through DGS or other sources. DGS has no authority to use employees who have been funded by the General Assembly from an operating budget for one building to do work at Saratoga, which is funded through DHR's operating budget.

DGS will still agree to a settlement substantially on the terms previously agreed to.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Andrew H. Baida
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

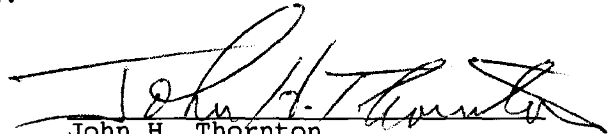


John H. Thornton
Assistant Attorney General
Department of General Services
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2d day of April 1996, a copy of the foregoing Memorandum of Defendants on Motion to Defer Dismissal was hand-delivered to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.



John H. Thornton
Assistant Attorney General

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 02/12/96

19

PRESIDING JUDGE Joseph H. H. Kaplan

COURTROOM CLERK ....

STENOGRAPHER ....

ASSIGNMENT FOR MONDAY FEBRUARY 26, 1996 P12 9:00 A.M.

CASE NUMBER - 94077005
CASE TITLE - FITCH, ETAL DEJONG, ETAL CL177675 CL
CATEGORY - OTHER TORT
PROCEEDING - MOTION GENERAL RULE 2-507 (E)

*MARYLAND DEPT OF GENERAL SERVICES	DEFENDANT	
BAIDA, ANDREW H	DEFENSE ATTORNEY	576-6318
THURTON, JOHN H	DEFENSE ATTORNEY	225-4990
SHAPIRO, DAVID	PLAINTIFF ATTORNEY	576-9100

Case postponed to April

TYPE OF PROCEEDING: (____ JURY) (____ NON-JURY) (____ OTHER)

DISPOSITION (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____ NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____ NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (____ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEMENT ABSOLUTE) (____ ORDER/DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATURE ____________ DATE February 26, 1996

JUDGE JOSEPH H. H. KAPLAN

KENNETH FITCH, *et al.*, : IN THE
Plaintiffs : CIRCUIT COURT
vs. : FOR
FREDERICK W. DEJONG, *et al.*, : BALTIMORE CITY
Defendants : CASE NO. 94077005/CL177675

: : : : : : : : : : : :

ANSWER TO MOTION TO DEFER MARYLAND RULE 2-507

Defendants, by their undersigned attorneys, oppose the Motion to Defer Maryland Rule 2-507 and as grounds therefor say:

1. The parties through their attorneys had orally agreed to a settlement of this case in February of 1995, nearly a year ago.

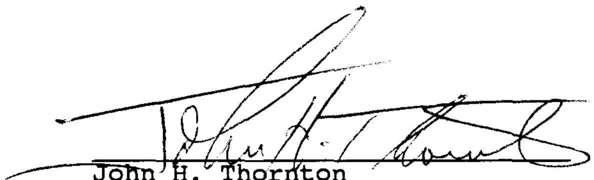
2. In reliance on that settlement and the negotiations that led up to it, Defendants had granted Plaintiffs an extension of time for answering Defendants' Partial Motion to Dismiss Amended Complaint, filed on or about November 14, 1994, and an extension of time for answering Defendants' Interrogatories served on or about October 7, 1994.

3. Plaintiffs subsequently reneged on the settlement agreement. For a brief time Plaintiffs attempted to negotiate new terms with Defendants but then for many months Defendants heard nothing at all from Plaintiffs until the filing of the Motion to Defer Rule 2-507. In the meantime, Plaintiffs have still not answered Defendants' Interrogatories or Defendants' Partial Motion to Dismiss Amended Complaint (which is based on grounds found to be meritorious by the Court in its October 3, 1994 order partially granting Defendants' Motion to Dismiss the original Complaint).

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Andrew H. Baida
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318



John H. Thornton
Assistant Attorney General
Department of General Services
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9th day of January 1996, a copy of the foregoing Answer to Motion to Defer Maryland Rule 2-507 was mailed to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.

John H. Thornton
Assistant Attorney General

17/98

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

RECEIVED
CIRCUIT COURT FOR BALTIMORE CITY
1996 JAN 12 A 8:41
CIVIL DIVISION

* * * * * * * * * * * * *

MOTION TO DEFER MARYLAND RULE 2-507

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Plaintiffs, by their attorney, David B. Shapiro, files this Motion to Defer Maryland Rule 2-507 and respectfully represents unto this Honorable Court the following:

1. That Plaintiffs filed this action on March 18, 1994.

2. That this case was originally assigned to Judge Hollander who presided over this matter when preliminary motions to dismiss or for summary judgment were filed by the defendants. In August 1994, Judge Hollander, just prior to taking her seat on the Court of Special Appeals, ruled on the defendants' motion and allowing plaintiffs time to file an amended complaint.

3. That this case was reassigned to Judge Hilary D. Caplan who met with counsel to the parties on two occasions in which settlement negotiations were underway.

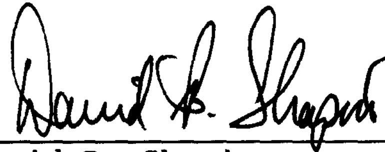
4. That in August 1995, Judge Caplan retired from the Circuit Court for Baltimore City and that, to the best knowledge of this writer, this matter has not yet been reassigned to another judge.

5. Plaintiffs, having been unable to reach a settlement in

this matter, are prepared to go forward with this matter and wish to have a revised scheduling order put into place by the court.

WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

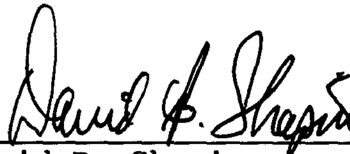
A. Pass an Order granting that the deferment of Maryland Rule 2-507.



David B. Shapiro
1101 St. Paul St., Suite 407
Baltimore, Maryland 21202
410-576-9100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January, 1996, a copy of the foregoing Plaintiffs' Motion to Defer Maryland Rule 2-507 was mailed first class, postage prepaid to Andrew H. Baida, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202 and John H. Thornton, Assistant Attorney General, Department of General Services, 300 West Preston Street, Room 403, Baltimore, Maryland 21202, Attorneys for Defendants.



David B. Shapiro

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et at.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * *

ORDER TO DEFER MARYLAND RULE 2-507

Upon consideration of the above-referenced Motion, and being submitted, the Complaint for Adoption and all the other proceedings,

It is by this Court on this ___ day of ______________, 1996,

ORDERED: that the Motion to defer Maryland Rule 2-507 be granted.

____
JUDGE

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et at.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * *

ORDER TO DEFER MARYLAND RULE 2-507

Upon consideration of the above-referenced Motion, and being submitted, the Complaint for Adoption and all the other proceedings,

It is by this Court on this ___ day of _____________, 1996,

ORDERED: that the Motion to defer Maryland Rule 2-507 be granted.

____
JUDGE

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

*MARYLAND DEPT OF GENERAL SERVICES
S/O ALAN BLUMBERG, ESQ.
200 ST. PAUL PL-20TH FL
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

BAIDA, ANDREW H
ASSISTANT ATTY GENERAL
200 ST. PAUL STREET
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CIRCUIT COURT FOR BAL[illegible]

CASE NUMBER 94077005 FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE *DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE *, 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

C

THORTON, JOHN H
300 W. PRESTON STREET
ROOM 403
BALTIMORE MD 21201

CIRCUIT COURT FOR BALTIMORE CITY

CASE NUMBER 94077005 FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE *DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A W[illegible] MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISS[illegible]

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMOR[illegible]

DATE OF MAILING 12-[illegible]

C

SHAPIRO, DAVID
1101 SAINT PAUL ST.
SUITE 405
BALTIMORE MD 21202

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

*MARYLAND DEPT OF GENERAL SERVICES
S/O ALAN BLUMBERG, ESQ.
200 ST. PAUL PL-20TH FL
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

BAIDA, ANDREW H
ASSISTANT ATTY GENERAL
200 ST. PAUL STREET
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

THORTON, JOHN H
300 W. PRESTON STREET
ROOM 403
BALTIMORE MD 21201

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

SHAPIRO, DAVID
1101 SAINT PAUL ST.
SUITE 405
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

"MARYLAND DEPT OF GENERAL SERVICES
S/O ALAN BLUMBERG, ESQ.
200 ST. PAUL PL-20TH FL
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

BAIDA, ANDREW H
ASSISTANT ATTY GENERAL
200 ST. PAUL STREET
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

THORTON, JOHN H
300 W. PRESTON STREET
ROOM 403
BALTIMORE MD 21201

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

CASE NUMBER
94077005

CIRCUIT COURT FOR BALTIMORE CITY

FITCH, ETAL DEJONG, ETAL CL177675

DOCKET FOLIO

NOTIFICATION TO PARTIES OF CONTEMPLATED DISMISSAL

PURSUANT TO MARYLAND RULE 2-507 THIS PROCEEDING WILL BE "DISMISSED FOR LACK OF JURISDICTION OR PROSECUTION WITHOUT PREJUDICE ", 30 DAYS AFTER SERVICE OF THIS NOTICE, UNLESS PRIOR TO THAT TIME A WRITTEN MOTION SHOWING GOOD CAUSE TO DEFER THE ENTRY OF AN ORDER OF DISMISSAL IS FILED.

COSTS WILL BE ASSESSED IN ACCORDANCE WITH THE MARYLAND RULES.

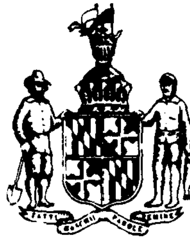
SHAPIRO, DAVID
1101 SAINT PAUL ST.
SUITE 405
BALTIMORE MD 21202

SAUNDRA E. BANKS, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DATE OF MAILING 12-13-95

File

J. JOSEPH CURRAN, JR.
Attorney General



NORMAN E. PARKER, JR.
RALPH S. TYLER
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER NO.

(410) 576-6955

WRITER'S DIRECT DIAL NO.

(410) 576-6318

April 7, 1995

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
APR -7 PM 4:16
CIVIL DIVISION

The Honorable Hilary D. Caplan
Circuit Court for Baltimore City
Courthouse East
Room 205
111 N. Calvert Street
Baltimore, MD 21202

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*,
Case No. 94077005/CL177675

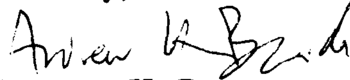
Dear Judge Caplan:

I am writing to ask that the Court schedule a meeting with counsel for the parties to discuss the future litigation of the above case. On February 1, 1995, I sent the Court a letter stating that the parties agreed to settle this case. I wrote that letter because the plaintiffs' counsel, David Shapiro, told me that the plaintiffs agreed to accept the terms of the defendants' settlement offer. Notwithstanding Mr. Shapiro's clear and unequivocal representation that his clients agreed to settle this case on those terms, he has informed me today that the plaintiffs are now unwilling to settle.

In reliance on Mr. Shapiro's prior representation, the defendants have not pressed for a ruling on their partial motion to dismiss the Amended Complaint that the plaintiffs filed after Judge Hollander dismissed the vast bulk of their original claims. To date, the plaintiffs have not filed a response to that motion, which was filed in November of 1994. Similarly, in anticipation of the settlement of this case, the defendants have not sought to compel answers to their interrogatories to the plaintiffs that the defendants served at the beginning of October of last year, nor have the defendants otherwise conducted discovery. Given the plaintiffs' last minute change of heart, it will be necessary to set a hearing on the defendants' motion to dismiss, to establish a discovery schedule, to set a date for summary judgment motions, and to set a new trial date (the current trial date is June 6, 1995).

Thank you for your consideration.

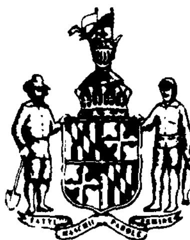
Sincerely,

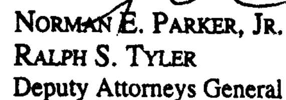


ANDREW H. BAIDA
Assistant Attorney General

cc: David B. Shapiro, Esq.
John H. Thornton, Assistant Attorney General
Clerk's office

J. JOSEPH CURRAN, JR.
Attorney General





NORMAN E. PARKER, JR.
RALPH S. TYLER
Deputy Attorneys General

CIRCUIT COURT FOR BALTIMORE CITY
1995 FEB -1 P 3: 44
CIVIL DIVISION

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER NO.

(410) 576-6955

February 1, 1995

WRITER'S DIRECT DIAL NO.

(410) 576-6318

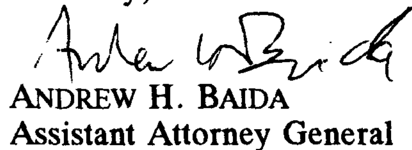
The Honorable Hilary D. Caplan
Circuit Court for Baltimore City
Courthouse East
Room 205
111 N. Calvert Street
Baltimore, MD 21202

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*,
Case No. 94077005/CL177675

Dear Judge Caplan:

I am writing to inform you that the parties have decided to settle the above case. I expect to have a written and signed settlement agreement in the near future, and will furnish you with a copy as soon as I do. Thank you for your consideration.

Sincerely,



ANDREW H. BAIDA
Assistant Attorney General

cc: David B. Shapiro, Esq.
John H. Thornton, Assistant Attorney General
Clerk's office ✓

(95) aB

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

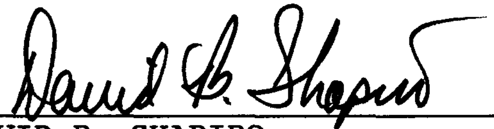
[court stamp] DEC -5 A 7:38 CIVIL DIVISION

* * * * * * * * * * * * * *

MOTION FOR EXTENSION OF TIME

Plaintiffs move to extend the time to file a responsive pleading to January 2, 1995, in order for the parties to continue settlement discussions. Defendants' counsel have stated that they do not object to the extension of time.

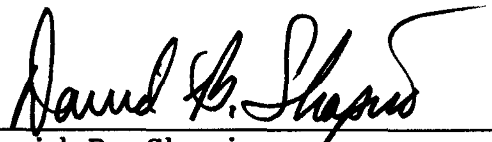
Respectfully submitted,



DAVID B. SHAPIRO
1101 St. Paul Street, Ste. 407
Baltimore, Maryland 21202
(410) 576-9100
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December, 1994, a copy of the foregoing Plaintiffs' Motion for Extension of Time was mailed first class, postage prepaid to Andrew H. Baida, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202 and John H. Thornton, Assistant Attorney General, Department of General Services, 300 West Preston Street, Room 403, Baltimore, Maryland 21202, Attorneys for Defendants.



David B. Shapiro

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * * *

ORDER

Upon consideration of the Plaintiffs' Motion for Extension of Time, and for good cause shown, it is this ___ day of ___________, 1994,

ORDERED that the motion be, and the same hereby is, GRANTED, and it is

FURTHER ORDERED that plaintiffs' responsive pleading will be due on or before January 2, 1994.

____
JUDGE

KENNETH FITCH, *et al.*	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * * *

ORDER

Upon consideration of the Plaintiffs' Motion for Extension of Time, and for good cause shown, it is this ___ day of ___________, 1994,

ORDERED that the motion be, and the same hereby is, GRANTED, and it is

FURTHER ORDERED that plaintiffs' responsive pleading will be due on or before January 2, 1994.

____
JUDGE

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1994 NOV 14 P 3:45
CIVIL DIVISION

(14)
AB

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

* * * * * * *

DEFENDANTS' PARTIAL MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to Maryland Rule 2-322, defendants file this partial motion to dismiss. In support of this motion, defendants rely on the Amended Complaint, the accompanying memorandum, and the Court's October 3, 1994 Memorandum Opinion and Order. The grounds are set forth in the memorandum filed in support of this motion. For the reasons stated in that memorandum, this Court should grant the motion, dismiss all claims against the State and the Department of General Services, and dismiss the claims against defendant Frederick DeJong set forth in Counts Three and Four of the Amended Complaint. A proposed order is attached.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

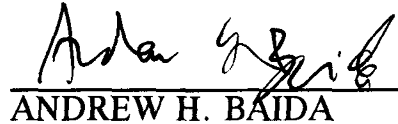
ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 1994 I sent by first class mail, postage prepaid, a copy of Defendants' Partial Motion to Dismiss, supporting Memorandum, Request for Hearing and a proposed order, to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.



ANDREW H. BAIDA

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1994 NOV 14 P 3:45
CIVIL DIVISION

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

The plaintiffs in this action, who consist of a number of present and former employees of the Department of General Services of the State of Maryland ("DGS"), seek monetary relief against the State, DGS and Frederick W. DeJong, a former DGS official who supervised plaintiffs. In an October 3, 1994 Memorandum Opinion and Order, this Court (Hollander, J.) granted and denied in part defendants' motion to dismiss the Complaint. The Court dismissed with prejudice all claims against the State and DGS except for two counts that the Court dismissed with leave to amend: one count asserted claims based on an allegedly dangerous working environment, and the other count raised claims based on a breach of contract theory. The Court also dismissed with prejudice all claims against Mr. DeJong except for two counts that raised claims asserting Mr. DeJong committed, respectively, the torts of invasion of privacy and intentional infliction of emotional distress.

Plaintiffs subsequently filed a timely Amended Complaint containing four counts that seek the following relief against all defendants: Count One (invasion of privacy); Count Two (intentional infliction of emotional distress); Count Three (strict liability for

abnormally dangerous activities); and Count Four (breach of contract). For the reasons stated below, plaintiffs' claims against the State and DGS should be dismissed for the same reasons that this Court cited in its October 3 decision: they are barred by sovereign immunity, and plaintiffs' sole remedy is under either the State employee merit system grievance procedures set forth in Md. State Pers. & Pens. Code §§ 10-101, *et seq.* (1993), or the Workers' Compensation Act, Md. Labor & Empl. Code §§ 9-101, *et seq.* (1991 Repl. Vol.). The claims against Mr. DeJong set forth in Counts Three and Four should also be dismissed for the reasons set forth in this Court's prior decision. This Court should accordingly grant defendants' motion.

ARGUMENT

I. ALL CLAIMS AGAINST THE STATE AND DGS SHOULD BE DISMISSED.

This Court previously stated that "[t]he State has immunity under [Md. Cts. & Jud. Proc. Code Ann.] CJP, § 5-399.2(a)(4)(ii) when the acts of State personnel are 'made with malice or gross negligence'. . . ." October 3, 1994 Memorandum Opinion and Order at 16. Applying this statutory immunity provision to the conduct giving rise to the claims now set forth in Counts One and Two, the Court found that those claims "necessarily encompass conduct which entitles the State to protection based on sovereign immunity." *Id.* Accordingly, the Court dismissed with prejudice, without leave to amend, plaintiffs' invasion of privacy and emotional distress claims. Because those claims are indistinguishable from the claims set forth in Counts One and Two of the Amended Complaint, this Court should dismiss the claims in those counts against the State and DGS.

The remaining claims against the State and DGS should similarly be dismissed

because those claims are the same as claims that the Court dismissed in its October decision. This Court previously dismissed plaintiffs' dangerous work environment claims, which are now set forth in Count Three of the Amended Complaint, because "Plaintiffs' only remedy for such injury is under the [Workers' Compensation Act] WCA." October 3 Memorandum Opinion and Order at 21. Although the Court provided plaintiffs with an opportunity to allege facts justifying their noncompliance with the filing provisions set forth in the Workers' Compensation Act, *see id.* at 29, the Amended Complaint contains no such facts.[1] Moreover, even if plaintiffs did make such a showing, that showing would, at most, toll the time in which they are to present their claims to the Workers' Compensation Commission, which this Court held has exclusive jurisdiction over the injuries arising out of an allegedly dangerous work environment. *See* Memorandum Opinion and Order at 18-21. Thus, regardless of the reasons why plaintiffs failed to file timely workers' compensation claims, this Court has no authority to address the claims set forth in Count Three of the Amended Complaint.

The breach of contract claim against the State and DGS set forth in Count Four of the Amended Complaint should be dismissed because, as this Court held previously, that claim is not based on a written contract and thus is barred by sovereign immunity, *see* Memorandum Opinion and Order at 6-7, and because "the failure to pay overtime

---

[1] It is unclear why the Court allowed plaintiffs this opportunity to amend this claim, as plaintiffs never argued that they had an excuse for failing to comply with the Workers' Compensation Act. Rather, as the Court noted, "Plaintiffs argue[d] that the injuries in question are expressly exempted from the WCA." October 3 Memorandum Opinion and Order at 17. It was only with respect to their failure to comply with the State employee merit system grievance procedures that plaintiffs contended their noncompliance was justified. *Id.* In any event, for the reasons stated above, plaintiffs' claims in Count Three are redressable only before the Workers' Compensation Commission.

wages clearly would be addressable by the grievance procedures" set forth in the State employee merit system statute. *Id.* at 29. Despite being afforded an opportunity to amend their Complaint, plaintiffs still "do not allege breach of a *written* contract, nor do they identify the specific terms of a *written* contract which Defendants are alleged to have breached." *Id.* at 7 (emphasis in original; footnote omitted). Citing a July 28, 1989 memorandum that Mr. DeJong issued to plaintiffs requiring them to carry an electronic pager at all times, plaintiffs argue that "[t]he effect of this writing was to establish additional terms for the Plaintiffs' continued employment, requiring them to be on duty at all times without the benefit of additional wages." Amended Complaint ¶ 9. This same memorandum was attached to and incorporated in the original Complaint, however, which this Court found failed to allege adequately the existence of a written contract.

Likewise missing in the Amended Complaint is any identification of the "specific terms" of the contract that defendants are alleged to have breached. *See* Memorandum Opinion and Order at 7. Contrary to plaintiffs' contention that regulations of the Department of Personnel provide "that state employees are to be compensated for the time they are on-call and waiting for work," Amended Complaint ¶ 9, those regulations state only that "[w]ork time includes time during which an employee: (a) Is required to be on duty." COMAR 06.01.11.02(B)(1)(a). These regulations do not constitute "specific terms" that require DGS to reimburse plaintiffs for time that they spend at home wearing their beepers, as the mere act of being available to respond to an emergency at work does not constitute being "on duty" within the meaning of the regulations. In any event, regulations of the Department of Personnel do not qualify as a written contract between plaintiffs and the Department of General Services. *See Leese v. Baltimore*

County, 64 Md.App. 442, 479 (1985). Plaintiffs' breach of contract claim should be dismissed, therefore, because it is not based on a written contract, nor does it even identify any specific terms that defendants supposedly breached.

Even if plaintiffs could overcome the State's immunity by sufficiently alleging the existence of a written contract that defendants breached, plaintiffs' contract claim is still barred because, as this Court held, "claims for unpaid wages are among the quintessential grievances that the [Employee Grievance Procedure Act] EGPA was adopted to address." October 3 Memorandum Opinion and Order at 29-30. Although the Court provided plaintiffs with an opportunity to allege facts supporting an excuse for failing to pursue such a grievance, the Amended Complaint sets forth no such excuse. Citing a "reign of terror" to which they were supposedly subjected, plaintiffs allege that "[t]he distrust and KGB-style tactics discouraged plaintiffs from believing that they could obtain a fair hearing in any grievance proceeding." Amended Complaint ¶ 13. This conclusory and irrelevant allegation fails to demonstrate that plaintiffs were justified in failing to exhaust their remedies before the *Secretary of Personnel*, who they do not allege was in any way a part of the "atmosphere of suspicion and distrust *between employees and defendant DeJong and his assistant, Eugene Gunter*." Amended Complaint ¶ 13 (emphasis added).

As this Court noted previously, "an administrative remedy is not inadequate so as to authorize judicial intervention before exhaustion merely because it is accompanied by delay, expense, annoyance, or even hardship." October 3 Memorandum Opinion and Order at 29 (*quoting Prince George's County Health Dept. v. Briscoe*, 79 Md.App. 325, 345-46 (1989), *aff'd*, 323 Md. 439 (1991)). Plaintiffs simply have no excuse for not pursuing their grievances with the Secretary of Personnel, who is obligated by the state

employee grievance statute to ensure that an employee may present any grievance that he or she may have "free from coercion, discrimination, interference, restraint, or reprisal." Md. State Pers. & Pens. Code Ann. § 10-103 (1993). In addition, given plaintiffs' contentions that their breach of contract claim "continues to the present time," Amended Complaint ¶ 49, and that Mr. DeJong left the State service in January of 1993, *id.* ¶ 18, plaintiffs could have no excuse for failing to utilize the Department of Personnel's grievance procedures.

For these reasons, plaintiffs' claims in Count Four against the State and DGS, as well as plaintiffs' other claims against those defendants set forth in the remainder of the Amended Complaint, should be dismissed.

II. THIS COURT SHOULD DISMISS THE CLAIMS IN COUNTS THREE AND FOUR AGAINST MR. DEJONG.

The claims against Mr. DeJong set forth in Counts Three and Four should also be dismissed for the reasons set forth in the Court's earlier decision. The Court previously held that the duty to provide a safe working environment is a nondelegable duty held solely by the employer (the State and DGS) that cannot be breached by a co-employee such as Mr. DeJong. *See* October 3 Memorandum Opinion and Order at 21-22. The claims against Mr. DeJong in Count Three, therefore, should be dismissed. The Court also held that plaintiffs' breach of contract claim against Mr. DeJong was barred (1) by sovereign immunity because the claim is not based on a written contract, and (2) because "Plaintiffs have not averred that DeJong was even a party to the alleged contract" and "have not presented any grounds by which they could recover from DeJong personally for a breach of contract." *Id.* at 8. Thus, plaintiffs' claims in Count Four should also

be dismissed.

CONCLUSION

For the reasons stated, this Court should grant defendants' motion, dismiss all claims against the State and DGS, and dismiss the claims set forth in Counts Three and Four against Mr. DeJong.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

CIRCUIT COURT FOR BALTIMORE CITY
1994 NOV 14 P 3:45
CIVIL DIVISION

* * * * * * *

DEFENDANTS' REQUEST FOR A HEARING

Defendants respectfully request a hearing on their partial motion to dismiss the Amended Complaint.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

* * * * * * *

ORDER

Upon consideration of defendants' Partial Motion to Dismiss the Amended Complaint, and plaintiffs' opposition thereto, it is this ___ day of ______, 1994, ORDERED:

(1) That defendants' motion be, and it hereby is, GRANTED;

(2) That all claims against defendants State of Maryland and the Department of General Services be, and they hereby are, DISMISSED with prejudice and that judgment is hereby entered in favor of those defendants and against plaintiffs; and

(3) That all claims against defendant Frederick W. DeJong set forth in Counts Three and Four of the Amended Complaint be, and they hereby are, DISMISSED with prejudice.

____
JUDGE HILARY D. CAPLAN
CIRCUIT COURT FOR BALTIMORE CITY

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

CIRCUIT COURT FOR BALTIMORE CITY
CIVIL DIVISION

* * * * * * *

ANSWER

Defendant Frederick W. DeJong hereby answers Counts One and Two of plaintiff's Amended Complaint. Because defendant has filed, simultaneously with this Answer, a motion to dismiss the claims set forth in Counts Three and Four of the Amended Complaint, no answer is required as to those Counts.

FIRST DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Pursuant to Maryland Rule 2-323(d), defendant generally denies all liability with respect to Counts One and Two of the Amended Complaint.

THIRD DEFENSE

Plaintiffs' claims are barred by the doctrine of sovereign immunity.

FOURTH DEFENSE

Some or all of plaintiffs' claims are barred by the applicable statute of limitations or by the doctrine of laches.

FIFTH DEFENSE

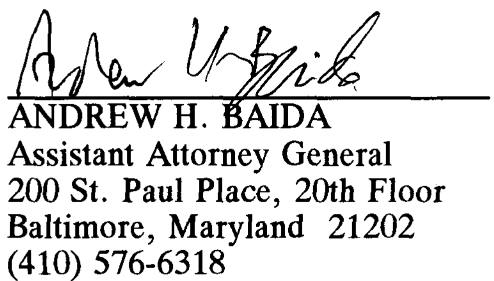
Plaintiffs' claims are barred because they have failed to invoke and exhaust their

administrative remedies and/or because the Workers' Compensation Commission has exclusive jurisdiction over their claims.

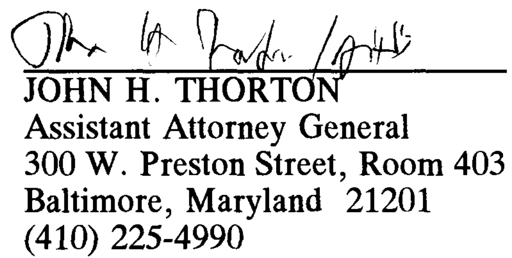
For the reasons stated, defendant respectfully requests that the Court dismiss plaintiffs' Amended Complaint and enter judgment in his favor, together with costs and reasonable attorney's fees.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland



ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318



JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 1994, I sent by first class mail, postage prepaid, a copy of the foregoing Answer to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.

ANDREW H. BAIDA

KENNETH FITCH
5214 Silver Spring Rd., #8
Perry Hall, MD 21128

HARRY L. BIEDENBACK
7704 Beekay Road
Edgemere, MD 21219

HAROLD H. MORRIS, JR.
6111 Shipview Way
Baltimore, MD 21224

KENNETH A. SMITH
C-94 Holiday Mobile Est
Jessup, MD 20794

JENNIS H. DANIELS
4701 Chatford Ave.
Baltimore, MD 21206

FRANK LIN RANDALL
1220 Kevin Road
Baltimore, MD 21229

HECTOR JUAN CANDELARIO
128-S. Broadway
Baltimore, MD 21231

KENNETH A. KORITZER, SR.
6012 Eurith Ave.
Baltimore, MD 21206

HERBERT G. NICKLES
1673 Manchester Road
Westminster, MD 21157

MAURICE DALE MCDONALD
5043 Wright Avenue
Baltimore, MD 21205

RONALD D. SMITH
4601 Mainfield Avenue
Baltimore, MD 21214

PLAINTIFFS

v.

FREDERICK W. DEJONG
1554 Glen Keith Blvd.
Towson, MD 21204

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

CASE NO.: 94077005/CL177675

STATE OF MARYLAND *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: EVELYN O. CANNON, Esq. *
Office of the Attorney General
200 St. Paul Pl., 20th Fl. *
Baltimore, MD 21202
*
and
*
MARYLAND DEPARTMENT OF
GENERAL SERVICES *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: ALAN BLUMBERG, Esq. *
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202 *

DEFENDANTS *

* * * * * * * * * * * * * *

AMENDED COMPLAINT

Kenneth Fitch, Harry L. Biedenback, Harold H. Morris, Jr., Kenneth A. Smith, Jennis H. Daniels, Frank Lin Randall, Herbert Juan Candelario, Kenneth A. Koritzer, Sr., Herbert G. Nickles, Maurice Dale McDonald, and Ronald D. Smith, Plaintiffs, by their attorney, David B. Shapiro, sue Frederick W. DeJong, the State of Maryland (hereinafter "the State"), and the Maryland Department of General Services (hereinafter "the DGS"), Defendants, and state as follows:

PARTIES, JURISDICTION, VENUE

1. That Plaintiffs are residents of the State of Maryland and, at all relevant times, were employed by the State of Maryland in Baltimore City, State of Maryland.

2. That at all relevant times, Plaintiffs were employed by

the State and the DGS at the Saratoga Street Center facility located in Baltimore City, State of Maryland.

3. That Defendant DeJong, who resides at 1554 Glen Keith Blvd., Towson, MD, 21204, is a resident of Baltimore County, MD.

4. That Defendant DGS is an executive department of the Maryland State Government, which is responsible for, and which, through its agents, servants and employees, operates and maintains State owned and leased facilities.

FACTS COMMON TO ALL COUNTS

5. The State of Maryland Department of General Services' Saratoga State Center facility (hereinafter "the Saratoga Center"), is located at 310 West Saratoga Street in Baltimore, Maryland. The Saratoga Center is one of the four divisions within the DGS' Office of Facilities Management, which is responsible for providing technical assistance to help operate and maintain State facilities. The Saratoga Center division was created in 1986 and, among other charges, operates, maintains, and secures State buildings at 310 W. Saratoga Street and 220-230 N. Howard Street in Baltimore City, MD.

6. The Defendants, at all relevant times herein, were assigned to the Central-North Public Buildings and Grounds division of the DGS and worked out of the Saratoga Center's first floor, using this area for administering the agency's maintenance program in it's nine facilities located in Anne Arundel, Baltimore, Cecil, Harford, Howard, and Calvert Counties, and Baltimore City. Employees also utilized other portions of this facility for it's maintenance shops (electrical, carpentry, plumbing, supply,

janitorial, and mechanics).

7. Defendant Frederick W. DeJong, at all relevant times herein, was Superintendent of the Saratoga State Center Division and supervised directly or indirectly through his agents, servants and employees, all of the named Plaintiffs who were assigned to Saratoga State Center.

8. Defendants, the State, the DGS, and Mr. DeJong, at all times relevant herein, through their agents, servants and employees, including Defendant DeJong and Eugene Gunter, his assistant, were responsible for the supervision of the Plaintiffs, all employees at the Saratoga Center facility. The acts of the Defendants against the Plaintiffs as described herein were committed within the scope of their employment with the State of Maryland, in that they were committed while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong and Mr. Gunter, the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of their employment.

9. That on July 28, 1989, Defendant DeJong issued a memorandum to the Plaintiffs, who were all maintenance personnel at the Saratoga Center, directing them to carry their electronic pagers at all times in order to make themselves available during off hours or vacations. The effect of this writing was to establish additional terms for the Plaintiffs' continued employment, requiring them to be on duty at all times without the benefit of additional wages. Regulations promulgated by the State of

Maryland's Department of Personnel at 06.01.11 Leave With Pay, indicates that state employees are to be compensated for the time they are on-call and waiting for work. This regulation along with Mr. DeJong's July 28, 1989 Memorandum requiring all maintenance personnel to carry their pager "at all times in order to...[be]..readily available to respond to an emergency during...off hours or vacation." create a fresh and special contractual relationship between the parties. A copy of the July 28, 1989 memorandum is attached hereto as Exhibit 1.

10. At the time of their hiring by DGS, Plaintiffs were never informed that they were expected to be on call 24 hours a day, 7 days a week, including periods of vacation. A subsequent memorandum were distributed on November 21, 1989 requiring employees to monitor the weather conditions which would determine the hours they were to report to work. A copy of the November 21, 1989 memorandum is attached hereto as Exhibit 5.

11. The policy referred to in paragraph 9 above was reiterated orally to Plaintiff Harold Morris on November 22, 1989, and in writing on November 24, 1989 and on February 27, 1990. Copies of the November 24, 1989 memorandum is attached hereto as Exhibit 6 and the February 27, 1990 memorandum as Exhibit 7.

12. For a period of years and continuing through until January 1993, Defendant DeJong conducted unlawful wiretapping and electronic surveillance, a felonious act if convicted in the State of Maryland pursuant to the Courts and Judicial Proceedings Article of the Maryland Annotated Code, Sections 10-401 to 10-414, against

the Plaintiffs which included, but was not limited to, the placement and use of electronic listening devices hidden in the ceilings, walls and around the telephone system at the Saratoga Center facility. Defendant DeJong monitored these devices from his office and from other locations, intercepting oral communications and making unauthorized tape recordings of conversations made by the Plaintiffs. That Defendant DeJong ordered the fingerprinting and photographing of some of the Plaintiffs.

13. That Defendant DeJong's electronic wiretapping and surveillance created an atmosphere of suspicion and distrust between employees and defendant DeJong and his assistant, Eugene Gunter. A reign of terror ensued, which included harassing memos, constant reprimands, both orally and in writing, of trivial infractions, constant threats of reprimands, suspensions and terminations. The distrust and KGB-style tactics, discouraged plaintiffs from believing that they could obtain a fair hearing in any grievance proceeding.

14. That the Defendants were aware that the Saratoga Center facility posed serious health problems to the Plaintiffs which were generated by fumes and dust from maintenance shop activities (saw dust, paint thinner, etc.), excessive heat and humidity in summer, cold and dampness in winter, lack of air circulation, as well as unsafe levels of lead and asbestos.

15. That the Defendants were on notice that the heating, ventilation and air conditioning at Saratoga Center were inadequate for any work environment. A memorandum of May 9, 1994 show that

the Defendants had knowledge that the system did not meet minimal standards and were unwilling to "shake loose" the funds necessary to improve the facilities. A copy of this memorandum is attached hereto as Exhibit 8. Saratoga Center is a state owned property and defendants were in control of this property at all times relevant to this action.

16. That in December 1992 and after excessive harassment by Defendant DeJong and Mr. Gunter, Plaintiff Kenneth Fitch submitted his resignation to the State Personnel Department and threatened to inform the press about certain improper activities taking place at the Saratoga Center unless an immediate investigation is initiated.

17. That in January 1993, Sergeant Wright and other members of the Maryland State Police conducted a unannounced investigation at the Saratoga Center and recovered numerous electronic listening devices and recording equipment belonging to or under the control and possession of Defendant DeJong.

18. That in January 1993, Defendant DeJong was relieved of his duties as Superintendent of the Saratoga State Center Division and shortly thereafter left State service.

19. On January 30, 1993, Lieutenant Commander H. Frank Rayne, of the Maryland State Police, issued Memorandum No. 93-01-02 indicating that effective February 1, 1993, Mr. Fred DeJong is not permitted on State property at either the Baltimore, Annapolis, or Saratoga Street complex and that he will be arrested should he be found trespassing on the premises. A copy of this memorandum is attached hereto as Exhibit 2.

20. On June 12, 1993, within one hundred and eighty days after the plaintiffs became aware of the Plaintiff's activities against them, Plaintiffs filed a claim for injuries and damages to the State Treasurer by certified mail/return receipt requested. The filing of this claim satisfied the notice requirement under the Maryland Tort Claims Act, Md. State Gov't Code Ann. Sections 12-101 to 12-109. A copy of this claim is attached hereto as Exhibit 3.

21. By letter dated September 3, 1993, the State Treasurer's office provided the Plaintiff with an official and final denial of this claim against the State. A copy of this letter is attached hereto as Exhibit 4.

COUNT ONE

Invasion of Privacy - Intrusion Upon Seclusion

22. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Twenty-One of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

23. That Defendant DeJong, while employed by Defendants State and DGS and without the Plaintiffs' knowledge or consent, secretly placed unlawful wiretaps and other electronic listening devices in the ceilings, walls, and around the telephone systems located at the Saratoga Center and conducted electronic eavesdropping activities on the private conversations of the Plaintiffs. Defendant improperly and recklessly recorded these conversations which contained personal and private matters about the Plaintiffs. The listening and recording of private conversations of the

Plaintiffs would be highly offensive to any reasonable person.

24. That the conduct of Defendant DeJong, which constituted an intentional intrusion into the privacy of the Plaintiffs, was highly offensive to a reasonable person.

25. As a result of the intrusion upon Plaintiffs' seclusion by Defendant DeJong, Plaintiffs suffered humiliation and mental distress.

26. The above described acts of Defendant DeJong were committed within the scope of his employment with the State and the DGS, in that he committed them while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong and Mr. Gunter, the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of their employment.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT TWO

Infliction of emotional distress - Intentional

27. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Twenty-Six of this Complaint and realleges each of them with the same force

and effect as if restated herein in their entirety.

28. That Defendant DeJong, without the Plaintiffs' knowledge or consent, hid unlawful wiretaps and electronic listening devices in the ceilings, walls, and around the telephones at the Saratoga Center and eavesdropped on the private conversations of the Plaintiffs. Defendant improperly and recklessly recorded these conversations which contained personal and private matters about the Plaintiffs. The listening and recording of private conversations of the Plaintiffs would be highly offensive to any reasonable person. This action resulted in the Plaintiffs becoming highly embarrassed and in causing this action to occur, Defendant acted with knowledge of the severe distress it would cause the Plaintiffs.

29. The Defendant DeJong's intentional and reckless conduct was extreme and outrageous and in deliberate disregard of a high degree of probability that emotional distress would result to the Plaintiffs and these actions of the Defendant caused Plaintiffs great emotional distress.

30. Plaintiffs suffered such distress from Defendant DeJong's treatment that they have suffered psychological trauma that has compromised their ability to relate to co-workers, supervisory personnel at the State of Maryland as well as family and friends.

31. That Plaintiffs were in such emotional distress that they required psychotherapy and other medical attention.

32. That by reason of the Defendant's conduct and actions, Plaintiffs have suffered, and will continue to suffer, damages

including, but not limited to, severe and extreme emotional distress, and embarrassment.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT THREE

Strict Liability for Abnormally Dangerous Activities

33. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Thirty-Two of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

34. That the Defendants were aware that the Saratoga Center facility posed serious health problems to the Plaintiffs which were generated by fumes and dust from maintenance shop activities (saw dust, paint thinner, etc.), excessive heat and humidity in summer, cold and dampness in winter, lack of air circulation, as well as unsafe levels of lead and asbestos.

35. That Defendants allowed these dangerous environmental conditions to continue, unabated for more than 4 years.

36. That Defendants' conduct in allowing the Plaintiffs to be exposed to such dangerous conditions constituted an abnormally dangerous activity which exposed the Plaintiffs to an unreasonable

risk of harm.

37. At all times relevant herein, Defendants maintained control over the abnormally dangerous activity of allowing these dangerous environmental conditions to remain to the detriment of the Plaintiffs.

38. Plaintiffs sustained serious injury to their persons by being exposed to asbestos, lead and noxious fumes over a period of years, such injuries being the result of the Defendants' conduct in allowing these dangerous environmental conditions to remain on their property.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT FOUR

Breach of Contract

39. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Thirty-Eight of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

40. That at all times relevant herein, Defendants State, DGS and DeJong directed the terms of employment and compensation of the Plaintiffs, all classified employees of the State of Maryland.

41. That through the State's agents, servants and employees, including Defendant DGS and DeJong, as well as the Department of Personnel, employees who are required to be on duty, even if not on the job location, must receive compensation for being available for work-related duties.

42. That Defendant DeJong, in his capacity as Superintendent for the Saratoga Street Center division, was responsible for the hours of employment and payment of overtime wages as necessary and directed the Plaintiffs to be available for work 24 hours a day, 7 days a week, 365 days a year.

43. That Plaintiffs, pursuant to Defendant DeJong's July 8, 1989 memorandum, made themselves available yet were not paid in accordance with State of Maryland requirements for compensation.

44. That Defendants acted with knowledge of the requirement to compensate employees who make themselves available for service even when not on the job site and with the intent to materially breach their contractual obligation to compensate the Plaintiffs.

45. That Plaintiffs suffered a loss of income associated with the thousands of hours worked without compensation.

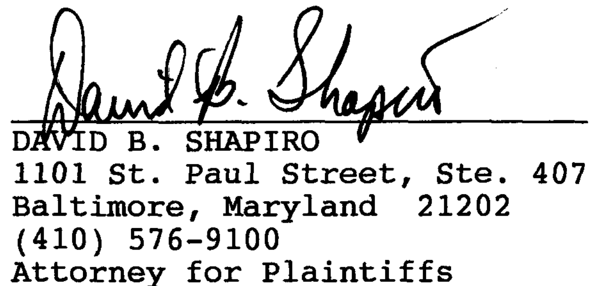
46. That the above described acts of the Defendant were committed within the scope of their employment with the State of Maryland, in that they committed them while on duty, at the State's property, and in furtherance of the State's interests.

47. That as the employer of Defendant DeJong, the State, through DGS, is responsible for all of the acts committed by Defendant DeJong within the scope of his employment.

48. That Plaintiffs have performed all conditions precedent under the terms of their respective MS-22 job descriptions and Defendant State, through the actions of Defendant DeJong, materially breached their employment contract with the Plaintiffs.

49. The Defendants' acceptance and retention of the benefit of services above and beyond the duties negotiated for in the Plaintiffs' employment contracts continues to the present time. It would be inequitable for Defendants to enjoy these additional services without providing compensation to the Plaintiffs.

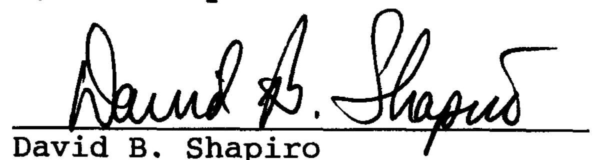
WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of One Hundred Thousand Dollars ($100,000.00), in compensatory damages with interest and costs and such other and further relief as the Court deems proper.



DAVID B. SHAPIRO
1101 St. Paul Street, Ste. 407
Baltimore, Maryland 21202
(410) 576-9100
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of October, 1994, a copy of the foregoing Plaintiffs' Amended Complaint and Demand for Jury Trial was mailed first class, postage prepaid to Andrew H. Baida, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland 21202 and John H. Thornton, Assistant Attorney General, Department of General Services, 300 West Preston Street, Room 403, Baltimore, Maryland 21202, Attorneys for Defendants.



David B. Shapiro

KENNETH FITCH 5214 Silver Spring Rd., #8 Perry Hall, MD 21128	* *	IN THE CIRCUIT COURT
HARRY L. BIEDENBACK 7704 Beekay Road Edgemere, MD 21219	* *	FOR BALTIMORE CITY
HAROLD H. MORRIS, JR. 6111 Shipview Way Baltimore, MD 21224	* *	
KENNETH A. SMITH C-94 Holiday Mobile Est Jessup, MD 20794	* *	
JENNIS H. DANIELS 4701 Chatford Ave. Baltimore, MD 21206	* *	
FRANK LIN RANDALL 1220 Kevin Road Baltimore, MD 21229	* *	
HECTOR JUAN CANDELARIO 128-S. Broadway Baltimore, MD 21231	* *	
KENNETH A. KORITZER, SR. 6012 Eurith Ave. Baltimore, MD 21206	* *	
HERBERT G. NICKLES 1673 Manchester Road Westminster, MD 21157	* *	
MAURICE DALE MCDONALD 5043 Wright Avenue Baltimore, MD 21205	* *	
RONALD D. SMITH 4601 Mainfield Avenue Baltimore, MD 21214	* *	
PLAINTIFFS	*	
v.	*	
FREDERICK W. DEJONG 1554 Glen Keith Blvd. Towson, MD 21204	* *	CASE NO.: 94077005/CL177675

STATE OF MARYLAND *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: EVELYN O. CANNON, Esq. *
Office of the Attorney General
200 St. Paul Pl., 20th Fl. *
Baltimore, MD 21202
*
and
*
MARYLAND DEPARTMENT OF
GENERAL SERVICES *
300 W. Preston Street
Baltimore, MD 21201 *

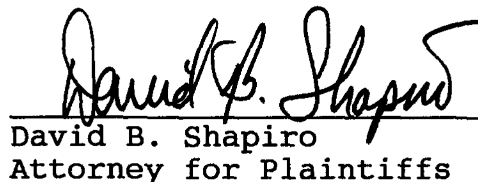
Serve On: ALAN BLUMBERG, Esq. *
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202 *

DEFENDANTS *

* * * * * * * * * * * * * *

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues.



David B. Shapiro
Attorney for Plaintiffs

STATE OF MARYLAND

MEMORANDUM

DEPARTMENT OF GENERAL SERVICES
SARATOGA STATE CENTER

DATE: July 28, 1989

TO: ALL MAINTENANCE PERSONNEL

FROM: Fred DeJong, Superindent

SUBJECT: PAGERS/EMERGENCY CALLS

Since the opening of our building, we have experienced unexpected emergencies that required your attention and services during off hours, weekends, and holidays.

As a reminder, it is still your responsibility to carry your pager with you at all times in order to make yourself readily available to respond to an emergency during your off hours or vacation. If you must leave the metropolitan area for any reason, please notify Security immediately by calling 333-6404.

In addition, it is also the responsibility of each employee to submit to the Superintendent's Office his most recent address and telephone number, whether listed or unlisted, within 24 hours of a change.

I have always been very proud to boast to my superiors of the cooperation and dedication of our personnel since the opening of our facilities. I am confident that you will adhere to this policy as in the past.

I have read this policy, reviewed it, and understand it thoroughly.

Signed: ______________________________

FDJ:pk

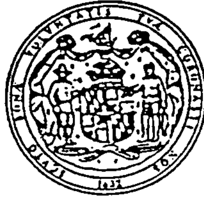
EXHIBIT 1

State of Maryland
Department of General Services

FINANCE & ADMINISTRATION
SERVICES & LOGISTICS
FACILITIES MANAGEMENT
TELECOMMUNICATIONS
REAL ESTATE

WILLIAM DONALD SCHAEFER
Governor

MARTIN W. WALSH, JR.
Secretary



JANUARY 30, 1993

DEPARTMENT OF GENERAL SERVICES POLICE
BALTIMORE DETACHMENT

MEMORANDUM NO. 93-01-02

TO : ALL PERSONNEL (Confidential)
SUBJECT: Mr. Fred DeJong

Effective February 1, 1993 Mr. DeJong is not permitted on State property at either the Baltimore, Annapolis, or Saratoga Street complexes, unless he has official business. This does not include general public access areas (e.g. State Employees Credit Union).

Should Mr. DeJong be observed the shift supervisor will immediately be notified and the following procedures applied:

* The shift supervisor will notify the Detachment Commander promptly and personally meet with Mr. DeJong

* An inquiry will be made as to the nature of Mr. DeJong's business

* The shift supervisor will obtain the contact person's name, telephone number, etc. and verify if Mr. DeJong has official business with them

* If verification is made no further DGSP action is needed

* If verification is not made Mr. DeJong will be told to leave the premises and his failure to do so could result in his arrest for trespassing

* If Mr. DeJong fails to obey an arrest will be made.

Finally, this situation should be treated seriously and caution should be used when confronting this individual. A complete profile and photograph are included with this memorandum for which all personnel will acknowledge via DGSP Form 42.

This memorandum supercedes any other order in conflict herewith.

H. Frank Rayne [signature] 1/30

H. Frank Rayne, Lieutenant
Commander, DGSP
Maryland State Police

301 WEST PRESTON STREET, ROOM M-6, BALTIMORE, MARYLAND 21201 (301) 225-4409
Baltimore Public Buildings & Grounds
TTY for the Deaf: Balto Area 383-7555
D.C. Metro 565-0451

EXHIBIT 2

DAVID B. SHAPIRO
ATTORNEY AT LAW

SUITE 407
1101 SAINT PAUL STREET
BALTIMORE, MARYLAND 21202

(410) 576-9100
FAX (410) 576-9102

ALSO ADMITTED TO PRACTICE IN
THE DISTRICT OF COLUMBIA

June 11, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lucille Maurer, Treasurer
State Treasury Building
P.O. Box 666
Annapolis, Maryland 21404

Re: Maurice Dale McDonald, Harry Biedenbock, Harold H. Morris, Jr., Ken Smith, Jennis Daniels, Frank Lin Randall, Hector Juan Candelario, Ken Fitch, Kenneth A. Koritzer, Sr., Herbert Nickles and Ronald D. Smith v. The State of Maryland

Date of Loss: December 15, 1992

Dear Ms. Maurer:

Please be advised that I have been retained as private counsel to represent the eleven (11) state employees listed-above who work within the Department of General Services for the State of Maryland. This notice is to present claims on behalf of the aforementioned individuals under the Maryland Tort Claims Act. In accordance with the requirements of the Act, specifically Section 12-107(a) of the Maryland State Government article, I provide the following information:

As early as 1989 and continuing until January 31, 1993, all claimants have been either directly or indirectly supervised by Fred W. DeJong and Eugene Gunter at the 310 W. Saratoga Street facility operated by the Department of General Services. During this period of time, Messrs. DeJong and Gunter have engaged in outrageous conduct towards the eleven claimants.

Said conduct involves the following:

1. Messrs. DeJong and Gunter placed or caused to be placed electronic listening and recording devices throughout the Saratoga Street facility, including telephones and bathrooms, for the purpose of eavesdropping on the claimants and violating their right and expectation of privacy;

2. Messrs. DeJong and Gunter directed some of the claimants to have their finger prints and photographs taken and kept on file for purposes unknown to them;

3. Messrs. DeJong and Gunter unreasonably required claimants to perform a variety of tasks under extremely stressful circumstances. These tasks ranged from the requirement that claimants were to be on call for work duties, 24 hours per day, 7 days a week without compensation to threatening claimants with layoffs or other personnel sanctions if the claimants attempted to file grievances or attempted to receive medical attention for injuries or illnesses.

4. Messrs. DeJong and Gunter and the State of Maryland knew or should have known of the dangerous environmental conditions at the Saratoga Street facility, however, no work has been done to correct the serious conditions and, as a result, claimants have suffered serious health problems due to their exposure to asbestos, saw dust, paint thinner, and other hazardous materials.

Throughout this period, Messrs. DeJong and Gunter have engaged in a pattern of behavior against my clients that has also included harassment, intimidation, verbal abuse, constant threats that they will be reprimanded for the slightest infraction, actual or imagined and other numerous forms of inappropriate behavior.

The State of Maryland knew, or should have known of the activities described above, however, did nothing to reprimand or remove Messrs. DeJong or Gunter from their positions. The specific claims against the State of Maryland include the violation of the claimants' right to privacy under the Maryland Constitution and the Federal Constitution, negligent retention on the part of the State for keeping Messrs. DeJong and Gunter employed despite the State of Maryland's knowledge of their outrageous behavior towards the claimants, violation of State Personnel guidelines and Fair Labor Standards by requiring claimants as early as 1989 to be on call 24 hours of the day, 7 days a week to respond to beeper calls from Messrs DeJong, Gunter or others in supervisory positions.

On behalf of my clients, a claim is made against the State of Maryland for the sum of $500,000.00 for each of the claimants. The names and addresses of each of the claimants are as follows:

DAVID B. SHAPIRO
ATTORNEY AT LAW

Maurice Dale McDonald
5043 Wright Avenue
Baltimore, MD 21205

Ronald David Smith
4601 Mainfield Avenue
Baltimore, MD 21214

Harold H. Morris, Jr.
6111 Shipview Way
Baltimore, MD 21224

Kenneth Fitch
5214 Silver Spring Rd., #8
Perry Hall, MD 21128

Hector Juan Candelario
128-S. Broadway
Baltimore, MD 21231

Frank Lin Randall
1220 Kevin Road
Baltimore, MD 21229

Ronald D. Smith
4601 Mainfield Avenue
Baltimore, MD 21214

Harry Leroy Biedenbock
7704 Beekay Road
Edgemere, MD 21219

Herbert George Nickles
1673 Manchester Road
Westminster, MD 21157

Ken Smith
C-94 Holiday Mobile Est
Jessup, MD 20794

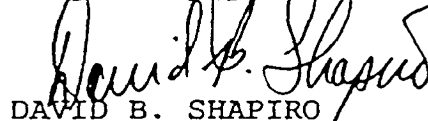
Kenneth Albert Koritzer, Sr.
6012 Eurith Ave.
Baltimore, MD 21206

Jennis A. Daniels
4701 Chatford Ave.
Baltimore, MD 21206

Herbert Nickles
1673 Manchester Road
Westminster, MD 21157

As attorney for these claimants, I would request that all communications and correspondence regarding this matter be directed to me at the address listed above. If you have any further questions or require additional information, please feel free to contact me.

Very truly yours,



DAVID B. SHAPIRO

DBS/br

cc: Claimants

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
LUCILLE MAURER, TREASURER
STATE TREASURY BUILDING
P. BOX 666
ANNAPOLIS, MD 21404

4a. Article Number
P 636 698 740

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
JUN 15 1993

Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

Signature (Agent)

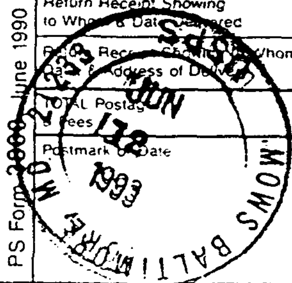
Form 3811, October 1990 ★U.S. GPO: 1990—273-861 DOMESTIC RETURN RECEIPT

P 636 698 740

Certified Mail Receipt
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

UNITED STATES POSTAL SERVICE

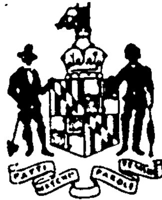
Sent to	
LUCILLE MAURER, TREAS.	
Street & No.	
STATE TREASURY BLDNG	
P.O., State & ZIP Code	
P.O. BOX 666, ANNAPOLIS, MD 21404	
Postage	$ .29
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.00
Return Receipt Showing to Whom, Date, & Address of Delivery	
TOTAL Postage & Fees	$2.29
Postmark or Date	



PS Form 3800, June 1990

LUCILLE MAURER
TREASURER

MARK A. REGER
ACTING CHIEF DEPUTY



MARYLAND STATE TREASURER

LOUIS L. GOLDSTEIN TREASURY BUILDING

ANNAPOLIS, MARYLAND 21401

DEPUTIES
GARY M. AAMOLD
BERNADETTE T. BENIK
MARION B. MEIDENBAUER
GUSTAVO MERCANTI
H. BYRON MATTHEWS
ROBERT L. RICHTER
JUDITH A. SMITH
EMMA STINCHCOMB

CERTIFIED-RETURN RECEIPT REQUESTED

SEPTEMBER,3 1993

DAVID SHAPIRO
SUITE 407
BALTIMORE, MD 21202

RE: CLAIMANT: **MAURICE MCDONALD, AND ELEVEN OTHER CLMTS.**
CLAIM NUMBER: 01MD93TG1678
DATE OF ACCIDENT: 12/15/92

Dear MR. SHAPIRO:

This will acknowledge receipt of your claim.

The Maryland Tort Claims Act (Section 12-106 of the State Government Article) establishes very strict standards under which a claim may be considered by the State Treasurer. In particular, the Maryland Tort Claims Act requires that the claimant must submit a written claim to the Treasurer within 180 days of the accident.

Since your claim was not filed within the 180 day period, the claim may not be considered.

Very truly yours,

Michael J. Fullerton/[illegible]

Michael J. Fullerton
Claims Manager

MJF:brw

TELEPHONE NUMBERS:
410-974-3533 D.C. AREA TOLL FREE 858-5419 TTY 410-974-2609

EXHIBIT 4

STATE OF MARYLAND

MEMORANDUM

DEPARTMENT OF GENERAL SERVICES
SARATOGA STATE CENTER

DATE: November 21, 1989

TO: ALL PERSONNELL

FROM: Fred DeJong, Superintendent

SUBJECT: Snow Plan for Saratoga State Center 1989/1990

All personnel will be required to report to work by 5:00 a.m. when there is a snow fall before the start of a normal work day. You are to report to work automatically and begin to remove snow from all entrances and walkways. You should also be alert to your pager when the weather calls for snow in case your supervisor needs to page you.

Should the weather call for a major snow storm you will report to work by 4:00 a.m. or earlier if instructed to do so. Now is the time to prepare for a snow emergency. Be prepared to report to work early when the weather calls for snow.

Should you have any questions regarding this matter see your supervisor.

cc: W. Eugene Gunter
Assistant Superintendent

EXHIBIT 5

STATE OF MARYLAND

MEMORANDUM

DEPARTMENT OF GENERAL SERVICES
SARATOGA STATE CENTER

DATE: November 24, 1989

TO: Harold Morris, Steam Fitter

FROM: Herb Nickles, Maintenance Chief IV

SUBJECT: WRITTEN REPRIMAND/FAILURE TO RESPOND TO PAGER

On July 28, 1989 you received a memorandum which stated that you must carry your pager after normal working hours. The purpose of this memorandum was to set a procedure for contacting employees after normal working hours so that they could respond to emergencies.

On November 22, 1989 you received instructions from Mr. Gunter, Assistant Superintendent, in reference to snow emergencies. You were told to be prepared to report to work for snow removal and to keep your pager on.

You are being reprimanded for not carrying your pager, and for not responding to the snow emergency on November 22, 1989 and November 23, 1989.

Should an incident of this nature occur in the future, the appropriate disciplinary action will be taken, including a one day suspension.

HB:pk
cc: Fred DeJong, Superintendent
W. Eugene Gunter, Assistant Superintendent
Eric Peddle, Maintenance Supervisor I
Personnel File

EXHIBIT 6

STATE OF MARYLAND

MEMORANDUM

DEPARTMENT OF GENERAL SERVICES
SARATOGA STATE CENTER

DATE: February 27, 1990

TO: Harold Morris, Steam Fitter

FROM: Herb Nickles, Maint. Chief IV

SUBJECT: Written Reprimand/Failure to Respond

On November 24, 1989 you received a Written Reprimand for failing to respond to an emergency. On February 27, 1990 a few minutes past midnight you were called again to respond to an emergency and once again, you failed to respond. Your reason for not responding was that the buses do not run after midnight and you didn't have money for a taxi. This excuse is unacceptable. It will be your responsibility to report to work when called for an emergency (even if it means setting money aside for taxi fare).

Normally, a one day suspension is in order for a second occurrance. You are being reprimanded a second time for not responding to an emergency. Should an incident of this nature occur in the future, a one day suspension will be recommended as the course of action.

HN:cb
cc: Fred DeJong, Superintendent
W. Eugene Gunter, Asst. Superintendent
Eric Peddle, Maint. Supervisor
Personnel File

EXHIBIT 7

State of Maryland
Department of General Services

WILLIAM DONALD SCHAEFER
Governor

MARTIN W. WALSH, JR.
Secretary

ADMINISTRATIVE & FISCAL SERVICES
CENTRAL SERVICES
ENGINEERING & CONSTRUCTION
FACILITIES MANAGEMENT
REAL ESTATE
STATEWIDE FACILITIES MANAGEMENT
TELECOMMUNICATIONS

MEMORANDUM

TO: John Hergenroeder

FROM: Tony Schuster *Terry*

DATE: May 9, 1994

SUBJECT: 310 HVAC

I have been advised by DGS' Office of Engineering and Construction (OEC) that the Department of Budget and Fiscal Planning (DBFP) has verbally disapproved the use of BB-000-936-003 funds for the installation of HVAC in 310 W. Saratoga Street citing the non-relationship of the two projects. OEC is writing a letter of justification to DBFP hoping to shake loose the money. If it is not forthcoming, we (DGS and DHR) will have to see if we can put together enough funding from other sources. If not, we may have to take a look at scaling back the scope of work.

Please call me should you want to discuss this matter further.

TS/sab

cc: D. Dawson
R. Faust
H. Nickles
LTC Roberson
File

Saratoga State Center
310 WEST SARATOGA STREET, BALTIMORE, MARYLAND 21201-3516 (301) 333-4126
TTY for Deaf: Balto. Area 383-7555
D.C. Metro 565-0451
Fax: (301) 333-3016

EXHIBIT 8

11/BB

FILED
OCT 14 1994
CIRCUIT COURT FOR BALTIMORE CITY

KENNETH FITCH, ET AL.	*	**IN THE**
Plaintiffs	*	**CIRCUIT COURT**
v.	*	**FOR**
FREDERICK DeJONG, ET AL.	*	**BALTIMORE CITY**
Defendants	*	**CASE NO. 94077005/CL177675**

* * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Hollander, J.

The Plaintiffs in this case are eleven present and former employees of Defendant Department of General Services ("DGS"). They have filed suit against the State, DGS, and Frederick DeJong ("DeJong"), who, while employed by DGS, supervised Plaintiffs. Presently pending is Defendants' Motion To Dismiss Or For Summary Judgment (the "Motion").

In analyzing a motion to dismiss, the trial court must decide whether the complaint states a claim, assuming the truth of all well-pleaded facts in the complaint and taking all inferences from those facts in the light most favorable to the Plaintiff. Sharrow v. State Farm Mut. Ins. Co., 306 Md. 754, 762, 768 (1986) (citing Tadjer v. Montgomery Co., 300 Md. 539, 542 (1984)). "Dismissal is proper only if the facts and allegations . . . would . . . fail to afford plaintiff relief if proven." Faya v. Almaraz, 329 Md. 435, 443 (1993) (collecting cases). In deciding a motion for summary judgment, the court must decide whether there is any genuine dispute as to material facts, and if not, whether either party is entitled to judgment as a matter of law. Beatty v. Trailmaster Products, Inc., 330 Md. 726, 737-38 (1993); Bits "N" Bytes Computer Supplies, Inc. v. Chesapeake & Potomac

Telephone Co. of Md., 97 Md. App. 557, 576-77 (1993); Seaboard Surety Co. v. Richard F. Kline, Inc., 91 Md. App. 236, 242-45 (1992).

Defendants have fashioned the Motion so as to request alternative remedies. Accordingly, the procedure set forth in Hrehorovich v. Harbor Hospital, 93 Md. App. 772, 784-85 (1992), applies here. There, the Court said:

> When the court considers the motion to dismiss, it should consider only the sufficiency of the pleading. If the trial judge determines that the complaint does state a claim upon which relief can be granted, then he can consider the outside matters and decide whether the defendant is entitled to summary judgment.

In the case at bar, certain claims may be resolved under the standards governing analysis of a motion to dismiss. Where this court finds a claim has been stated, it will proceed to determine whether summary judgment is appropriate.[1] Hrehorovich, 93 Md. App. at 781-85. The following summary of facts has been culled either from the undisputed portions of the various pleadings or from Plaintiffs' Complaint. Only to the extent necessary to resolve a claim by way of summary judgment does the court rely on matters outside the pleadings.

---

[1]In Plaintiffs' Opposition to Defendants' Motion To Dismiss or Motion For Summary Judgment ("Opposition"), Plaintiffs request that the affidavit submitted by Defendants be stricken. To support this request, Plaintiffs assert that the affidavit is "improper," "conclusory," and "self-serving." Opposition, at 22. This court is at a loss to understand Plaintiffs' argument. More importantly, Plaintiffs cite no authority for the proposition that the affidavit is inadmissible. Accordingly, Plaintiffs' request is denied.

Background

At all relevant times, DGS operated the Saratoga State Center facility (the "Center"). DeJong was employed by DGS as the supervisor at the Center, and all Plaintiffs were employed at the Center in various maintenance capacities under DeJong's direct or indirect supervision. The Center also operated a workshop on the premises.

In a multi-count Complaint, Plaintiffs allege that DeJong engaged in a pattern of abusive, intimidating, and harassing conduct.[2] Plaintiffs further allege that DeJong illegally engaged in electronic eavesdropping throughout the Center, by planting wiretaps on telephones, and recording conversations without the knowledge or consent of the participants to the conversations.[3] Moreover, DeJong allegedly made threats of arbitrary termination, forced Plaintiffs to be fingerprinted, and required all Plaintiffs to carry pagers for work on an on-call basis, 24 hours a day, 365 days a year. In addition, Plaintiffs complain about the conditions in the workshop; they claim they were exposed to sawdust, paint thinner, lead dust, and asbestos, and have been injured as a result.

On January 8, 1993, police conducted a search of the Center. According to Defendants, no illegal listening devices were discovered, nor did the police find any recordings made without the knowledge and consent of the people who were recorded.

---

[2]Plaintiffs also allege that DeJong's assistant, Eugene Gunter, participated in the various acts which comprise the gravamen of Plaintiffs' claims. However, Plaintiffs did not join Eugene Gunter as a party herein, and none of the allegations concerning his actions change the legal analysis.

[3]According to Plaintiffs' Opposition, DeJong actually used at least one such recording against an employee at a grievance proceeding. See, Affidavit of Larry Richard Slayton, submitted with the Opposition. However, this allegation is not set forth in the Complaint.

Nevertheless, DeJong was discharged effective February 1, 1993, and he was forbidden to enter any of the DGS complexes.

Plaintiffs have not filed any claims for benefits under the Worker's Compensation Act (Md. Lab. & Emp't Code Ann., §§ 9-101 to 9-1201 (1991 & Supp. 1993). Nor have they lodged grievances under the Employee Grievance Procedures Act, Md. Ann. Code of 1957, Art. 64A, §§ 52-57 (1988).

Given the number of claims, parties, and defendants, the resolution of Defendants' Motion requires discussion of several complex issues. Some of the issues are mutually exclusive in application, but others are intertwined.

The Claims

Plaintiffs have set forth six grounds for recovery from all three Defendants. In Count I, Plaintiffs assert that Defendants were negligent in creating a hazardous work environment and, with respect to the State and DGS, in supervising DeJong's conduct. In Count II, they claim the State and DGS were negligent in hiring DeJong, because they knew or should have known DeJong was incompetent as a supervisor and prone to engage in improper behavior. In Count III, they allege that Defendants violated Plaintiffs' privacy rights by planting illegal surveillance devices. In Count IV, they contend that Defendants intentionally inflicted emotional distress upon Plaintiffs through DeJong's pattern of abusive, intimidating, and harassing conduct, as well as through the placement and use of the electronic surveillance devices. In Count V, Plaintiffs aver that Defendants are strictly liable for maintaining an abnormally dangerous work environment--viz. the airborne health hazards. Under Count VI,

Plaintiffs claim that Defendants have allegedly breached their employment contract with Plaintiffs by requiring them to work overtime without pay. With the exception of Counts II and VI, Plaintiffs appear to rely on the doctrine of respondeat superior to support their contention that the State and DGS are liable.

Defendants have set forth several legal and factual arguments to support their Motion.[4] These defenses are discussed below, *seriatim*.

The Defenses

I. Sovereign Immunity

Defendants argue, inter alia, that certain claims are barred by the doctrine of sovereign immunity. The doctrine of sovereign immunity is firmly established in the law of Maryland. Katz v. Washington Sub. San. Comm'n, 284 Md. 503, 507 (1978) (citing cases). The doctrine applies "not only to the State itself, but also to its agencies and instrumentalities, unless the General Assembly has waived the immunity either directly or by necessary implication." Id., at 507-08 (citation omitted). The doctrine also protects State personnel. See Md. State Gov. Code Ann., § 12-105 (Supp. 1992).

The sovereign may waive immunity, but the waiver must be specific, and funds must have been appropriated to pay a judgment arising from that waiver. Catterton v. Coale, 84

[4]The Attorney General represents the State, DGS and DeJong. At the hearing on the Motion, this court expressed concern as to a possible conflict of interest because, in order for the State and DGS to prevail on the defense of sovereign immunity, they would want to establish, inter alia, that DeJong's actions were sufficiently malicious and/or outrageous so as to be outside the scope of his employment, for which he might be personally liable. In response to the court's questions, counsel for Defendants asserted that as he was arguing for dismissal of the entire Complaint, he saw no conflict of interest.

Md. App. 337, 345-46 (1990) (citing Dep't of Nat'l Res. v. Welsh, 308 Md. 54, 58-49 (1986)). With the Maryland Tort Claims Act, Md. State Gov. Code Ann., §§ 12-101 through 12-501 (1993 & Supp. 1993) (the "MTCA"), the General Assembly has authorized a limited waiver of immunity as to specific conduct by agents of the State. Of particular relevance are MTCA §§ 12-104, 12-105, and 12-201, as modified by Md. Cts. & Jud. Proc. Code Ann., § 5-399.2 (Supp. 1992) ("CJP § 5-399.2"), which state in pertinent part as follows:

> § 12-104 (a) *In general.* -- Subject to the exclusions and limitations in this subtitle, the immunity of the State and of its units is waived as to a tort action, in a court of the State, to the extent of insurance coverage under Title 9 of the State Finance and Procurement Article.
> (b) *Exclusions and limitations.* -- Immunity is not waived under this section as described under [CJP § 5-399.2(a)].
>
> § 12-105 State personnel shall have the immunity from liability described under [CJP § 5-399.2(b)].
>
> § 12-201 (a) *In general.* -- Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.
> (b) *Exclusions.* -- In an action under this subtitle, the State and its officers and units shall have the immunity from liability described under [CJP § 5-399.2(d)].
>
> CJP § 5-399.2
> (a) *Tort liability -- Exclusions from waiver . . .* -- Immunity of the State is not waived under § 12-104 of the State Government Article for:
>
> * * *
>
> (4) Any tortious act or omission of State personnel that:
> (i) Is not within the scope of the public duties of the State personnel; or
> (ii) Is made with malice or gross negligence . . . .
>
> (b) *Same -- State personnel.* -- State personnel are immune from suit in courts of

> the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article . . . .
>
> * * *
>
> (d) *Contract actions.* -- In a contract action under Title 12, Subtitle 2 of the State Government Article, the State and its officers and units are not liable for punitive damages.

The foregoing provisions establish that, to recover on any claim in this case, Plaintiffs must demonstrate that the claim falls within the language of the limited waiver. With regard to their contract claim, Plaintiffs must show that Defendants breached the terms of a *written* contract. See Calvert Assoc's v. Dep't of Emp't & Soc. Svces., 277 Md. 372 (1975). To support a claim against the State or DGS on a tort theory, Plaintiffs must demonstrate that the acts in question were within the scope of DeJong's public duties[5] and were performed without malice or gross negligence. CJP, § 399.2(a)(4). In order to recover from DeJong personally, on a tort theory, Plaintiffs must show either that the act was outside the scope of DeJong's public duties, was done with "malice or gross negligence," or was an act for which the State had not waived immunity. Id., § 399.2(b).

Applying the doctrine of sovereign immunity here, it is immediately clear that Count VI (breach of contract), as presently alleged against the State and DGS, is barred under MTCA, § 12-201(a) and must be dismissed. This is because Plaintiffs do not allege breach of a *written* contract, nor do they identify the specific terms of a *written* contract which

[5]The Court of Appeals has equated the phrase, "scope of the public duties" with the phrase, "scope of employment" for the purposes of the State's liability under the doctrine of respondeat superior. Sawyer v. Humphries, 322 Md. 247, 254 (1991).

Defendants are alleged to have breached.[6] Rather, Plaintiffs merely allege that they are "classified" employees of the State, and that it is "inequitable" for Defendants to have the benefit of having employees on call 24 hours a day, 365 days a year without having to pay overtime wages. See Complaint, ¶¶ 51, 54-58, 61. Unfortunately for Plaintiffs, "recovery for unjust enrichment is based upon an implied in law contract. . . . However meritorious a claim based upon an implied contract may be, if that claim is against the State or any of its agencies, it is barred because it is not based upon a written contract." Mass Transit Admin. v. Granite Construction Co., 57 Md. App. 766, 780 (1980). Were Plaintiffs to amend their complaint to allege the existence of a written contract, Plaintiffs would overcome the sovereign immunity defense as to this claim. Accordingly, with respect to the State and DGS, Count VI will be dismissed with leave to amend.[7]

For the same reasons, DeJong also is entitled to a dismissal of Count VI based on the doctrine of sovereign immunity. In addition, Plaintiffs have not averred that DeJong was even a party to the alleged contract. Plaintiffs only allege that as a supervisor, DeJong "was responsible for the hours of employment and payment of overtime wages as necessary." Complaint, ¶ 54. Plaintiffs have not presented any grounds by which they could recover from DeJong personally for a breach of any contract. Accordingly, Count VI will be dismissed as to DeJong, with prejudice.

Regarding Counts I, III, and IV, Defendants argue that sovereign immunity bars

---

[6]Plaintiffs only reference is to a "MS-22 job description."

[7]Although Count VI as against the State and DGS is also subject to the defense of failure to exhaust administrative remedies (see infra, at 27), that defense can also be overcome by a proper amendment to the Complaint.

Plaintiffs' recovery from DGS and the State, because DeJong's conduct either (A) was outside the scope of employment or (B) was made with malice and/or gross negligence.

A. The Scope of Employment

Defendants argue that DeJong's conduct was outside the scope of his duties as a matter of law. Initially, Defendants maintain that the electronic surveillance activities were outside the scope because that conduct is illegal under CJP, § 10-402(a).[8] Defendants also contend that DeJong's alleged acts of harassment are so outrageous as to be inherently outside the scope of his duties.[9]

---

[8]CJP, § 10-402(a) provides, in part, that it is unlawful for any person to:

(1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(3) Wilfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

[9]Defendants also argue that DeJong's conduct was outside the scope of his duties as a matter of law because they are not within the duties of a superintendent, as set forth in Md. State Fin. & Proc. Code Ann., § 4-602 (1988). This section states, in pertinent part, as follows: "(b) *Duties*.--A superintendent shall perform the duties delegated by the Secretary [of General Services]." Inexplicably, Defendants rely on subsection (a), which states:

> (a) *Appointment and removal.* -- In accordance with the provisions of the State Personnel Article that govern classified service employees, the Secretary [of General Services] may appoint and remove superintendents to supervise designated improvements, grounds and multiservice centers under the jurisdiction of the Department . . . ."

Defendants have provided no authority to support their position that subsection (a) in any way limits the scope of a supervisor's duties.

The Court of Appeals considered the issue of the scope of public duties in Sawyer v. Humphries, 233 Md. 247 (1991). There, the plaintiffs sued a police officer for an egregious battery clearly committed while the officer was off-duty. At the time, the officer was wearing civilian clothing, and was driving his own car. The Court held that the officer's conduct was outside the scope of his employment.

The Court's analysis is noteworthy. After thoroughly reviewing the case law in Maryland, as well as the Restatement Agency (1933) and the Restatement (2d) Agency (1958), the Court summarized the considerations underlying a determination of the scope of employment:

> "To be within the scope of employment, the conduct must be of the kind the servant is employed to perform and must occur during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and actuated at least in part by a purpose to serve the master."

Sawyer, 233 Md. at 255 (quoting E. Coast Lines v. M. & C.C. of Balto., 190 Md. 256, 285 (1948)).[10] See also, Restatement (2d) Agency, § 228(1), Comment b (1958) ("If, however, it is also proved that the act tended to accomplish an authorized purpose and was done at an authorized place and time, there is an inference that it was within the scope of employment.").

The Restatement (2d) Agency also discusses several factors which directly bear on the present case. Under § 229(2), the determination of whether *unauthorized* conduct

---

[10]Although acts performed while "on duty" give rise to an inference of intent, the mere fact that the acts were performed while "on duty" does not by itself establish that the acts were within the scope of employment. Sawyer, 322 Md. at 258-59; see also, Terra Nova Ins. v. Chillum Corp, 71 Md. App. 552, 557 (1987).

nevertheless falls within the scope of employment is aided by the following "matters of fact:"

(a) whether or not the act is one commonly done by such servants;
(b) the time, place and purpose of the act;

* * *

(f) whether or not the master has reason to expect that such an act will be done;
(g) the similarity in quality of the act done to the act authorized;
(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
(i) the extent of departure from the normal method of accomplishing an authorized result; and
(j) whether or not the act is seriously criminal.

See also, Sawyer, 322 Md. at 256 (quoting similar language from Restatement Agency, § 229 (1933)).

Even if an agent's act is forbidden, or is done in a manner that is expressly prohibited, or is itself criminal, the act can still be one that is within the scope of employment. Restatement (2d) Agency, §§ 230-31. The mere fact that DeJong's alleged electronic surveillance is illegal does not per se render such conduct beyond the scope. Restatement Agency, § 229(2), Factor (j). Rather, the issue turns on the seriousness of the offense, and whether either the State or DGS could have foreseen that a supervisor, such as DeJong, would commit such an act in the execution of his duties. "The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do." Id., § 231, Comment a.

In addition, the intentions of the servant can be critical to a determination of whether the act in question is within the scope of employment. Conduct serving both the master's interests and the servant's own interests--even if predominantly benefitting the latter--may

nevertheless fall within the scope of employment. Id., § 236 & Comment b. On the other hand, when the servant acts with no intent whatsoever to serve the interests for which he is employed, the act is not within the scope of employment. Id., § 235. In both situations,

> [i]t is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined. If, therefore, the servant does the very act directed, or does the kind of act which he is authorized to perform within working hours and at an authorized place, there is an inference that he is acting within the scope of employment.

Id., § 235, Comment a. However, "[t]he fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business." Id., § 235, Comment c. See also, Sawyer, 322 Md. at 257 (citing Prosser and Keeton On The Law Of Torts, § 70, at 506 (5th ed. 1984)).

The determination of each of these factors, and the importance of each, are generally jury questions. Sawyer, 322 Md. at 262. See also, Caroll v. Hillendale Golf Club, 156 Md. 542, 545 (1928) (issue of the servant's intent to serve the master or himself is a jury question); Restatement (2d) Agency, § 235, Comment a (same); Id., § 228, Comment d (the degree to which the acts done differ from the acts authorized is a jury question). Only where one legal inference may be drawn from the facts (Carroll, 156 Md. at 545), or where the evidence is so clear that the result is obvious (Restatement Agency, § 228, Comment d), should the court decide the issue.

If Plaintiffs' allegations--in particular, those concerning DeJong's intent--are true, then upon analyzing the various factors set forth under Restatement (2d) Torts, §229(2), the

acts seemingly *appear* to be outside the scope of DeJong's public duties. First, covert surveillance and wiretapping are not acts "commonly done" by supervisors at DGS. Second, although the acts were done while at work, the intent to harass cuts against the conclusion that the acts are within the duties of employment. Third, there is a significant difference between supervising employees on the one hand and eavesdropping and recording employees' conversations on the other. Fourth, neither the State nor DGS furnished DeJong with the recording devices, or even knew about them. Fifth, the extent to which eavesdropping and secret recording of conversations departs from ordinary methods of supervision is apparent by Plaintiffs' allegation that the conduct is offensive to the reasonable person. Complaint, ¶ 36. Seventh, wiretapping is a felony--significantly more serious than the examples in the Restatement (2d) Agency.

Count III (invasion of privacy) and Count IV (intentional infliction of emotional distress), as against DeJong personally, are the only claims in the Complaint that require a determination of the scope of employment issue. Sovereign immunity protects DeJong only as long as the tortious act in question was "within the scope of the public duties," was made "without malice or gross negligence," and constitutes a cause of action "for which the State or its units have waived immunity." CJP § 5-399.2 (a)(4), (b). Plaintiffs have stated claims against DeJong on each of these Counts; DeJong has not established that he is entitled to sovereign immunity as a matter of law. Therefore, the Motion to Dismiss Counts III and IV, as against DeJong, must be denied.

The issue of DeJong's state of mind necessarily depends on evaluating the credibility of witness testimony. Resolution of Counts III and IV depends on whether DeJong's conduct

was, in fact, within the scope of employment. Consequently, whether the doctrine of sovereign immunity applies requires this court to determine disputed facts, so that Summary Judgment with respect to Counts III and IV, as against DeJong, must be denied.

As discussed below, disposition of the remaining counts does not depend on resolution of the scope of duties issue. Based on other grounds, this court can decide the other claims against the State and DGS, as well as Counts I, II, V, and VI as against DeJong personally, without having to resolve disputed facts.

B. Malice or Gross Negligence

Defendants argue that Plaintiffs have failed to state a claim against the State or DGS because Counts I (negligence), II (negligent hiring), III (invasion of privacy), and IV (intentional infliction of emotional distress) in the Complaint allege conduct done with malice and/or gross negligence. The Court of Special Appeals has recently analyzed the statutory term "malice or gross negligence" in the context of sovereign immunity of municipal employees (CJP § 5-321). In Manders v. Brown, 101 Md. App. 191 (1994), a real-estate developer sued the Mayor and City Council individually for a secret change to the zoning laws to benefit their careers and social status in the community. Addressing the defendants' argument of sovereign immunity, the Court held that the defense of sovereign immunity did not support the dismissal of the complaint, given the facts it alleged. Id., at 217-18. The Court's reasoning is apt here:

> [M]alice 'consists of the intentional doing of a wrongful act without legal justification or excuse. An act is malicious if it is done knowingly and deliberately, for an improper motive and without legal justification.' Elliot v.

> Kupferman, 58 Md. App. [510,] at 526 [(1984)]. Furthermore, the mere assertion that an act 'was done maliciously, or without just cause, or illegally, or with wanton disregard, or recklessly, or for improper motive' is not sufficient. Id., at 528. 'To overcome a motion raising governmental immunity, the plaintiff must allege with some clarity and precision those facts which make the act malicious.' Id. . . .

Manders, 101 Md. App. at 216.

Plaintiffs specifically allege that DeJong acted "recklessly," (Complaint, Counts III and IV, ¶¶ 35, 40), "with the intent to embarrass or place the Plaintiffs in an uncomfortable position," (Complaint, Counts I and II, ¶¶ 20, 29), and with the intent "to injure the Plaintiffs in their profession and employment . . . ." Complaint, Counts I and II, ¶¶ 20, 29. See also, Id., Count IV, ¶ 41 (DeJong's conduct was "intentional and reckless," as well as "extreme and outrageous and in deliberate disregard" to the risk of injury). Although Plaintiffs do not allege specifically that DeJong acted with "malice" or "gross negligence," the allegations of the Complaint, if true, are equivalent to malice and/or gross negligence. Given these facts, CJP § 5-399.2 clearly bars suit against the State or DGS.

With respect to both Counts III and IV, the facts alleged against the State and DGS more clearly qualify as malicious or grossly negligent. The privacy tort alleged, that of "intrusion upon seclusion," is defined by the Restatement (2d) Torts, which has been adopted as the definition of that tort in Maryland. Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 163 (1986). Under this standard,

> [o]ne who *intentionally* intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be *highly offensive* to a reasonable person.

Restatement (2d) Torts, § 652A (1958).

The tort of intentional infliction of emotional distress, which was first recognized in Maryland in the case of Harris v. Jones, 281 Md. 560, 566 (1977), is also defined by the Restatement (2d) Torts:

> One who by *extreme and outrageous conduct intentionally or recklessly* causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (2d) Torts, § 46 (1958).

The torts in question, "intrusion upon seclusion" and intentional infliction of emotional distress, similarly include two elements--intent and outrageousness. The State has immunity under CJP, § 5-399.2(a)(4)(ii) when the acts of State personnel are "made with malice or gross negligence," and it is patently evident that such alleged conduct by DeJong is the gravamen of the instant suit. Assuming the truth of these allegations, the contentions necessarily encompass conduct which entitles the State to protection based on sovereign immunity.

Consequently, based on sovereign immunity, Plaintiffs cannot recover for the causes of action pleaded in Counts I, II, III, and IV from either the State or DGS, and these claims must be dismissed with prejudice.

II. Exhaustion of Administrative Remedies

Defendants also contend that their Motion should be granted because Plaintiffs have failed to exhaust their administrative remedies. The law in Maryland is settled that a

prospective litigant must first exhaust all available administrative remedies before filing suit, and the failure to do so deprives the courts of subject matter jurisdiction. See Prince George's Co. v. Blumberg, 288 Md. 275, 288-89 n.9 (1980) (collecting cases). However, several exceptions to the "exhaustion of remedies" rule have been carved, and were stated by the Court in Blumberg:

1. When the legislative body has indicated an intention that exhaustion of administrative remedies was not a precondition to the institution of normal judicial action.
2. When there is a direct attack, constitutional or otherwise, upon the power or authority (including whether it was validly enacted) of the legislative body to pass the legislation from which relief is sought, as contrasted with a constitutional or other type of issue *that goes to the application of a general statute to a particular situation.*
3. When an agency requires a party to follow, in a manner and to a degree that is significant, an unauthorized procedure.
4. Where the administrative agency cannot provide to any substantial degree a remedy.
5. When the object of, as well as the issues presented by, a judicial proceeding only tangentially or incidentally concern matters which the administrative agency was legislatively created to solve, and do not, in any meaningful way, call for or involve applications of its expertise.

Id., at 285 (citations omitted; emphasis added). Of these, reasons 1 and 4 are relevant here.

Defendants' argument focuses on Plaintiffs' failure to file a claim under the Worker's Compensation Act (Md. Lab. & Emp't Code Ann., §§ 9-101 to 9-1201 (1991 & Supp. 1993) (the "WCA") or a grievance under the Employee Grievance Procedures Act, Md. Ann. Code of 1957, Art. 64A, §§ 52-57 (1988) (the "EGPA"). Plaintiffs argue that the injuries in question are expressly exempted from the WCA. With respect to the grievance procedures, Plaintiffs raise two arguments. First, they contend that the statutory language of EGPA, § 53(a) is expressly permissive. Second, they assert that DeJong's use of the secret tapes demonstrates that the grievance proceedings would have been so biased that the EGPA could

not provide a remedy.

A. The WCA

Defendants cannot avail themselves of the defense of failure to pursue WCA benefits with respect to Counts I (negligence), II (negligent retention), III (invasion of privacy), and IV (intentional infliction of emotional distress), as against the State and DGS, or with respect to Counts I, III, and IV as against DeJong. However, the defense supports dismissal of Count V as against the State and DGS.

The WCA was enacted to provide an expeditious remedy to workers "for an accidental personal injury." WCA, § 9-501(a)(1).[11] See generally, Belcher v. T. Rowe Price Found., Inc., 329 Md. 709 (1993); Johnson v. Mountaire Farms, 305 Md. 246, 249-50 (1986). The WCA imposes liability for covered injuries upon the "employer." WCA §§ 9-201(2), 9-501. The failure to file a claim against an employer does not preclude suit against someone other than the employer, such as a co-employee or supervisor. WCA, § 9-509(a); see also, Hutzell v. Boyer, 252 Md. 227 (1969).

The Court of Appeals has consistently held that, ordinarily, the WCA is the exclusive vehicle for an employee's recovery from the employer. Athas v. Hill, 300 Md. 133, 139

---

[11]An "accidental personal injury" is defined by the WCA, § 9-101(b), as follows:

> (1) an accidental injury that arises out of and in the course of employment; [or]
> (2) an injury caused by the willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee . . . .

(1984) (collecting cases); see also WPA, § 9-509 (a, b).[12] The General Assembly, however, has carved two exceptions to this principle:

§ 9-509

(d) *[Exception] -- Deliberate act.* -- If a covered employee is injured . . . as the result of the deliberate intent of the employer to injure . . . the covered employee, the covered employee . . . may:

(i) bring a claim for compensation under this title; or

(ii) bring an action for damages against the employer.

§ 9-901

When a person other than an employer is liable for the injury . . . of a covered employee for which compensation is payable under this title, the covered employee . . . may:

(1) file a claim for compensation against the employer under this title; or

(2) bring an action for damages against the person liable for the injury or death or, in case of joint tort feasors, against each joint tort feasor.

The employer may be responsible under the WCA for acts intentionally done by an employee. For the purposes of § 9-509(d), the Court has held that the WCA allows suit against the employer as if the employer personally had the "deliberate intent," whenever the common law would impute liability to an employer for the intentional tort of a tortfeasor-employee. Federated Stores v. Le, 324 Md. 71, 81 (1991) (citing cases).

---

[12]The Court of Appeals has held that injuries compensable under the WCA include those that are psychological in nature and do not arise from any physical injury. Belcher, 329 Md. 709 (recognizing "post-traumatic stress syndrome" as a valid injury if arising from an event covered by the WCA). However, the Court has limited the right to recover for psychological damages.

> "[A] mere showing that a mental injury was related to *general conditions* of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation. The mental injury must be precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently."

Id., at 739-40 (quoting Sparks v. Tulane Med. Ctr. Hosp. & Clinic, 546 So.2d 138, 147 (La. 1989) (emphasis in Sparks; footnote omitted)).

Defendants rely on the case of Johnson v. Mountaire Farms, 305 Md. 246, 249-50 (1986) to support their position that at least some of Plaintiffs' claims against the State and DGS should have been brought under the WCA. In Mountaire Farms, an employee was electrocuted by faulty equipment that months before had been cited by State inspectors as dangerous. Construing the predecessor statute (Md. Ann. Code of 1957, Art. 101, §§ 15, 44), the Court focused on the words, "deliberate intent of the employer," and refused to expand that phrase to include grossly negligent conduct. Mountaire Farms, 305 Md. at 253. The Court quoted from 2A A. Larson, The Law of Workmen's Compensation, § 68.13, at 13-22 to 13-26:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, *wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.*

Mountaire Farms, 305 Md. at 254 (emphasis in Mountaire Farms).

The case of Federated Dep't Stores Inc. v. Le, 324 Md. 71 (1991), also concerning the predecessor statute of the WCA, directly addresses the exhaustion rule with regard to intentional injuries. There, a store cashier was taken by security to a small room, accused by his supervisor of stealing a calculator that the supervisor herself may have placed in the cashier's briefcase, and held until he signed a prepared confession. After the cashier was fired, he sued for false imprisonment, defamation, and intentional infliction of emotional distress. The circuit court granted a motion for summary judgment in favor of the employer, finding that the employee had failed to exhaust his remedies under the WCA. The Court of

Appeals held, inter alia, that "our decisions support an employee's right . . . to sue his or her employer for some intentional torts based on the employer's vicarious liability for the conduct of a co-employee." Id., at 86 (collecting cases).[13] Thus, claims based on theories that require intent--as opposed to mere negligence--need not be brought under the WCA.

Assuming, arguendo, that DeJong's conduct with respect to the maintenance of the workshop conditions was within the scope of his employment and was not done with malice or gross negligence--so as to avoid the application of sovereign immunity--then Plaintiffs must first pursue their claims against the State or DGS under the WCA only with respect to Count V (abnormally dangerous workshop conditions). Injuries arising from environmental hazards present in the workplace are among the injuries that the WCA was created to address. See, e.g., WCA, § 5-101(g). Nowhere--in the Complaint or elsewhere--do Plaintiffs allege that the workshop conditions were *intentionally* made hazardous, and thus Plaintiffs' only remedy for such injury is under the WCA. Therefore, Count V as against the State and DGS must be dismissed.

In addition, Counts II and V fail to state a claim for relief against DeJong personally.[14] Plaintiffs correctly assert that the duty to select and retain competent employees (Count II) and the duty to provide a safe working environment (Counts II and V) are nondelegable duties held solely by the employer. Federated, 324 Md. at 85-86; Mountaire

---

[13]In so holding, the Court expressly distinguished Mountaire Farms, noting that the case merely stood for the proposition that the term "deliberate intention" used in the statute did not include "the employer's grossly negligent conduct in failing to provide a safe place to work, in violation of government regulations . . . ." Id., at 85.

[14]Indeed, at the hearing on the Motion, Plaintiffs conceded that Count II does not state a claim against DeJong.

Farms, 305 Md. at 254; Athas, 300 Md. at 139. Moreover, Plaintiff has provided no authority by which the allegedly "dangerous" co-employee is liable for the *employer's* negligence in hiring the employee. On the contrary, it is patently obvious that the employee owes no duty to anyone not to be hired by a negligent employer. The Court of Appeals has recognized that claims arising from the breaches of *these* duties are cognizable under the WCA. Athas, 300 Md. at 136, 139-40 & n.3. Therefore, to the extent there is a claim, it must be pursued against the State and DGS as they were the employers. Accordingly, DeJong is entitled to dismissal of Counts II and V as a matter of law.

In contrast, Counts I, II, III, and IV, as against the State and DGS, as well as Counts I, III, and IV as against DeJong, are not barred by Plaintiffs' failure to pursue relief under the WCA, as the alleged injury is not cognizable under the WCA. In general, the term "accidental personal injury" is given a broad construction so as to find the injury compensable whenever it is consistent with the general intent of the WCA. B.&.O.R.R. Co. v. Zapf, 192 Md. 403, 410 (1949). Ordinarily, an accidental injury is an injury arising from "'any fortuitous, casual, and unexpected happening . . . or from any unexpected and unusual operation of a known cause.'" Whiting-Turner Contracting Co. v. McLaughlin, 11 Md. App. 360, 364 (1971) (quoting State Roads Comm'n v. Reynolds, 164 Md. 539, 546 (1933)). Indeed, to be accidental, "'nothing more is required than that the harm be unexpected.'" Id., at 365 (quoting Reiger v. Washington Suburban Sanitary Comm'n, 211 Md. 214, 216 (1956)). An injury may qualify as "accidental," even if it arises from an intentional tort perpetrated by a third person, such as a client of the employer or a co-employee. Bd. of Trustees v. Grandinetti, 269 Md. 733 (1973) (employee's heart attacks,

precipitated by assaults and threats of violence by co-employees if the employee were to testify against employer, constitute an "accidental" injury under WCA); Yellow Cab Co. v. Bisasky, 11 Md. App. 491 (1970) (cab driver's strokes and ultimate death, precipitated by passengers' armed robbery, constitute "accidental" injury under WCA).

However, the term "accidental" does not include unexpected results not produced from accidental causes. McLaughlin, 11 Md. App. at 365 (citing Stancliff v. H.B. Davis Co., 208 Md. 191 (1955)); see also, Mize v. Beauchamp Assoc., 245 Md. 583, 586 (1966) (discussing general rules and collecting cases); Bethlehem Steel Co. v. Golombieski, 231 Md. 124, 129-30 (same); Rowe v. Baltimore Colts, 53 Md. App. 526 (1982) (when injury is a usual event and integral to employment activities, bizarre injury is not "accidental"), cert. denied, 296 Md. 61 (1983). In addition, where the injury arises from causes unrelated to the employment, they are not covered by the WCA, even if the injury takes place at work. Rice v. Revere Copper & Brass, Inc., 186 Md. 561, 566-68 (1946) (death of employee inflicted by co-employee for personal vendetta not covered by WCA).

The analysis in Davis v. Dyncorp, Ct. App. Slip Op. No. 155, filed September 15, 1994 (Sept. Term, 1994), concerning claimed harassment injuries, is particularly applicable to the instant case. Davis, a computer operator, was denied WCA benefits for post-traumatic stress syndrome which he claimed he suffered due to harassment by his co-workers and supervisors. Davis appealed, arguing that Belcher extended to all losses covered by the WCA, including "occupational diseases," and that post-traumatic stress syndrome is an occupational disease.

The Court held that Belcher only extended to the specific statutory phrase, "accidental

personal injuries," under WCA, §§ 9-101(b) and 9-501, and did not apply to the phrase "occupational diseases," independently covered in WCA, §§ 9-101(g) and 9-502. Dyncorp, supra, at 6-7. Then, analyzing a host of cases from other jurisdictions, along with eminent treatises, the Court opined that Davis' claimed injury could, in fact, constitute an occupational disease. Id., at 12. However, the Court determined that even if the injury did fall within the definition of occupational disease, § 9-502(d)(1)(i)[15] precludes recovery because it was not an injury that the nature of an employment intrinsically creates. Dyncorp, supra, at 13-14.[16]

The Court observed that "'while a claimant might prove that a common cold was contracted in the workplace and that lost time resulted, compensation for that occurrence would far exceed the scope of remedy contemplated by the General Assembly.'" Id., at 11 (quoting Richard P. Gilbert & Robert L. Humphreys, Jr., Maryland Workers' Compensation

---

[15]WCA, § 9-502(d) limits an employer's and an insurer's liability to cases where:
(1) The occupational disease that caused the death or disability:
   (i) is *due to the nature of an employment in which hazards of the occupational disease exist* and the covered employee was employed before the date of disablement; or
   (ii) has manifestations that are consistent with those known to result from exposure to a biological, chemical, or physical agent that is attributable to the type of employment in which the covered employee was employed before the date of disablement; and
(2) on the weight of the evidence, it reasonably may be concluded that the occupational disease was incurred as a result of the employment of the covered employee.
(Emphasis added).

[16]The Court expressly refused to rule that all gradually developing, purely mental injuries do not constitute "occupational diseases;" the Court merely held that the mental disease arising from the harassment suffered by Davis did not so qualify. Id., at 15.

Handbook, § 8.2-2, at 168-69 (2d ed. 1993)).[17] The Court concluded that there was nothing about Davis' job that entailed exposure to harassment, and therefore his injuries arising from harassment did not constitute an occupational disease.

For the purposes of WCA benefits, Plaintiffs' alleged injuries are indistinguishable from those suffered by Davis in Dyncorp. They are not an "accidental personal injury," suffered as a result of a particular, violent, fortuitous, precipitating event, and they are not an "occupational disease," arising either from the *nature* of their employment or from a biological, chemical or physical agent. With respect to all Counts, Plaintiffs would not have a claim under the WCA for injuries arising out of Defendants' harassment, as Dyncorp clearly excludes such injuries from coverage. Consequently, this defense does not entitle Defendants to dismissal of Plaintiffs' claims.

Moreover, Counts III and IV, as against all Defendants, are clearly not barred by Plaintiffs' failure to pursue relief under the WCA. As discussed above in the context of sovereign immunity,[18] both counts necessarily depend on conduct arising from an intent to injure. Therefore, WCA § 9-509(d) gives Plaintiffs the option to pursue relief in the courts for damages suffered from such conduct.

Furthermore, Plaintiffs' negligence claim (Count I) and intentional tort claims (Counts III and IV), as against DeJong, survive this defense. Because Plaintiffs could not claim benefits from DeJong personally--as § 9-509(a) makes WCA the exclusive remedy only as

---

[17]The Court noted lead poisoning in painters as a classic example of an occupational disease, in that it evidenced how the intrinsic effects of employment can cause a particular illness. Id., at 9.

[18]See supra, at 15-16.

against employers, and DeJong was never Plaintiffs' employer--any failure by Plaintiffs to file such a futile claim does not preclude filing suit. And as DeJong cannot raise the defense of sovereign immunity for his own malicious conduct (CJP § 5-399.2(b)), Plaintiffs can freely assert that DeJong's conduct was intentional or grossly negligent. Consequently, Counts I, III, and IV state a claim against DeJong, and so survive Defendants' Motion to Dismiss on this ground.[19]

B. The EGPA

Like the WCA, the EGPA was created to centralize and streamline cases involving State employees' grievances arising from their employment. See generally, Prince George's Co. v. Briscoe, 79 Md. App. 325 (1989); 62 Opin. Att'y Gen. 686 (1977); 61 Opin. Att'y Gen. 219 (1976). A "grievance" is defined by EGPA, § 52(b), as follows: "'Grievance' means any cause of complaint . . . arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any

[19]The fact that Plaintiffs' failure to file a WCA claim does not mean that Counts I, II, III, and IV survive the motion to dismiss altogether. As discussed above (see supra, at 14-16), all four counts as stated against the State and DGS are barred by sovereign immunity. With respect to Counts I and II as against the State and DGS, they are barred by Plaintiffs' failure to file a grievance (see infra, at 28-30). With respect to Counts III and IV as against all Defendants, the tortious conduct averred is by definition intentional, and Plaintiffs are allowed under WCA, § 9-509(d) to bring an action for damages in court. Moreover, by assuming the absence of malice and gross negligence--so as to avoid the doctrine of sovereign immunity--Plaintiffs effectively negative the intentional elements of Counts III (invasion of privacy) and IV (intentional infliction of emotional distress), thus precluding action in the courts. Finally, Counts I and II, as stated against DeJong, fall afoul of other defenses. See supra, at 21-22 (Count II), and infra, at 30 (Count I).

other rules, regulations or policies over which management has control."[20] Under the exhaustion rule, a "grievance" must be submitted through the EGPA, unless otherwise excused, as a prerequisite to judicial action. In light of the definition of a "grievance," however, this defense only applies to claims against the State and DGS, as DeJong is not Plaintiffs' employer.

The EGPA does not have an express exclusivity provision comparable to that found in the WCA, § 9-509(a), or an express bypass mechanism comparable to the WCA, §§ 9-509(d), 9-901. Plaintiffs argue that the language of EGPA, § 53(a), is expressly permissive. Specifically, § 53(a) states in pertinent part as follows:

> Any employee classified or unclassified, of the executive branch of the State government, . . . *may* present any grievance which he may have, in accordance with the provisions of this subtitle, free from interference, coercion, restraint, discrimination, or reprisal.

(Emphasis added).

Notwithstanding Plaintiffs' assertions to the contrary, § 53(a) does not constitute an express indication by the Legislature that the grievance mechanism is optional. See White v. Prince George's Co., 282 Md. 641, 648-49 (1978) (interpreting statutory language--to the effect that a person "may" appeal the denial of a tax refund to the Tax Court--as subject to the exhaustion rule). Indeed, nowhere in the EGPA is a potential complainant specifically permitted to bypass the EGPA procedures, as the General Assembly clearly provided in § 9-

[20]At the hearing, Defendants acknowledged that claims concerning DeJong's electronic eavesdropping activities (Claims I, III, and IV) may not constitute a grievance under the EGPA, unless it is shown that such activities constituted a practice or policy of DGS.

509(c,d) of the WCA. This strongly suggests that no such bypass was intended.[21] Consequently, Plaintiffs have not established that the provisions of the EGPA are optional.

Counts I, II, and V, as alleged against the State and DGS, also fall clearly within the ambit of the EGPA. As previously mentioned, a "grievance" is defined by EGPA, § 52(b), as "*any* cause of complaint . . . arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations or policies over which management has control." Logically, this includes the hiring and supervising of all personnel, as well as to the required duties of employees and the environment to which the employees are exposed. Plaintiffs have not presented any argument or authority to contradict this apparent conclusion. Therefore, all claims that were not brought under the EGPA but should have been, where that failure is not excused, must be dismissed.

Plaintiffs contend that DeJong's earlier use of an unauthorized recording of an employee at an unrelated grievance proceeding demonstrates that the grievance process was biased,[22] and would excuse pursuit of any claims under the EGPA. Plaintiffs' Opposition, at 11. Plaintiffs' assertion that "the grievance process was biased against them" (Plaintiffs' Opposition, at 11) does not excuse their failure to file the grievance.

In Prince George's Co. v. Briscoe, 79 Md. App. 325 (1989), several co-workers of Briscoe tried to intervene in the suit then pending in the circuit court, even though none of

---

[21]In contrast, the fact that the EGPA lacks an exclusivity clause merely implies that other remedies may be sought in addition to the EGPA.

[22]The facts relating to Richard Slayton, the co-employee whose conversation allegedly had been used at a grievance proceeding, appear only in Plaintiffs' Opposition.

the co-workers had filed grievances. There, as here, the prospective parties claimed that "it would have been futile for the . . . workers to use the administrative process because the [Department of Personnel] had made clear its position on this [reclassification of employment] issue by ruling in regard to the [other] workers." Id., at 345. The Court of Special Appeals rejected the notion that the process was biased based upon other cases, stating:

> Given the fact that the hearing officer was never given the opportunity to hear evidence and make a decision on the reclassification issue, there is no basis for the contention that the [Department of Personnel] has evidenced a strong position such that it would make any action filed by the . . . workers at the administrative level an exercise in futility. It simply appears that the . . . workers are availing themselves of the administrative process, but attempting to bypass some of the steps. As the Court pointed out in [Blumberg, 288 Md. at 292], an administrative remedy is not inadequate so as to authorize judicial intervention before exhaustion merely because it is accompanied by delay, expense, annoyance, or even some hardship.

Id., at 345-46.

In their Complaint, Plaintiffs do not present even skeletal averments so as to excuse noncompliance with the EGPA, whether on the basis of futility or on any other basis. Thus, this court cannot consider any claim that should have been raised first in a grievance proceeding, unless, through amendment, Plaintiffs can present facts that support excuse. This rule clearly applies to Count V, as the State and DGS. However, as to Counts I, II, III, and IV, as against the State and DGS, even if the Complaint were amended, the claims would fail on other grounds. Consequently, as against the State and DGS, Counts I (negligence), II (negligent supervision), and VI (overtime wages) must be dismissed with prejudice, and Count V (abnormally dangerous working conditions), must be dismissed

without prejudice.

As to Count VI, discussed supra at pages 7-8, even assuming Plaintiffs can produce a written contract so as to avoid the application of sovereign immunity (CJP § 5-399.2(d)), the failure to pay overtime wages clearly would be addressable by the grievance procedures. Indeed, claims for unpaid wages are among the quintessential grievances that the EGPA was adopted to address. See, e.g., Briscoe, 79 Md. App. at 338-41; EGPA, §§ 6-102(a), 6-303(a), 6-304(a), 6-305(a), 10-103, 10-210(a); 61 Opin. Att'y Gen. 219, 226 (1976) ("It is generally held that in the absence of definition 'grievance' is not a term of art but must be accepted in its usual sense and has no connotation different from its ordinary use"). Therefore, unless excused, Claim VI against the State and DGS must be dismissed as a matter of law for the failure to exhaust remedies. Likewise, even if Plaintiffs were to amend Count VI as against DeJong to state facts sufficient to avoid all previous objections, Plaintiffs' unexcused failure to bring a grievance also bars suit against DeJong for the same reasons as it bars suit against the State and DGS.

Other Issues Relating To DeJong

Count I, essentially alleging that DeJong negligently inflicted emotional distress upon Plaintiffs, must be dismissed as a matter of law because Maryland does not recognize the right to recover for the negligent infliction of emotional distress absent intent or physical injury.[23] Abrams V. City of Rockville, 88 Md. 588, 593-94. (1991) (tort not recognized); H. & R. Block, Inc. v. Testerman, 275 Md. 36, 48-49 (1975) (emotional distress recover-

[23]Neither party raised this issue in their briefs or at the hearing on the Motion.

able with intent, or along with physical injury arising from negligence). To the extent Plaintiffs allege that DeJong was grossly negligent in inflicting emotional distress, that theory is embraced by the intentional infliction of emotional distress (Count IV). See Hamilton v. Ford Motor Credit Co., 66 Md. App. 46, 62-64, cert. denied, 306 Md. 118 (1986).

Conclusion

Based on the foregoing, Plaintiffs cannot recover from the State or DGS on the grounds raised in Counts I, II, III, and IV, under any statement of facts or theory of law. Similarly, Plaintiffs cannot recover from DeJong on Counts I, II, and V. Although Plaintiffs have failed to state a claim against the State or DGS in Count V, Plaintiffs could state a claim if, by amendment, they allege facts supporting an excuse for any failure to comply with the EGPA. Furthermore, although Plaintiffs have failed to state a claim against the State, DGS, or DeJong in Count VI, Plaintiffs could, by amendment, state a claim against the State and DGS if they allege the existence of a written contract, the specific terms therein breached, and facts supporting an excuse for any failure to comply with the EGPA.

Accordingly, it is, this 3rd day of October, 1994, by the Circuit Court for Baltimore City, ORDERED that Counts I, II, III, and IV of Plaintiffs' Complaint against the State and DGS be, and the same hereby are, DISMISSED with prejudice. It is further ORDERED that Counts I, II, V, and VI of Plaintiffs' Complaint against DeJong be, and the same hereby are, DISMISSED with prejudice. It is further ORDERED that Counts V and VI of Plaintiffs' Complaint as to the State and DGS be, and the same hereby are, DISMISSED without prejudice, with 15 days leave to amend from the date of this Order. It

is further ORDERED that the remainder of Defendants' Motion be, and the same hereby is, DENIED.

Ellen Hollander
Judge Ellen L. Hollander
10:02 AM

cc: Hon. Hilary D. Caplan
David B. Shapiro, Esq.
Andrew H. Baida, Esq., Assistant Attorney General

KENNETH FITCH, et al.	:	IN THE
PLAINTIFFS	:	CIRCUIT COURT
vs.	:	FOR
FREDERICK W. DeJONG, et al.	:	BALTIMORE CITY
DEFENDANTS	:	
	:	CASE NO. 94077005/CL177675

CIRCUIT COURT FOR BALTIMORE CITY
1994 OCT 12 A 7:03
CIVIL DIVISION

: : : : : : : : : : : : : :

NOTICE OF SERVICE OF DISCOVERY MATERIALS

The State of Maryland, Defendant, gives notice that on this 7th day of October, 1994, it has served a copy of Interrogatories directed to each of the Plaintiffs: Kenneth Fitch, Harry L. Biedenback, Harold H. Morris, Jr., Kenneth A. Smith, Jennis H. Daniels, Frank Lin Randall, Hector Juan Candelario, Kenneth A. Koritzer, Sr., Herbert G. Nickles, Maurice Dale McDonald, and Ronald D. Smith, by first class mail, postage prepaid on each of the following counsel of record:

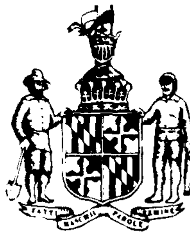
David Shapiro, Esq.
1101 St. Paul St., Suite 407
Baltimore, MD 21202
Attorney for Plaintiffs

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Andrew H. Baida
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6318

John H. Thornton
Assistant Attorney General
Department of General Services
300 W. Preston St., Room 403
Baltimore, MD 21201
(410) 225-4990
Attorneys for Defendant State of Maryland

J. Joseph Curran, Jr.
Attorney General



Norman E. Parker, Jr.
Ralph S. Tyler
Deputy Attorneys General

State of Maryland
OFFICE OF THE ATTORNEY GENERAL

Telecopier No. (410) 576-6955

Writer's Direct Dial No. (410) 576-6318

September 23, 1994

The Honorable Hilary D. Caplan
Circuit Court for Baltimore City
Courthouse East
Room 205
111 N. Calvert Street
Baltimore, MD 21202

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 SEP 23 PM 3:38
CIVIL DIVISION

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*,
Case No. 94077005/CL177675

Dear Judge Caplan:

I am enclosing a copy of the letter to Judge Hollander that I referred to at today's scheduling conference in the above case which discusses the Court of Special Appeals' recent decision in *Manders v. Brown*, 101 Md.App. 191 (1994). Thank you for your consideration.

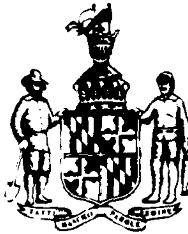
Sincerely,

Andrew H. Baida
Assistant Attorney General

cc: David B. Shapiro, Esq.
John H. Thorton, Assistant Attorney General
Clerk's office

200 Saint Paul Place ♦ Baltimore, Maryland 21202-2021
Telephone Numbers: (410) 576-6300 ♦ D.C. Metro 470-7534
Telephone for Deaf: (410) 576-6372 ♦ D.C. Metro 565-0451

J. JOSEPH CURRAN, JR.
Attorney General



NORMAN E. PARKER, JR.
RALPH S. TYLER
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER NO. (410) 576-6955

WRITER'S DIRECT DIAL NO. (410) 576-6318

September 2, 1994

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 SEP 23 PM 3:38
CIVIL DIVISION

The Honorable Ellen L. Hollander
Circuit Court for Baltimore City
Mitchell Courthouse
Courthouse West, Room 408
100 N. Calvert Street
Baltimore, MD 21202

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*,
Case No. 94077005/CL177675

Dear Judge Hollander:

I am writing to bring to the Court's attention the recent decision of the Court of Special Appeals in *Manders v. Brown*, 101 Md.App. 191 (1994), which is relevant to two of the defenses that the defendants have raised. I did not learn about this decision, which is contained in the August 19, 1994 Maryland Advance Reports, until after the August 25 hearing on defendants' Motion to Dismiss or for Summary Judgment.

The Court of Special Appeals in *Manders v. Brown* held that local public officials who allegedly modified an urban renewal plan to benefit certain constitutents and themselves acted with malice and beyond the scope of their employment and thus were not entitled to immunity under Md. Cts. & Jud. Proc. Code § 5-321 (1993 Cum. Supp.). *See* 101 Md.App. at 216-218. Observing that "malice 'consists of the intentional doing of a wrongful act without legal justification or excuse,'" *id.* at 216 (*quoting Elliott v. Kupferman*, 58 Md.App. 510, 526 (1984)), the Court of Special Appeals held that "[p]urposefully modifying an existing urban renewal plan for a corrupt or fraudulent motive to benefit oneself or an influential constituent is a malicious act. Manders alleged that this modification was done secretly to gain government; if so, that conduct would be malicious." *Id.* at 217. This holding is directly relevant to the State and Department of General Services' position that they are immune from liability under the Tort Claims Act, because the allegations of the complaint demonstrate that Mr. DeJong's alleged wiretapping conduct was "done knowingly and deliberately, for an improper motive and without legal justification." *Id.* at 216 (*quoting Elliott v. Kupferman*, 58 Md.App. at 526).

200 Saint Paul Place • Baltimore, Maryland 21202-2021
Telephone Numbers: (410) 576-6300 • D.C. Metro 470-7534
Telephone for Deaf: (410) 576-6372 • D.C. Metro 565-0451

The Court in *Manders v. Brown* also stated that whether an employee acts within the scope of his or her employment depends on whether "the act was such as was incident to the performance of the duties entrusted to the employee by the employer." 101 Md.App. at 217 (*quoting Ennis v. Crenca*, 322 Md. 285, 293-94 (1991)). Addressing the allegations set forth in the complaint, the Court held that "it can reasonably be inferred from these allegations that appellees were acting solely in their own interests and, therefore, not within the scope of their official employment." 101 Md.App. at 218. This holding is relevant to the defendants' arguments that plaintiffs cannot sue the State or the Department of General Services in a tort action but rather can only seek relief before the Workers' Compensation Commission, because the alleged wiretapping acts of Mr. DeJong directly violated Maryland law and advanced none of the statutory duties of the Department of General Services set forth in Md. State Fin. & Proc. Code §§ 4-602 and 4-604 (1988).

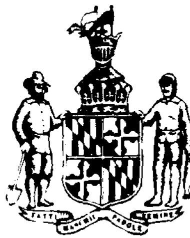
Thank you for your consideration.

Sincerely,

ANDREW H. BAIDA
Assistant Attorney General

cc: David B. Shapiro, Esq.
John H. Thorton, Assistant Attorney General
Clerk's office

J. JOSEPH CURRAN, JR.
Attorney General



NORMAN E. PARKER, JR.
RALPH S. TYLER
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER NO. (410) 576-6955

WRITER'S DIRECT DIAL NO. (410) 576-6318

September 2, 1994

The Honorable Ellen L. Hollander
Circuit Court for Baltimore City
Mitchell Courthouse
Courthouse West, Room 408
100 N. Calvert Street
Baltimore, MD 21202

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 SEP -2 PM 3:48
CIVIL DIVISION

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*, Case No. 94077005/CL177675

Dear Judge Hollander:

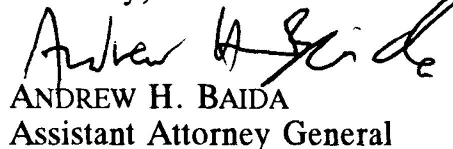
I am writing to bring to the Court's attention the recent decision of the Court of Special Appeals in *Manders v. Brown*, 101 Md.App. 191 (1994), which is relevant to two of the defenses that the defendants have raised. I did not learn about this decision, which is contained in the August 19, 1994 Maryland Advance Reports, until after the August 25 hearing on defendants' Motion to Dismiss or for Summary Judgment.

The Court of Special Appeals in *Manders v. Brown* held that local public officials who allegedly modified an urban renewal plan to benefit certain constitutents and themselves acted with malice and beyond the scope of their employment and thus were not entitled to immunity under Md. Cts. & Jud. Proc. Code § 5-321 (1993 Cum. Supp.). *See* 101 Md.App. at 216-218. Observing that "malice 'consists of the intentional doing of a wrongful act without legal justification or excuse,'" *id.* at 216 (*quoting Elliott v. Kupferman*, 58 Md.App. 510, 526 (1984)), the Court of Special Appeals held that "[p]urposefully modifying an existing urban renewal plan for a corrupt or fraudulent motive to benefit oneself or an influential constituent is a malicious act. Manders alleged that this modification was done secretly to gain government; if so, that conduct would be malicious." *Id.* at 217. This holding is directly relevant to the State and Department of General Services' position that they are immune from liability under the Tort Claims Act, because the allegations of the complaint demonstrate that Mr. DeJong's alleged wiretapping conduct was "done knowingly and deliberately, for an improper motive and without legal justification." *Id.* at 216 (*quoting Elliott v. Kupferman*, 58 Md.App. at 526).

The Court in *Manders v. Brown* also stated that whether an employee acts within the scope of his or her employment depends on whether "the act was such as was incident to the performance of the duties entrusted to the employee by the employer." 101 Md.App. at 217 (*quoting Ennis v. Crenca*, 322 Md. 285, 293-94 (1991)). Addressing the allegations set forth in the complaint, the Court held that "it can reasonably be inferred from these allegations that appellees were acting solely in their own interests and, therefore, not within the scope of their official employment." 101 Md.App. at 218. This holding is relevant to the defendants' arguments that plaintiffs cannot sue the State or the Department of General Services in a tort action but rather can only seek relief before the Workers' Compensation Commission, because the alleged wiretapping acts of Mr. DeJong directly violated Maryland law and advanced none of the statutory duties of the Department of General Services set forth in Md. State Fin. & Proc. Code §§ 4-602 and 4-604 (1988).

Thank you for your consideration.

Sincerely,



ANDREW H. BAIDA
Assistant Attorney General

cc: David B. Shapiro, Esq.
John H. Thorton, Assistant Attorney General
Clerk's office

(9) 00

FILED
AUG 15 1994
CIRCUIT COURT FOR
BALTIMORE CITY

KENNETH FITCH, et al.	: IN THE
PLAINTIFFS	: CIRCUIT COURT
vs.	: FOR
FREDERICK W. DEJONG, et al.	: BALTIMORE CITY
	:
	:
	: Case No. 94077005/CL177675

:::::::::::::::::::::::::

AMENDED AFFIDAVIT OF JAMES S. WRIGHT IN SUPPORT OF
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

I, JAMES S. WRIGHT, SOLEMNLY SWEAR AND AFFIRM as follows:

1. I am over the age of 18 and I am competent to be a witness.

2. This affidavit is made on my personal knowledge.

3. I am A (JSW) Sergeant in the Maryland State Police and I have been a Maryland State Police trooper since 1980.

4. On January 8, 1993, I was assigned to investigate allegations that Frederick DeJong had engaged in illegal wiretapping, electronic eavesdropping, or recording of telephone conversations at the Saratoga State Center in Baltimore, Maryland. My investigation consisted of searching the premises, including the office of Frederick DeJong, for wiretapping or other electronic eavesdropping equipment, and interviewing numerous individuals, including employees of the Department of General Services who worked at the Saratoga State Center. The employees interviewed included Jennis Daniels, Ronald David Smith, Harold "Sonny" Morris, Hector Juan Candelario, Kenneth Fitch, and others. A thorough electronic "sweep" of the premises was conducted on January 13, 1993 by Sgt. James Schroyer of the Maryland State Police in my presence and at my request to search for electronic eavesdropping equipment.

5. My investigation failed to develop probable cause to support allegations that Frederick DeJong (1) conducted unlawful wiretapping or other unlawful electronic surveillance of any telephone conversations of any employees who worked at Saratoga State Center; (2) used electronic listening devices hidden in ceilings, walls, around the telephone system, or anywhere else at Saratoga State Center; or (3) made unauthorized tape recordings of conversations of employees at Saratoga State Center. No wiretapping or electronic listening devices or equipment and no unauthorized tape recordings of conversations of employees were found.

6. During my investigation I found in Mr. DeJong's desk one tape recording of employees at the Saratoga State Center but this recording was of a routine business meeting among Mr. DeJong and other employees of the Department of General Services, and it was made clear in the conversation recorded that all present at the meeting were aware that it was being recorded.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this affidavit are true.

July 28, 1994
Date

James S. Wright
James S. Wright

(8) DB

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

RECEIVED - CIRCUIT COURT FOR BALTIMORE CITY
94 AUG 15 PM 3:39
CIVIL DIVISION

* * * * * * *

MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' response to defendants' Motion to Dismiss or for Summary Judgment confirms the propriety of granting defendants' motion. Plaintiffs have chosen to ignore a number of arguments that defendants set forth in their June 2, 1994 memorandum in support of their motion. Plaintiffs have also elected to rely on irrelevant factual allegations that are not set forth in the Complaint, that pertain to alleged incidents arising long before the Complaint was filed, and that, even if true, give rise to claims that are plainly barred by the statute of limitations. For the reasons set forth in defendants' June 2 memorandum and this reply, this Court should grant defendants' motion.

REPLY ARGUMENT

Defendants' June 2 memorandum addresses each of the plaintiffs' claims in the order in which those claims are set forth in the Complaint. This reply memorandum responds to each of the plaintiffs' arguments in the order in which they are set forth in plaintiffs' Opposition to defendants' motion.

I. PLAINTIFFS' CLAIMS ARE SUBJECT TO THE MANDATORY EXHAUSTION PROVISIONS SET FORTH IN THE STATE EMPLOYEE MERIT SYSTEM GRIEVANCE PROCEDURE STATUTE.

Plaintiffs do not dispute that the literal language set forth in Md. State Pers. & Pens. Code §§ 10-101 (1993) applies to all of their claims. Rather, they argue that the language provided in the State employee merit system grievance procedure statute does not impose a "compulsory" remedy but rather one that is "permissive." Plaintiffs' Opposition at 10. That argument is directly undermined by the Court of Special Appeals' decision in *Prince George's County Health Department v. Briscoe*, 79 Md. App. 325 (1989), *aff'd*, 323 Md. 439 (1991), in which that court held that the State employee grievance procedure statute must "be pursued and exhausted; such exhaustion is a prerequisite to judicial review." 79 Md. App. at 344. Contrary to plaintiffs' citationless claim that this procedure is optional, the Court of Special Appeals reversed the Circuit Court for Prince George's County for refusing "to require the [plaintiffs] to follow that procedure" and for instead allowing the plaintiffs to file suit directly at the trial court level. *Id.* at 345. Plaintiffs are just wrong, therefore, in contending that "[t]here is no language in the statute to indicate that the grievance procedure is the 'sole remedy' available to the Plaintiffs," Opposition at 10, as the Court of Special Appeals recognized that "where a statute provides a special form of remedy, the plaintiff must use that form rather than any other." *Briscoe*, 79 Md. App. at 344, *citing Soley v. State of Maryland Comm'n on Human Relations*, 277 Md. 521, 526 (1976).

Plaintiffs rely on the affidavit of a nonplaintiff against whom defendant DeJong allegedly used an unauthorized tape recording in connection with a grievance proceeding,

and assert that the use of this tape violated former Md. Code Ann. Art. 64A, § 53(a) (1977); therefore, plaintiffs contend that because they "were not free from interference, restraint or reprisal, they did not have to exhaust the grievance procedure. . . ." Opposition at 11. However, the Complaint makes no reference to this alleged incident, which supposedly took place in 1988 and thus falls far outside the applicable statute of limitations. *See* Affidavit of Larry Richard Slayton, ¶¶ 3-5. More importantly, even if former § 53(a) (presently Md. State Pers. & Pens. Code § 10-103) did provide an excuse for failing to exhaust the grievance procedures in the circumstances set forth in Mr. Slayton's affidavit, no *plaintiff* has that excuse because no plaintiff contends that any unauthorized tape recordings were ever introduced in grievance proceedings in which they were parties.

Plaintiffs nevertheless argue that Mr. Slayton's alleged experience demonstrated the futility of their pursuit of any grievances before the Secretary of Personnel, claiming that "[t]his episode alerted the employees, as it would any reasonable person, that the grievance process was biased against them." Opposition at 11. Once again, the Court of Special Appeals in *Briscoe* rejected an indistinguishable contention "that it would have been futile for the RICA social workers to use the administrative process because the DOP had made clear its position on this issue by its ruling in regard to the PG social workers." 79 Md. App. at 345. Instead, the Court of Special Appeals stated, "[g]iven the fact that the hearing officer was never given the opportunity to hear evidence and make a decision on the reclassification issue, there is no basis for the contention that the DOP has evidenced a strong position such that it would make any action filed by the RICA social workers at the administrative level an exercise in futility." *Id.*

Thus, regardless of the circumstances that surrounded Mr. Slayton's grievance experience, they provide no excuse for the plaintiffs to bypass the mandatory mechanism set forth in the employee grievance procedure statute. Rather, as their opposition makes clear, plaintiffs complain (1) that they were subject to "restrictions in their ability to continue in their jobs and [were] inhibited [in] their ability or confidence to be promoted to better paying positions", and (2) that "[i]n some instances, the actions of DeJong, tacitly approved by his supervisors and the State government, led to the unwarranted firing or forced resignation of employees at the Saratoga Street facility." Opposition at 21. These are the precise types of claims that are subject to the jurisdiction of the Maryland Secretary of Personnel under the State employee grievance procedures. Indeed, the Court of Special Appeals in *Briscoe* held that even more serious claims alleging a constitutional violation must first be brought as "a grievance at the agency level. . . ." 79 Md. App. at 344.

For these reasons, this Court should dismiss the plaintiffs' claims because plaintiffs have failed to utilize the mandatory remedy provided in the State employee grievance procedure statute.

II. EVEN IF NOT SUBJECT TO THE STATE EMPLOYEE GRIEVANCE PROCEDURE STATUTE, PLAINTIFFS' CLAIMS ARE REDRESSABLE ONLY BEFORE THE WORKERS' COMPENSATION COMMISSION.

Even if the plaintiffs could show that they are not subject to the mandatory grievance procedures set forth in Md. State Pers. & Pens. Code §§ 10-101 - 10-210, their claims are still barred because their sole remedy is before the Workers' Compensation Commission. Plaintiffs quote *Belcher v. T. Rowe Price Foundation, Inc.*, 329 Md. 709,

739 (1993), without offering any elaboration on this point, for the proposition that "a mere showing that a mental injury was related to *general conditions* of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation" under the Workers' Compensation statute. *See* Opposition at 12 (emphasis in original). This quote from *Belcher* does not assist plaintiffs because the heart of their psychological injury claims is based on alleged specified acts of wiretapping, eavesdropping and harassment that they contend resulted in tortious injuries to the plaintiffs. *See* Complaint ¶¶ 10, 12, 20, 24, 25, 29, 30, 31, 32, 35-37, 40-44. These claims are clearly compensable under the Workers' Compensation statute as set forth in Md. Labor & Empl. Code §§ 9-101(b)(1) and (2). *See also Hardy v. State*, 685 P.2d 610, 611 (Wash.App. 1984) (holding that the State of Washington's workers' compensation statute barred an employee's action for damages based on a supervisor's acts of harassment); *Sparks v. Tulane Med. Ctr. Hosp. & Clinic*, 546 So.2d 138, 148 (La. 1989) (*cited and quoted with approval* in *Belcher*).

Moreover, plaintiffs quote *Belcher* entirely out of context to give the incorrect impression that they may seek recovery in a tort action for psychological injuries related to incidents that span an extended time period. *Belcher* does not support such an unprecedented claim. To the contrary, the passage from *Belcher* that plaintiffs cite follows an earlier portion of that decision in which the Court of Appeals adopted in the workers' compensation context the tort standard that allows recovery for mental injuries. In that portion of its decision, the Court stated that recovery under traditional tort principles is allowed for emotional harm provided that "such harm be capable of objective determination." 329 Md. at 735. The subsequent passage that plaintiffs rely on makes

clear, however, that no recovery will lie under either tort principles or workers' compensation law upon "a mere showing that a mental injury was related to *general conditions* of employment, or to incidents occurring over an extended period of time. . . ." *Belcher,* 329 Md. at 739 (emphasis in original) (quotations and citation omitted). Therefore, to the extent the incidents plaintiffs complain of give rise to a claim for psychological injuries, those injuries are compensable only before the Workers' Compensation Commission; otherwise, those injuries are not compensable at all.

Plaintiffs' remaining claims, which seek compensation for the *physical* injuries plaintiffs contend they have suffered as a result of working in dangerous environments, *see* Complaint ¶¶ 11, 24, 46-50, are also clearly compensable under the Workers' Compensation Act as an "occupational disease" within the meaning of Md. Labor & Empl. Code §§ 9-101(b)(3) and 9-101(g). Md. Labor & Empl. Code § 9-101(b)(3)(i) provides that an "accidental personal injury" includes an "occupational disease," which § 9-101(g) provides "means a disease contracted by a covered employee: (1) as the result and in the course of employment; and (2) that causes the covered employee to become temporarily or permanently, partially or totally incapacitated." Nothing in *Belcher* remotely suggests that the plain language of these statutory provisions does not apply to plaintiffs' assertions that they "sustained serious injury to their persons by being exposed to asbestos, lead and noxious fumes over a period of years. . . ." Complaint ¶ 50. *See also* Defendants' June 2 memorandum at 12-16.[1]

---

[1] In addition, for the reasons set forth in defendants' June 2 memorandum at 22, even if plaintiffs' dangerous work environment claims were not subject to the Workers' Compensation statute, defendant DeJong owed no personal duty toward the plaintiffs to provide them with a safe workplace and thus "cannot be held liable for negligently performing the employer's (continued...)

There is similarly no merit in plaintiffs' contention that the Workers' Compensation statute does not apply because "[i]ntentional torts of employees are an exception to Workman's Compensation." Opposition at 13. In fact, the exception is much more limited, and the Court of Appeals has held that an employee may sue his or her employer only for "the intentional torts of an employee committed within the scope of employment. . . ." *Federated Dept. Stores Inc. v. Le*, 324 Md. 71, 86 (1991). For the reasons discussed below and in the defendants' June 2 memorandum at 4-9 and 10-16, none of the alleged actions of defendant DeJong occurred within the scope of his employment. Therefore, plaintiffs' claims are subject to the exclusive jurisdiction of the Workers' Compensation Commission.

As set forth in defendants' June 2 memorandum at 16-17, the exclusivity provisions of the Workers' Compensation statute also apply to plaintiffs' negligent retention claims in Count Two of the Complaint, which seek relief against the State and the Department of General Services for their alleged negligence in hiring and retaining defendant DeJong. *See* Complaint ¶¶ 27-33. Plaintiffs' opposition makes no attempt to respond to this argument. In addressing another argument that defendants make, plaintiffs maintain that "[t]he State knew or reasonably should have known that extra precautions should have been taken against Mr. DeJong and that he should never have been placed in a supervisory position." Plaintiffs' Opposition at 20. But this is simply another way of arguing that the State breached its duties to provide a safe workplace and to select competent employees. As the Court of Appeals has recognized, however,

---

[1](...continued)
nondelegable duties." *Athas v. Hill*, 300 Md. 133, 149 (1984). Plaintiffs offer no response to this argument.

damages resulting from the breach of either of these duties are recoverable only before the Workers' Compensation Commission. *See Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 255 (1986) ("Here, the employer's failure to warn of the dangerous electrical lines or failure to provide safe conditions, deliberately placing Rodney in a dangerous position and wilfully violating governmental regulations, does not constitute an intentional tort for purposes of overcoming the exclusivity provision of the Workmen's Compensation Act."); *Athas v. Hill*, 300 Md. at 149 ("Thus, under the workmen's compensation scheme as well as under the common law, the supervisory employee should not be held liable for breaching a duty such as providing a safe place to work.").

For these reasons, even if plaintiffs could establish that some of their claims were not subject to the mandatory State employee grievance procedures, those claims must be dismissed because they can only be brought before the Workers' Compensation Commission.

III. PLAINTIFFS' CLAIMS AGAINST THE STATE AND THE DEPARTMENT OF GENERAL SERVICES ARE BARRED BY SOVEREIGN IMMUNITY.

Plaintiffs do not dispute that the Maryland Tort Claims Act bars their claims against the State and the Department of General Services unless they can show that the alleged wrongful acts they complain of were committed within the scope of Mr. DeJong's employment without gross negligence or malice. Rather, they principally argue that Mr. DeJong did act within the scope of his public duties because he "conducted himself as employer, at his place of employment, during normal working hours." Plaintiffs' Opposition at 16. The Court of Appeals has made clear, however, that unless a plaintiff can establish that "an employee's tortious acts . . . were in furtherance of the employer's

business and were 'authorized' by the employer," those acts are not within the scope of employment even if they occurred "during normal duty hours and at an authorized locality. . . ." *Sawyer v. Humphries*, 322 Md. 247, 255, 257 (1991). Plaintiffs have utterly failed to make such a showing.

Plaintiffs argue that "[a]t this stage of the proceedings, it would be sheer speculation to conclude that all of the acts of Mr. DeJong which give rise to this Complaint fall outside of the scope of his employment or that they were made with malice and gross negligence." Plaintiffs' Opposition at 16. The State respectfully submits that no amount of discovery will establish that a former state employee, who the plaintiffs boldly accuse of having "conducted unlawful wiretapping and electronic surveillance, a felonious act if convicted in the State of Maryland pursuant to the Courts and Judicial Proceedings Article of the Maryland Annotated Code, Sections 10-401 to 10-414," Complaint ¶ 10, advanced any interest of either the State or the principal department of State government for which that employee worked. "The facts set forth by the plaintiffs indicate that the defendant [DeJong] was acting from personal motives, that such conduct . . . would not be expectable, and that [DeJong] was in no way furthering the State's interests." *Sawyer v. Humphries*, 322 Md. at 260. *See also Terra Nova Insurance Co., Ltd. v. Chillum Corp.*, 71 Md. App. 552, 559 (1987), *cert. denied*, 311 Md. 22 (1987); *Ennis v. Crenca,* 322 Md. 285, 294 (1991); *Cebula v. General Electric Co.*, 614 F.Supp. 260, 268 (N.D. Ill. 1985); *Bussen v. South Central Bell Telephone Co.*, 682 F.Supp. 319, 325 (S.D.Miss. 1987).

Plaintiffs contend that "[t]he Complaint in para. 25 states that the State and DGS had particular knowledge of Mr. DeJong's unorthodox approach to carrying out his duties

and his treatment of his employees." Opposition at 17. The vague and generalized assertions in ¶ 25 of the Complaint contain no claim, however, that anyone in State government was aware of Mr. DeJong's purported wiretapping activities; these conclusory allegations, therefore, in no way demonstrate that those alleged activities were, as plaintiffs assert, "expectable" or "foreseeable." Opposition at 17. On the contrary, plaintiffs state that "the Maryland State Police discovered some sort of irregularity which prompted the immediate removal of Mr. DeJong from State service and caused an official fiat to be rendered which prevented Mr. DeJong from returning [to] his place of employment." Opposition at 16-17. If anything, this assertion confirms the lack of authority for Mr. DeJong's alleged actions. Simply put, the Complaint amply demonstrates that as a matter of law, Mr. DeJong's alleged wiretapping activities "[we]re personal" and "represent a departure from the purpose of furthering the employer's business. . . ." *Sawyer v. Humphries*, 322 Md. at 256-57. For this reason alone, Mr. DeJong's alleged conduct was not within the scope of the public duties that he was authorized to discharge.[2]

[2] Plaintiffs assert that "the State authorized and ratified DeJong's acts," Opposition at 18, when it allegedly did not object to or disallow the use of a supposedly unauthorized tape recording in connection with a 1988 grievance proceeding involving Larry Richard Stanton, a nonplaintiff. But the affidavit of Mr. Slayton, who acknowledges that the tape "contained portions of conversation where I was cursing Mr. DeJong," Slayton Aff. ¶ 4, includes no assertion that this tape was actually used in any formal grievance proceeding which should have placed State officials on notice of Mr. DeJong's purported wiretapping activities. Rather, immediately after Mr. Slayton claims that "[t]his tape was used against me in my grievance proceedings," *id.*, he then states that "I found out about this recording *when it was played back to me in front of other co-workers*, Eric Peddle and Eugene Gunter." *Id.* (emphasis added). Moreover, Mr. Slayton makes no claim that this supposed tape recording was the result of unlawful wiretapping. In sum, this affidavit, the allegations of which are found nowhere in the Complaint, does not even begin to establish that the State had any knowledge of Mr. DeJong's alleged wiretapping activities.

Finally, for the reasons set forth in defendants' June 2 memorandum at 9-10, even if plaintiffs did allege adequately that Mr. DeJong's alleged wiretapping activities were committed within the scope of his employment, as a matter of law, those activities were made with malice or gross negligence and thus expose neither the State nor the Department of General Services to any liability under the Tort Claims Act. Plaintiffs misplace their reliance on the standard for actual malice set forth in *Owens-Illinois v. Zenobia*, 325 Md. 420, 452 (1992), as that is not the standard set forth in Md. Cts. & Jud. Proc. Code § 5-399.2(a)(4)(ii). Rather, plaintiffs' repeated allegations in the Complaint concerning Mr. DeJong's unlawful, reckless and otherwise highly offensive behavior plainly demonstrates that his alleged conduct was made with malice or gross negligence and thus falls beyond the waiver of sovereign immunity set forth in the Tort Claims Act. *See Catterton v. Coale*, 84 Md. App. 337, 343-44 (1990), *cert. denied*, 321 Md. 638 (1991); *Ritchie v. Donnelly*, 324 Md. 344, 374 n.14 (1991). For these additional reasons, this Court should hold that the State and DGS are immune from plaintiffs' tort claims.

Defendants previously set forth reasons why plaintiffs' breach of contract claim in Count Six of the Complaint is barred by sovereign immunity. *See* Defendants' June 2 memorandum at 18-19. Plaintiffs offer no response to this argument or to the defendants' related argument that plaintiffs' breach of contract claim against Mr. DeJong must be dismissed because any such claim that plaintiffs have is against the State as their employer. *Id*. at 23-24.

IV. MISCELLANEOUS.

Plaintiffs also cite 42 U.S.C. § 1983 and contend that "[d]efendants' actions violated Plaintiffs' constitutional right to privacy." Opposition at 21. First, this is not a § 1983 action, nor could it be because neither the State nor the Department of General Services are "persons" for purposes of that federal statute. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Moreover, violation of an individual's right to privacy does not give rise to a claim under § 1983. *See Paul v. Davis*, 424 U.S. 693 (1976).[3]

Plaintiffs also request that the Affidavit of Maryland State Police Sergeant James S. Wright be stricken, claiming that it is "improper and self-serving." Opposition at 22. As set forth in defendants' June 2 memorandum at 20-21, Sergeant Wright's affidavit refutes the centerpiece of plaintiffs' Complaint, *i.e.,* that the Maryland State Police discovered hidden listening devices throughout the Department of General Services and found recording tapes in Mr. DeJong's office. *See* Complaint ¶¶ 13, 20-21, 28-30, 32, 35, 40.[4] Defendants will not address plaintiffs' objection that Sergeant Wright's affidavit

---

[3] In any event, plaintiffs' allegations fail to establish that any plaintiff was placed in a "false light" as plaintiffs argue in their Opposition at 22.

[4] Referring to Sergeant's Wright affidavit, plaintiffs assert that defendants concede that "there exists a recording of a conversation, the nature of which is unknown at this time." Opposition at 5. In fact, as Sergeant Wright's affidavit unambiguously states, "[d]uring my investigation I found in Mr. DeJong's desk one tape recording of employees at the Saratoga State Center but this recording was of a routine business meeting among Mr. DeJong and other employees of the Department of General Services, *and it was made clear in the conversation recorded that all present at the meeting were aware that it was being recorded.*" Wright Aff. ¶ 6 (emphasis added). This hardly raises any factual dispute as plaintiffs suggest.

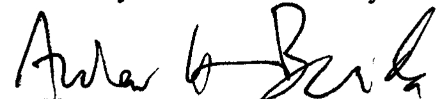
is self-serving because that claim is silly.[5] However, to the extent plaintiffs object to the form in which Sergeant Wright's affidavit was executed, defendants have prepared and have filed with this reply another affidavit that Sergeant Wright has signed and that is identical to his first affidavit except for the last sentence, which states that "I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this affidavit are true."

CONCLUSION

For the reasons stated above and in the defendants' June 2 memorandum, this Court should grant defendants' motion and dismiss the complaint.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland



ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

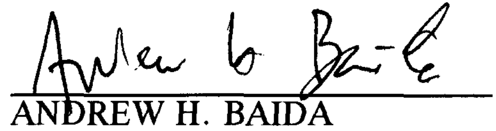
JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

[5] Indeed, plaintiffs attach to their opposition two affidavits, including one that was submitted by plaintiff Ronald D. Smith. Neither of these affidavits refutes Sergeant Wright's assertion that the Maryland State Police discovered no hidden listening devices or unauthorized tapes as the Complaint repeatedly alleges.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, I sent by first class mail, postage prepaid, a copy of the foregoing Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss or for Summary Judgment to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.



ANDREW H. BAIDA

KENNETH FITCH, ET AL * IN THE

PLAINTIFFS * CIRCUIT

V. * FOR

* BALTIMORE CITY

FREDERICK W. DEJONG, ET AL * CASE NO.: 94077005/ CL177675

DEFENDANTS *

* * * * * * * * * * * * * *

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their undersigned attorney, hereby oppose Defendants' Motion to Dismiss or Motion for Summary Judgment on the grounds set forth in the attached Memorandum of Points and Authorities.

REQUEST FOR HEARING

Plaintiffs respectfully request an opportunity to present argument before this Court in support of their Opposition to Defendants' Motion to Dismiss or Motion for Summary Judgment.

David B. Shapiro
1101 St. Paul Street, Ste. 407
Baltimore, Maryland 21202
(410) 576-9100

Attorney for Plaintiffs

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT

Table of Contents

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. LEGAL STANDARDS

i. MOTION TO DISMISS STANDARDS. 7
ii. SUMMARY JUDGMENT STANDARDS 8

B. PLAINTIFFS WERE NOT REQUIRED TO USE THE GRIEVANCE PROCESS BECAUSE IT IS NOT MANDATORY AND BECAUSE THEY WERE NOT FREE FROM INTERFERENCE, RESTRAINT, DISCRIMINATION OR REPRISAL. 10

C. THE PLAINTIFFS' CLAIMS COULD NOT BE BROUGHT UNDER WORKERS' COMPENSATION. 11

D. THE PLAINTIFF'S CLAIMS AGAINST THE STATE FIT THE EXCEPTION TO SOVEREIGN IMMUNITY CODIFIED IN THE MARYLAND TORT CLAIMS ACT. 14

i. DEJONG WAS ACTING WITHIN THE SCOPE OF HIS DUTIES. 14
ii. DEJONG WAS NOT ACTING WITH MALICE OR GROSS NEGLIGENCE. 19

III. CONCLUSION. 23

EXHIBITS 1 AND 2

RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiffs, by their attorney, David B. Shapiro, respond to Defendants' Motion to Dismiss Complaint and says that motion should not be granted for the reasons stated herein:

I. INTRODUCTION

Plaintiffs all work at the Department of General Service' Saratoga Center. Defendant DeJong was Superintendent of the Saratoga State Center and supervised the Plaintiffs. Plaintiffs claim that DeJong made use of recording devices at the Saratoga Center facility and monitored these devices, intercepting oral communications and making unauthorized tape recordings of Plaintiffs' conversations. Also, DeJong engaged in abusive behavior towards the Plaintiffs, including the use of intimidation and harassment, threatening arbitrary firings, and forcing employees to have their fingerprints and photographs taken. Saratoga Center is in poor condition and working there poses serious health problems to the Plaintiffs.

In December 1992, Plaintiff Fitch submitted his resignation to the State Personnel Department and threatened to inform the press about improper activities at Saratoga Center unless an immediate investigation is initiated. In January 1993, the Maryland State Police conducted an investigation at the Saratoga Center and recovered recording equipment used by DeJong;

he was promptly relieved of his duties and shortly thereafter left State service. Mr. DeJong is not permitted on State property at either the Baltimore, Annapolis, or Saratoga Street complex.

Plaintiffs filed their Complaint and the Attorney General's Office, representing all three named Defendants, filed a Motion to Dismiss and/or Motion for Summary Judgment to which Plaintiffs now respond.

II. ARGUMENT

Pursuant to Maryland Rule 2-322 (b), a party seeking a Motion to Dismiss must show clearly and convincingly that the Motion should be granted. Defendants state that the Plaintiffs' claims are not covered by the Maryland Tort Claims Act and are therefore barred by the doctrine of sovereign immunity. Defendants also state that Plaintiffs should have exhausted compulsory grievance procedures or made their claims through Workman's Compensation. For the reasons stated in this Memorandum, the alternative avenues endorsed by the Defendants were either not available to the Plaintiffs or, if available, other factors precluded them from taking advantage of the avenues. The only route for relief to the Plaintiffs' injuries is through the exception to sovereign immunity embodied in the Maryland Tort Claims Act. As the Plaintiffs have established herein that their claims fit the avenue of relief sought, the

Defendant's Motion to Dismiss should be denied.

A Motion for Summary Judgment must be denied if there exists a genuine issue of material fact that is in dispute. In the case at Bar, several issues of material facts remain disputed. For example, attached to this memorandum are two affidavits that attest to the witnessing of illicit and unauthorized recordings made by or directed to be made by Defendant DeJong, which directly contradicts the affidavit submitted by the Defendants. The remaining disputes revolve around the existence of tapes, the purpose and nature of the recordings as well as lack of knowledge and consent of the Plaintiffs regarding the recording and use of their conversations, the existence of dangerous working conditions at the Saratoga Street facility, and the application of the doctrine of sovereign immunity.

In answering each point raised by the Defendants in their memorandum supporting their Motion for Summary Judgment, Plaintiffs offer the following response:

1. Supported by the Defendants' own admission in their Motion and their accompanying affidavit, there exists a recording of a conversation, the nature of which is unknown at this time.

2. Summary judgment is inappropriate when intent and motive are at issue and are necessary to this cause of action.

3. Material issues of fact exist as to:

a. Whether Defendant DeJong was engaged in criminal

wiretapping of the Plaintiffs' conversations, and those of all state employees under his charge;

b. Whether the Plaintiffs had knowledge of and consented to these recordings;

c. Whether Defendant DeJong was acting under the scope of his employment;

d. Whether Defendant DeJong was acting with actual malice or merely in furtherance of normal business interests.

The Court should deny the Defendants' motion.

4. Any claim of sovereign immunity available to DeJong for his conduct was waived. His conduct clearly falls into the exceptions provided for in the Maryland Tort Claims Act. It is undisputed that DeJong recorded Plaintiffs' conversations. DeJong's conduct indicates an unprofessional method of supervising his employees. Also, the circumstances indicate that such behavior was ratified by the State of Maryland. His unprofessional conduct towards the Defendants is demonstrated by his "sweat shop" style of management. This is indicative of a system long-established and entrenched, clearly tolerated and approved of by the State of Maryland.

5. Material issues of fact exist as to whether DeJong was using these tapes in furtherance of state business, for his own designs or both; whether it was with gross negligence or negligence; whether such use was in a criminal manner or not,

thereby precluding summary judgment in Defendant's action.

A. LEGAL STANDARDS

i. MOTION TO DISMISS STANDARDS

Defendants assert that Plaintiffs have failed to state claims upon which relief can be granted. In considering the legal sufficiency of a complaint, the Court must assume the truth of all relevant and well pleaded facts as well as all inferences which can be reasonably be drawn from them. Sharrow v. State Farm Mutual Ins. Co., 306 Md. 754, 511 A.2d 492, 500 (1986) (*citing* Tadjer v. Montgomery County, 300 Md. 539, 542, 479 A.2d 1321 (1984)). Defendants' motion admits all well-pleaded facts but contests Plaintiffs' right to any recovery based on those facts. P. Niemeyer and L. Richards, Maryland Rules Commentary, Sec. 2-322(b)(2), at 149.

Since this rule is derived from F.R. Civ. P. 12(b), the broad base of relevant case law commentaries such as Wright & Miller on Federal Practice and Procedure are persuasive authority. P. Niemeyer & L. Richards, Maryland Rules Commentary, Sec. 2-322, at 147 (1984). A complaint should be dismissed for failure to state a claim only where it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 U.S. 41, 45-46, (1957). As a general rule, a complaint should not be dismissed under F.R. Civ. P. 12(b)(6), the federal counterpart of Rule 2-322(b)(2) because the court doubts that the Plaintiff will

prevail in the action; whether a plaintiff can prevail is a matter determined on the basis of proof and not merely on the pleadings. C. Wright & A. Miller, Federal Practice and Procedure, sec. 1357 (1969). If there is any possibility that the facts the Plaintiff alleges could support a claim before a reasonable trier of fact then a dismissal under 12(b)(6) is improper. Keating v. Shell Chemical Company, 610 F.2d 328, 331 (5th Cir. 1980).

ii. **SUMMARY JUDGMENT STANDARDS**

In Beatty v. Trailmaster Products, Inc. et al., 330 Md. 726, 625 A.2d 1005 (1993), the Court of Appeals broadly acknowledged that "[o]ur cases recognize that in order to defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence. Citing Hoffman Chev. v. Wash. Co. Nat'l Sav., 297 Md. 691, 467 A.2d 758 (1983); Shaffer v. Lohr, 264 Md. 397, 287 A.2d 42 (1972); Broadfording Ch. v. Western Md. Ry, 262 Md. 84, 277 A.2d 276 (1971).

Maryland Rule 2-501 provides the Court an opportunity to "determine whether or not there is a bona fide issue between the parties" and if such a determination is made then it "requires the denial of the motion for summary judgment and a trial of the issues by the jury or court at the election of either party." Strickler Eng'g Corp. v. Seminar, Inc., 210 Md.

93, 122 A.2d 563 (1956).

In determining whether a factual dispute exists, all inferences which may be drawn from the pleadings, from affidavits or from admissions must be resolved against the moving party. Merchants Mtg. Co. v. Lubow, 275 Md. 208, 339 A.2d 664 (1975); Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216, 401 A.2d 1013 (1979).

If affidavit or other evidence shows genuine conflict, the Court should deny the Motion for Summary Judgment. The Court does not attempt to decide any issue of fact or of credibility, but only whether such issues exist. Strickler, 210 Md. 93 at 100.

In Gross v. Sussex, 332 Md. 247, 630 A.2d 1156, (1993), the Court of Appeals stated that "[s]ummary judgment is inappropriate when intent and motive are critical to the proof of a case." (emphasis added)(*citing* Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (1962)). The case at Bar involves the tort of invasion of privacy, where an essential element is the offensive intrusion into private affairs. Invasion of privacy is a recognized tort in the state of Maryland. Household Finance Corp. v. Bridge, 252 Md. 531, 250 A.2d 878 (1969).

B. THE PLAINTIFFS WERE NOT REQUIRED TO USE THE GRIEVANCE PROCESS BECAUSE IT IS NOT MANDATORY AND BECAUSE THEY WERE NOT FREE FROM INTERFERENCE, RESTRAINT, DISCRIMINATION OR REPRISAL.

The State employee merit system grievance procedures set forth in Md. State Pers. & Pens. Code 10-101 (1993) are not compulsory, as the Defendants' claim. There is no language in the statute to indicate that the grievance procedure is the "sole remedy" available to the Plaintiffs. In fact, the exact language is permissive. "Any employee...**may** present any grievance which he may have, in accordance with the provisions of this subtitle...." Article 64A, sec. 53 (a) (Emphasis added) . Further, "[T]here is no indication in subsection (a) of this section of any legislative intent other than to clarify that...employees have been granted, by statute, a procedural right..." 62 Op. Att'y Gen. 686 (1977). The intent, clearly stated, is to create a right, not an obligation, on the part of the party seeking relief.

Additionally, the nature of the grievance procedure, expressly stated within the scope of the system, is that it be made "[f]ree from interference, coercion, restraint, discrimination or reprisal." Article 64A, sec. 53(a) (1977). Part of the Plaintiffs' claim is that Maryland state personnel in supervisory positions carried on a pattern of harassment and intimidation, including threats of termination from their state positions and interference with their duties. Part of the

interference experienced by the Plaintiffs included an employee that attempted to use the system to process a grievance. At the hearing, DeJong produced and played a recording made unbeknownst to the employee involved in a grievance proceeding and to his detriment. Not only was DeJong allowed to play the recording uninterrupted, his acquisition of the recording was not questioned or prosecuted by the state. See Affidavit of Larry Slayton in Exhibit B attached herein and made a part hereof. This episode alerted the employees, as it would any reasonable person, that the grievance process was biased against them. Therefore, because the grievance procedure is not expressly mandatory and because the employees were not free from interference, restraint or reprisal, they did not have to exhaust the grievance procedure before filing a claim against the state within the exception to the Maryland Tort Claims Act.

C. THE PLAINTIFFS' CLAIMS COULD NOT BE BROUGHT UNDER WORKERS' COMPENSATION

Defendants contend that the complaint should be dismissed because Plaintiffs have a remedy under the Workers' Compensation laws. The primary intent of workmans' compensation is to pay for the medical bills and lost work time of the injured party. This Act is not designed to compensate one whose injuries do not fall into said remuneration categories. Although the Workers' Compensation laws in Maryland were recently broadened to

include some psychological injuries, the scope was expressly limited to injuries "[p]recipitated by an accident, i.e., and unexpected and unforseen event that occurs suddenly or violently." Belcher v. T. Rowe Price, 329 Md.709.739 (1993); (*quoting* Sparks v. Tulane Med. Ctr. Hosp. & Clinic, 546 So.2d 138, 147 (La. 1989)). "[A] mere showing that a mental injury was related to general conditions of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation." Id. (Emphasis in original).

In the Belcher case, a woman was working at her desk when a piece of the building fell within five feet of her head due to a construction accident on the roof directly above her. All of her injuries were psychological. The Court of Appeals took the opportunity to analyze an exhaustive history of psychological injuries in tort before determining that Workers' Compensation would from then on apply the common law definition of "physical injury" to the Workers' Compensation Act's term "personal injury", specifically with regard to emotional distress in tort actions. However, the court does not extend the concept beyond the express accidental nature provided for in the Act. The determinative language of the Workers' Compensation Act is that

> "Accidental personal injury" means:
>
> (1) an accidental injury that arises out of and in the

course of employment;

(2) an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee.

Title 9 of the Labor and Employment Article of Md Code (1991) sec. 9-101(b). The express emphasis on the term "accidental" in the Act precludes any claims of the Plaintiffs under the Workers' Compensation Act. In Federated Stores v. Le, 324 Md. 71 (1991), the court describes an employee's ability to seek remedies in Circuit Court for certain injuries sustained on the job: "The language grants the employee the option of maintaining a 'cause of action against [an] employer' for an injury resulting 'from the deliberate intention of his employer to produce such an injury.'"

The Plaintiff's injuries are not accidental for the purposes of the Workers' Compensation Act. Intentional torts of employees are an exception to Workman's Compensation. "When an employee suffers an injury resulting from a deliberate intent to injure him, sec. 44 authorizes a suit against the employer 'as if this article [Art. 101] had not been passed.'" Federated Stores at 85. Although the codified exclusion of intentional torts to the Workers' Compensation Act was repealed in 1977, the common law continues to recognize the exception. "Absent any bar to suit in Workers' Compensation Act, under common-law employer can be sued for intentional tortious acts committed by one of his employees acting within scope of employment." Johnson v.

Mountaire Farms, 305 Md. 246 (1986). In Johnson, the Court narrowed the intentional tort exception to cases where the employer acted with deliberate intention to injure an employee.

D. THE PLAINTIFFS' CLAIMS AGAINST THE STATE FIT THE EXCEPTION TO SOVEREIGN IMMUNITY CODIFIED IN THE MARYLAND TORT CLAIMS ACT.

DeJong committed his acts while under the scope of his employment:

> (a) In general.--Subject to the exclusions and limitations in this subtitle, the immunity of the State and of its units is waived as to a tort action, in a court of t he State, to the extent of insurance coverage under Title 9 of the State Finance and Procurement Article.
>
> (b) Exclusions and limitation.--Immunity is not waived under this section as described in sec. 5-399.2(a) of the Court and Judicial Proceedings Article.

Md. Cts. & Jud. Proc. Code sec 5-399.2(a) (1993 Cum. Supp.) states:

> (a) Tort liability -- Exclusions form waiver under sec. 12-104 of the State Government Article. -- Immunity of the State is not waived under sec. 12-104 of the State Government Article for:
>
> (4) Any tortious act or omission of State personnel that:
>
> (i) Is not made within the scope of the public duties of the State personnel; or
>
> (ii) Is made with malice or gross negligence.

i. DeJong was acting within the scope of his duties

Maryland courts have gone to great lengths to describe when an employee's act is considered to be within the scope of

his employment. Generally the tests include the general test for determining if an employee's tortuous acts are within the scope of employment are:

a) whether they were in furtherance of the employer's business and were authorized by the employer;

b) to be within the scope of employment the conduct must be of the kind the servant is employed to perform and must occur during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and actuated at least in part by a purpose to serve the master;

c) an important factor in determining whether an employee's tortious conduct is within the scope of employment is whether the employee's conduct was expectable or foreseeable;

d) particularly in cases involving intentional torts, where an employee's actions are personal, or where they represent a departure from the purpose of furthering the employer's business, or where the employee is acting to protect his own interest, the employee's actions are outside the scope of his employment;

e) when the conduct of the servant is unprovoked, highly unusual, and quite outrageous, this may indicate that his motive was purely personal, placing his conduct

outside the scope of employment. Sawyer v. Humphries, 322 Md. 247 (1991).

Defendants asserts that Sawyer demonstrates that DeJong's actions were outside the scope of his employment. In actuality, both the legal holdings and factual findings of Sawyer serve to show Defendant's actions were in the scope of his employment. The standards in Sawyer completely support Plaintiffs' position. Defendant conducted himself as employer, at his place of employment, during normal working hours. The court in Sawyer allows for motivation at least in part. Id. at 255. There is no need to delve into Mr. DeJong's complete psychological motivations for his clearly tortious actions. Also, it must be noted that Defendant has mislead the Court in its statement of law. If there is an issue as to whether a defendant's actions are subject to sovereign immunity that issue will be determined by the trier of fact.

Defendants argue that the Maryland General Assembly did not waive the State's and DGS' immunity with respect to the conduct of Mr. DeJong giving rise to this claim. At this stage of the proceedings, it would be sheer speculation to conclude that all of the acts of Mr. DeJong which give rise to this Complaint fall outside of the scope of his employment or that they were made with malice and gross negligence. Clearly, the Maryland State Police discovered some sort of irregularity which prompted the immediate removal of Mr. DeJong from State service

and caused an official fiat to be rendered which prevented Mr. DeJong from returning from his place of employment.

Proper discovery should reveal under what authority, if any, Mr. DeJong was acting, whether it was within the scope of his public duties and whether it was made with malice or gross negligence. These questions remain in dispute and, as such, a motion to dismiss is not the appropriate context for resolution of these issues.

In Sawyer, on which the Defendants' rely, the court states that the general test set forth in numerous cases for determining if an employee's tortious acts were within the scope of his employment is whether they were in furtherance of the employer's business and were "authorized" by the employer. The court acknowledges that, "in applying this test, there are few, if any, absolutes." Id. at 255.

In correlating the concept of an employee's actions that are "within the scope of public duties" to the well-worn pathways of master-servant's "scope of employment", the court in Sawyer, make special note of whether the employee's conduct was "expectable" or "foreseeable". The Complaint in para. 25 states that the State and DGS had particular knowledge of Mr. DeJong's unorthodox approach to carrying out his duties and his treatment of his employees. Discovery in this proceeding will allow the fact finder to determine whether or not Mr. DeJong was acting within the scope of his public duties and whether he acted with

malice or gross negligence.

The tapes were used in furtherance of disciplinary action at a grievance hearing where the state did not object or disallow or demonstrates that the State authorized and ratified DeJong's acts. It is interesting to note that the State did not choose to prosecute DeJong for his activities at his place of employment despite his abrupt termination from employment with the State. Their decision not to press criminal charges against DeJong, with the need to meet the burden of proof to convict to beyond a reasonable doubt and to a moral certainty, does negate the Plaintiffs' charge that tortious conduct of invasion of privacy took place at their place of employment. Defendants' carefully craft their words to argue that no <u>unlawful</u> wiretapping took place by DeJong. Still, while Defendants they may have not uncovered sufficient evidence to meet the burden of proof for the crime of unlawful wiretapping, the conduct still constituted an invasion of privacy.

Tape recordings made of conversations between co-workers, without their knowledge or consent and later used against the employees in official state proceedings violated their expectation of privacy, was conducted against their interest, and in the furtherance of the interest of the State. These acts directly related to threats of termination, which was within DeJong's authority as the Defendants' supervisor.

ii. DeJong was not acting with malice or gross negligence

Actual malice is a standard that should be set before the trier of fact, not disposed of in a summary judgment hearing. As articulated by the Court of Appeals in Owens-Ilinois v. Zenobia, 325 Md. 420 (1992) at 452, the standard for actual malice is that the Defendants conduct was charcterized by evil motive, intent to injure, fraud or actual knowledge coupled with a deliberate disregard of the consequences. Such a standard implies that a trier of fact would need to see and hear evidence as well as examine the demeanor of the witnesses in order to reach such a conclusion.

DeJong had the duty to use reasonable care to protect the privacy of his subordinates. His conduct was not in furtherance of personal goals but instead were used to benefit the State. See affidavit of Larry Slayton attached hereto as Exhibit 1.

Defendants assert that Plaintiffs' allegation "[t]hat in January 1993, Sergeant Wright and other members of the Maryland State Police conducted a [sic] unannounced investigation at the Saratoga Center and recovered numerous electronic listening devices and recording equipment belonging to or under the control and possession of Defendant DeJong" is factually untrue. In support of their assertion, Defendants offer the affidavit from Sergeant Wright denying that such equipment was found. See affidavit of Ron Smith attached hereto as Exhibit 2.

The State is guilty of the tort of wrongful employment. Defendant DeJong's previous criminal behavior stemmed from his involvement with employees at work. Since his behavior was within the State of Maryland and the State of Maryland was his employer, the State of Maryland knew or should have known by exercising reasonable background checks on its employees that Mr. DeJong committed crimes within the State of Maryland. This man has a perpensity for violence and for certainly improper conduct. He exercised this conduct on the work site and off the work site.

The State knew or reasonably should have known that extra precautions should have been taken against Mr. DeJong and that he should never have been placed in a supervisory position. Mr. DeJong, in fact, used his techniques of intimidation and violence. He tried to subdue the Plaintiffs in relinquishing their employment rights. The State knew or should have known that Mr. DeJong would use such techniques in subduing the Plaintiffs. The State did not exercise its right to terminate at will Mr. DeJong until long after the damages had been committed and long after they had been tolerated and ratified by the State of Maryland.

Defendants' breached this duty and were negligent by participating in, supervising, and approving the actions of its employees, Defendant DeJong, which resulted in the placement of the Plaintiffs in unacceptable work settings. That as a result of this breach of duty on the part of the Defendants, the

Plaintiffs sustained, and will continue to sustain, substantial damages, restrictions in their ability to continue in their jobs and inhibited their ability or confidence to be promoted to better paying positions. In some instances, the actions of DeJong, tacitly approved by his supervisors and the State government, led to the unwarranted firing or forced resignation of employees at the Saratoga Street facility. Plaintiffs have also suffered damage from inconvenience and aggravation, and damage from the expenditure of funds for investigation and litigation of his claim against the Defendants.

Defendants actions violated Plaintiffs' constitutional right to privacy. Under 42 U.S.C. sec. 1983, public entities may be held liable for depravations of citizens' constitutional rights. In Monell v. Dept. of Social Services, 436 U.S. 658 (1978), the Supreme Court found that Congress had in fact intended to permit municipal liability, but only when the municipality's actions caused the constitutional depravation. Id. at 690. The Court went on to hold that liability may accrue for actions taken pursuant to "customs" which have not received formal government approval. Id. at 690.

Invasion of privacy is a recognized tort in the state of Maryland. Household Finance Corp. v. Bridge, 252 Md. 531, 250 A.2d 878 (1969). Section 652E Restatement (Second) of Torts (1979) provides that "one who gives publicity to a matter concerning another, that places the other before the public in a

false light, is subject to liability to the other for invasion of his privacy, if a) the false light in which the other was placed would be highly offensive to reasonable person; and b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

In Carr v. Watkins, 227 Md. 578, 177 A. 2d 841 (1962) the Court of Appeals recognized that an oral communication is sufficient to support an action for invasion of privacy. At a grievance proceeding, Defendant DeJong replayed a tape recording made of a conversation between he and Mr. Larry Slayton, a former DGS employee, where the recording was made without the knowledge and consent of Mr. Slayton.

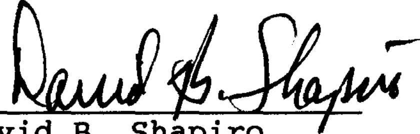
III. Plaintiffs Request That Defendants Affidavit Be Stricken

The Affidavit of James S. Wright is improper and self-serving; as such, it should be stricken and, not considered as evidence in Defendants' Motion to Dismiss Summary Judgment. Mr. Wright is a Maryland State Trooper, and as such, he is an employee of one of the Defendants. His statements have the indicia of unreliability. Also, his statements in paragraph #6 are conclusory and self serving. As per Read v. Montgomery County, 210 TDR 168, an improper affidavit may be cause to dismiss a Motion for Summary Judgment.

CONCLUSION

For the above reasons, Defendants' Motion to Dismiss and/or Motion for Summary Judgment should be denied and costs assessed.

Respectfully submitted,



David B. Shapiro
1101 St. Paul Street, Suite 407
Baltimore, Maryland 21202
(410) 576-9100

Attorney for Plaintiffs

Exhibit A

KENNETH FITCH, et. al.	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, et. al.	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * * *

AFFIDAVIT OF RONALD SMITH

I, RONALD SMITH, being duly sworn, do hereby depose and say:

1. I am of sufficient age and competent to testify from personal knowledge as to the following matters.

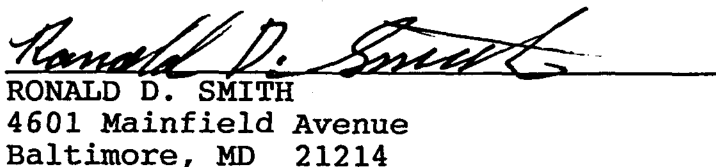
2. I am employed by the State of Maryland (hereinafter "the State") and the Department of General Services (hereinafter "the DGS") at the Saratoga Street Center facility located in Baltimore City, State of Maryland.

3. In the Fall of 1991, I met with Walter Eugene Gunter, who at the time was Assistant Superintendent of the Saratoga State Center Division of the State of Maryland Department of General Services. Mr. Gunter played a cassette tape for me of a conversation previously recorded between Mr. Gunter and the Defendant Fred DeJong.

4. I have personally observed six (6) electronic devices at the Saratoga Street facility which are connected to telephone lines and used to monitor the premises.

5. I have personally observed eleven (11) fingerprint cards issued by the Maryland State Police of State employees assigned to the Saratoga Street facility.

I hereby declare under penalty of perjury that the foregoing is true and correct.

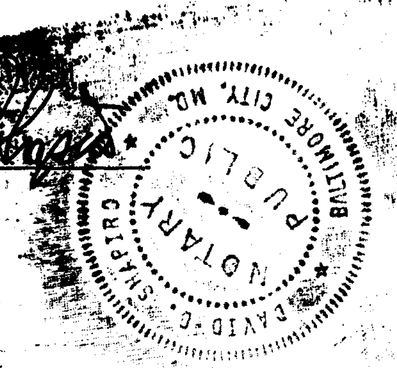


RONALD D. SMITH
4601 Mainfield Avenue
Baltimore, MD 21214

STATE OF MARYLAND, BALTIMORE CITY, TO WIT:

I HEREBY CERTIFY, That on this 15th day of June, 1994, before me, the subscriber, a Notary Public, in and for the State of Maryland, personally appeared Ronald D. Smith, and he acknowledged the foregoing affidavit to be true and correct.

AS WITNESS my hand Notarial Seal.



Notary Public

My Commission Expires:
7/1/94

3

Exhibit B

KENNETH FITCH, et. al.	*	IN THE
PLAINTIFFS	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, et. al.	*	BALTIMORE CITY
	*	
DEFENDANTS	*	CASE NO.: 94077005/CL177675

* * * * * * * * * * * * * *

AFFIDAVIT OF LARRY RICHARD SLAYTON

I, LARRY RICHARD SLAYTON, being duly sworn, do hereby depose and say:

1. I am of sufficient age and competent to testify from personal knowledge as to the following matters.

2. I was employed by the State of Maryland (hereinafter "the State") and the Department of General Services (hereinafter "the DGS") at the Saratoga Street Center facility located in Baltimore City, State of Maryland.

3. During 1988, I worked directly with Fred DeJong at the Saratoga Street Center facility and was directly involved with extensive renovations of the building.

4. On May 20, 1988, I was asked by Fred DeJong to come into his office for a meeting. I attended this meeting on that day at approximately 9 A.M. The meeting was more of an interrogation of me by Fred DeJong. At that meeting, the entire conversation was recorded by Fred DeJong, without my knowledge or consent and contained portions of conversation where I was cursing Mr. DeJong. This tape was used against me in my grievance proceedings. I found out about this recording when it was played back to me in front of other co-workers, Eric Peddle and Eugene Gunter.

5. In 1988, Fred DeJong had directed me to install telephone cables at the Saratoga facility which I discovered later were used by him and Gene Gunter to listen in on and record employees' conversations without their knowledge.

I hereby declare under penalty of perjury that the foregoing is true and correct.

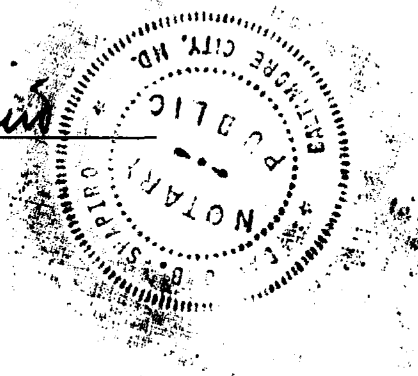
Larry R Slayton
LARRY RICHARD SLAYTON
506 Rita Drive
Odenton, Maryland 21113

STATE OF MARYLAND, BALTIMORE CITY, TO WIT:

I HEREBY CERTIFY, That on this 28th day of July, 1994, before me, the subscriber, a Notary Public, in and for the State of Maryland, personally appeared Larry Richard Slayton, and he acknowledged the foregoing affidavit to be true and correct.

AS WITNESS my hand Notarial Seal.

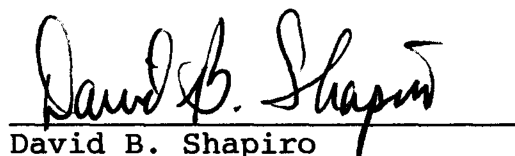
David S. Shapiro
Notary Public



My Commission Expires:
7-18-98

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of July, 1994, a copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss or Motion for Summary Judgment, Memorandum of Points and Authorities in support thereof, proposed Order and Request for a Hearing was hand delivered to Andrew Baida, Esquire, Assistant Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, Maryland, 21202 and John H. Thornton, Esquire, Asst. Attorney General, 300 W. Preston St., Room 403, Baltimore, Maryland 21201, Attorneys for Defendants.



David B. Shapiro

Circuit Court for Baltimore City

111 North Calvert Street
Baltimore, Maryland 21202

Ellen Lipton Hollander
Judge

396-5100
City Deaf TTY 396-4930

July 26, 1994

Andrew H. Baida, Esquire
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

John H. Thorton, Esquire
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201

David Shapiro, Esquire
1101 St. Paul Street
Suite 407
Baltimore, Maryland 21202

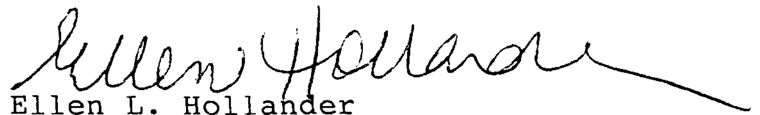
Re: Fitch, et al. v. DeJong, et al.
<u>Case No. 94077005/CL177675</u>

Dear Counsel:

This is to confirm that the court has scheduled a hearing in connection with Defendants' Motion for Summary Judgment for 9:30 a.m. on Thursday, August 25, 1994. Plaintiffs' Opposition to the Motion for Summary Judgment is due at the close of business on July 29, 1994. Defendants' reply is due by the close of business on August 15, 1994.

The original of all pleadings must be filed with the clerk. However, it is most important that you file a courtesy copy of all pleadings directly with my chambers. Should you have any questions, of course, please do not hesitate to contact me.

Very truly yours,



Ellen L. Hollander

cc: Court File
Civil Assignment Office

File

Circuit Court
for
Baltimore City

111 North Calvert Street
Baltimore, Maryland 21202

Joseph H. H. Kaplan
Administrative Judge

396-5080
City Deaf TTY 396-4930

June 21, 1994

Andrew H. Baida, Esquire
Assistant Attorney General
200 St. Paul Street
Baltimore, MD 21202

David Shapiro, Esquire
Suite 407
1101 St. Paul Street
Baltimore, MD 21202

Re: Fitch, et al v. DeJong, et al.
Case Nº 94077005/CL177675

Dear Counsel:

As a result of our meeting on June 16, 1994, I have specially assigned the above captioned case to Judge Ellen L. Hollander who will handle all future proceedings. Judge Hollander will contact counsel and establish a trial date during the 1995 March term. The anticipated length of the trial is one and one-half weeks.

Additionally, the Defendants' Motion to Dismiss or for Summary Judgment which is currently scheduled before Judge Angeletti on July 18, 1994, is hereby cancelled.

Sincerely yours,

Joseph H. H. Kaplan
Administrative Judge

kak
cc: Judge Ellen M. Heller, JICC
Judge Ellen L. Hollander
Judge Edward J. Angeletti
Robert J. Ignatowski
Frank Sherry

FITCH, ETAL DEJONG, ETAL CL177675

: IN THE
: CIRCUIT COURT FOR
: BALTIMORE CITY
: CASE NO: 94077005

****

PRE-TRIAL CONFERENCE ORDER

****

PURSUANT TO MD. RULE 2-504(A), IT IS THIS 06 DAY OF JUNE , 1994, ORDERED:

1. (A) THAT ALL PARTIES SHALL APPEAR BEFORE THE COURT FOR A CONFERENCE BEFORE TRIAL ON MAY 08, 1995.

(B) THE PARTIES SHALL PREPARE IN ADVANCE AND BRING TO THE CONFERENCE A PRETRIAL MEMORANDUM COVERING IN FULL EACH OF ITEMS (1) THROUGH (8) IN SEC (B) OF RULE 2-504. (ITEM (9) IN SEC (B) IS SUBSUMED IN PARAGRAPH 2 OF THIS ORDER.)

2. ALL DISCOVERY INCLUDING FULL RESOLUTION OF ALL DISCOVERY DISPUTES SHALL BE COMPLETED NO LATER THAN EIGHT MONTHS FROM THE DATE OF THIS ORDER.

3. ANY MOTION FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINE MONTHS FROM THE DATE OF THIS ORDER.

4. TRIAL OF THIS CASE SHALL BEGIN ON JUNE 06, 1995.

5. THIS ORDER IS SUBJECT TO MODIFICATION, INCLUDING THE SCHEDULING OF THE PRETRIAL CONFERENCE AND TRIAL, UPON A WRITTEN MOTION FOR MODIFICATION FILED WITHIN 15 DAYS OF THE DATE OF THIS ORDER. THEREAFTER, THIS ORDER MAY BE MODIFIED ONLY UPON A WRITTEN MOTION FOR MODIFICATION SETTING FORTH A SHOWING OF GOOD CAUSE THAT THE SCHEDULE CANNOT REASONABLY BE MET DESPITE THE DILIGENCE OF THE PARTIES SEEKING MODIFICATION. IF EXIGENT CIRCUMSTANCES PREVENTS A MOTION IN WRITING, AN ORAL MOTION SHALL BE MADE AT A HEARING AT 1:45 P.M. ON A DAILY BASIS IN ROOM 434 OF THE CLARENCE M. MITCHELL, JR. COURTHOUSE.
COUNSEL FOR ALL PARTIES AND ANY PRO SE PARTIES MUST ATTEND THESE HEARINGS. AN "EXIGENT CIRCUMSTANCE" MEANS AN UNFORESEEN DEVELOPMENT OCCURRING WITHIN 30 DAYS OF THE PRETRIAL CONFERENCE OR TRIAL DATE WHICH PREVENT COMPLIANCE WITH THIS ORDER.

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

SHAPIRO, DAVID
SUITE 407
1101 SAINT PAUL ST.
BALTIMORE , MD 21202

FITCH, ETAL DEJONG, ETAL CL177675

: IN THE
: CIRCUIT COURT FOR
: BALTIMORE CITY
: CASE NO: 94077005

****

PRE-TRIAL CONFERENCE ORDER

****

PURSUANT TO MD. RULE 2-504(A), IT IS THIS 06 DAY OF JUNE , 1994, ORDERED:

1. (A) THAT ALL PARTIES SHALL APPEAR BEFORE THE COURT FOR A CONFERENCE BEFORE TRIAL ON MAY 08, 1995.

(B) THE PARTIES SHALL PREPARE IN ADVANCE AND BRING TO THE CONFERENCE A PRETRIAL MEMORANDUM COVERING IN FULL EACH OF ITEMS (1) THROUGH (8) IN SEC (B) OF RULE 2-504. (ITEM (9) IN SEC (B) IS SUBSUMED IN PARAGRAPH 2 OF THIS ORDER.)

2. ALL DISCOVERY INCLUDING FULL RESOLUTION OF ALL DISCOVERY DISPUTES SHALL BE COMPLETED NO LATER THAN EIGHT MONTHS FROM THE DATE OF THIS ORDER.

3. ANY MOTION FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINE MONTHS FROM THE DATE OF THIS ORDER.

4. TRIAL OF THIS CASE SHALL BEGIN ON JUNE 06, 1995.

5. THIS ORDER IS SUBJECT TO MODIFICATION, INCLUDING THE SCHEDULING OF THE PRETRIAL CONFERENCE AND TRIAL, UPON A WRITTEN MOTION FOR MODIFICATION FILED WITHIN 15 DAYS OF THE DATE OF THIS ORDER. THEREAFTER, THIS ORDER MAY BE MODIFIED ONLY UPON A WRITTEN MOTION FOR MODIFICATION SETTING FORTH A SHOWING OF GOOD CAUSE THAT THE SCHEDULE CANNOT REASONABLY BE MET DESPITE THE DILIGENCE OF THE PARTIES SEEKING MODIFICATION. IF EXIGENT CIRCUMSTANCES PREVENTS A MOTION IN WRITING, AN ORAL MOTION SHALL BE MADE AT A HEARING AT 1:45 P.M. ON A DAILY BASIS IN ROOM 434 OF THE CLARENCE M. MITCHELL, JR. COURTHOUSE.
COUNSEL FOR ALL PARTIES AND ANY PRO SE PARTIES MUST ATTEND THESE HEARINGS. AN "EXIGENT CIRCUMSTANCE" MEANS AN UNFORESEEN DEVELOPMENT OCCURRING WITHIN 30 DAYS OF THE PRETRIAL CONFERENCE OR TRIAL DATE WHICH PREVENT COMPLIANCE WITH THIS ORDER.

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

THORTON, JOHN H
ROOM 403
300 W. PRESTON STREET
BALTIMORE , MD 21201

FITCH, ETAL DEJONG, ETAL CL177675

: IN THE
: CIRCUIT COURT FOR
: BALTIMORE CITY
: CASE NO: 94077005

****

PRE-TRIAL CONFERENCE ORDER

****

PURSUANT TO MD. RULE 2-504(A), IT IS THIS 06 DAY OF JUNE , 1994, ORDERED:

1. (A) THAT ALL PARTIES SHALL APPEAR BEFORE THE COURT FOR A CONFERENCE BEFORE TRIAL ON MAY 08, 1995.

(B) THE PARTIES SHALL PREPARE IN ADVANCE AND BRING TO THE CONFERENCE A PRETRIAL MEMORANDUM COVERING IN FULL EACH OF ITEMS (1) THROUGH (8) IN SEC (B) OF RULE 2-504. (ITEM (9) IN SEC (B) IS SUBSUMED IN PARAGRAPH 2 OF THIS ORDER.)

2. ALL DISCOVERY INCLUDING FULL RESOLUTION OF ALL DISCOVERY DISPUTES SHALL BE COMPLETED NO LATER THAN EIGHT MONTHS FROM THE DATE OF THIS ORDER.

3. ANY MOTION FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINE MONTHS FROM THE DATE OF THIS ORDER.

4. TRIAL OF THIS CASE SHALL BEGIN ON JUNE 06, 1995.

5. THIS ORDER IS SUBJECT TO MODIFICATION, INCLUDING THE SCHEDULING OF THE PRETRIAL CONFERENCE AND TRIAL, UPON A WRITTEN MOTION FOR MODIFICATION FILED WITHIN 15 DAYS OF THE DATE OF THIS ORDER. THEREAFTER, THIS ORDER MAY BE MODIFIED ONLY UPON A WRITTEN MOTION FOR MODIFICATION SETTING FORTH A SHOWING OF GOOD CAUSE THAT THE SCHEDULE CANNOT REASONABLY BE MET DESPITE THE DILIGENCE OF THE PARTIES SEEKING MODIFICATION. IF EXIGENT CIRCUMSTANCES PREVENTS A MOTION IN WRITING, AN ORAL MOTION SHALL BE MADE AT A HEARING AT 1:45 P.M. ON A DAILY BASIS IN ROOM 434 OF THE CLARENCE M. MITCHELL, JR. COURTHOUSE.
COUNSEL FOR ALL PARTIES AND ANY PRO SE PARTIES MUST ATTEND THESE HEARINGS. AN "EXIGENT CIRCUMSTANCE" MEANS AN UNFORESEEN DEVELOPMENT OCCURRING WITHIN 30 DAYS OF THE PRETRIAL CONFERENCE OR TRIAL DATE WHICH PREVENT COMPLIANCE WITH THIS ORDER.

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

BAIDA, ANDREW H
200 ST. PAUL STREET
ASSISTANT ATTY GENERAL
BALTIMORE , MD 21202

FITCH, ETAL DEJONG, ETAL CL177675

: IN THE
: CIRCUIT COURT FOR
: BALTIMORE CITY
: CASE NO: 94077005

****

PRE-TRIAL CONFERENCE ORDER

****

PURSUANT TO MD. RULE 2-504(A), IT IS THIS 06 DAY OF JUNE , 1994, ORDERED:

1. (A) THAT ALL PARTIES SHALL APPEAR BEFORE THE COURT FOR A CONFERENCE BEFORE TRIAL ON MAY 08, 1995.

(B) THE PARTIES SHALL PREPARE IN ADVANCE AND BRING TO THE CONFERENCE A PRETRIAL MEMORANDUM COVERING IN FULL EACH OF ITEMS (1) THROUGH (8) IN SEC (B) OF RULE 2-504. (ITEM (9) IN SEC (B) IS SUBSUMED IN PARAGRAPH 2 OF THIS ORDER.)

2. ALL DISCOVERY INCLUDING FULL RESOLUTION OF ALL DISCOVERY DISPUTES SHALL BE COMPLETED NO LATER THAN EIGHT MONTHS FROM THE DATE OF THIS ORDER.

3. ANY MOTION FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINE MONTHS FROM THE DATE OF THIS ORDER.

4. TRIAL OF THIS CASE SHALL BEGIN ON JUNE 06, 1995.

5. THIS ORDER IS SUBJECT TO MODIFICATION, INCLUDING THE SCHEDULING OF THE PRETRIAL CONFERENCE AND TRIAL, UPON A WRITTEN MOTION FOR MODIFICATION FILED WITHIN 15 DAYS OF THE DATE OF THIS ORDER. THEREAFTER, THIS ORDER MAY BE MODIFIED ONLY UPON A WRITTEN MOTION FOR MODIFICATION SETTING FORTH A SHOWING OF GOOD CAUSE THAT THE SCHEDULE CANNOT REASONABLY BE MET DESPITE THE DILIGENCE OF THE PARTIES SEEKING MODIFICATION. IF EXIGENT CIRCUMSTANCES PREVENTS A MOTION IN WRITING, AN ORAL MOTION SHALL BE MADE AT A HEARING AT 1:45 P.M. ON A DAILY BASIS IN ROOM 434 OF THE CLARENCE M. MITCHELL, JR. COURTHOUSE.
COUNSEL FOR ALL PARTIES AND ANY PRO SE PARTIES MUST ATTEND THESE HEARINGS. AN "EXIGENT CIRCUMSTANCE" MEANS AN UNFORESEEN DEVELOPMENT OCCURRING WITHIN 30 DAYS OF THE PRETRIAL CONFERENCE OR TRIAL DATE WHICH PREVENT COMPLIANCE WITH THIS ORDER.

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

*MARYLAND DEPT OF GENERAL SERVICES
300 ST. PAUL PL-20TH FL
S/O ALAN BLUMBERG, ESQ.
BALTIMORE , MD 21202

FITCH, ETAL DEJONG, ETAL CL177675

: IN THE
: CIRCUIT COURT FOR
: BALTIMORE CITY
: CASE NO: 94077005

****

PRE-TRIAL CONFERENCE ORDER

****

PURSUANT TO MD. RULE 2-504(A), IT IS THIS 06 DAY OF JUNE , 1994, ORDERED:

1. (A) THAT ALL PARTIES SHALL APPEAR BEFORE THE COURT FOR A CONFERENCE BEFORE TRIAL ON MAY 08, 1995.

(B) THE PARTIES SHALL PREPARE IN ADVANCE AND BRING TO THE CONFERENCE A PRETRIAL MEMORANDUM COVERING IN FULL EACH OF ITEMS (1) THROUGH (8) IN SEC (B) OF RULE 2-504. (ITEM (9) IN SEC (B) IS SUBSUMED IN PARAGRAPH 2 OF THIS ORDER.)

2. ALL DISCOVERY INCLUDING FULL RESOLUTION OF ALL DISCOVERY DISPUTES SHALL BE COMPLETED NO LATER THAN EIGHT MONTHS FROM THE DATE OF THIS ORDER.

3. ANY MOTION FOR SUMMARY JUDGMENT SHALL BE FILED NO LATER THAN NINE MONTHS FROM THE DATE OF THIS ORDER.

4. TRIAL OF THIS CASE SHALL BEGIN ON JUNE 06, 1995.

5. THIS ORDER IS SUBJECT TO MODIFICATION, INCLUDING THE SCHEDULING OF THE PRETRIAL CONFERENCE AND TRIAL, UPON A WRITTEN MOTION FOR MODIFICATION FILED WITHIN 15 DAYS OF THE DATE OF THIS ORDER. THEREAFTER, THIS ORDER MAY BE MODIFIED ONLY UPON A WRITTEN MOTION FOR MODIFICATION SETTING FORTH A SHOWING OF GOOD CAUSE THAT THE SCHEDULE CANNOT REASONABLY BE MET DESPITE THE DILIGENCE OF THE PARTIES SEEKING MODIFICATION. IF EXIGENT CIRCUMSTANCES PREVENTS A MOTION IN WRITING, AN ORAL MOTION SHALL BE MADE AT A HEARING AT 1:45 P.M. ON A DAILY BASIS IN ROOM 434 OF THE CLARENCE M. MITCHELL, JR. COURTHOUSE. COUNSEL FOR ALL PARTIES AND ANY PRO SE PARTIES MUST ATTEND THESE HEARINGS. AN "EXIGENT CIRCUMSTANCE" MEANS AN UNFORESEEN DEVELOPMENT OCCURRING WITHIN 30 DAYS OF THE PRETRIAL CONFERENCE OR TRIAL DATE WHICH PREVENT COMPLIANCE WITH THIS ORDER.

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

DEJONG, FREDERICK W

1554 GLEN KEITH BLVD
BALTIMORE , MD 21204

RECEIVED CIRCUIT COURT FOR BALTIMORE CITY
94 JUN -2 PM 3:57
CIVIL DIVISION

(6) AS.

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

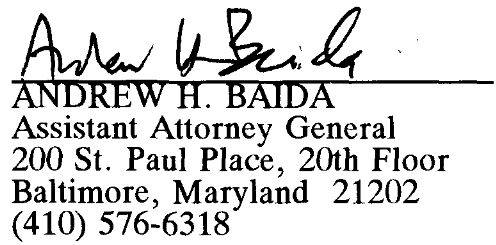
* * * * * * *

DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

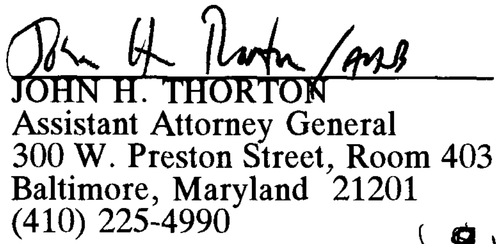
Pursuant to Maryland Rules 2-322 and 2-501, defendants file this motion to dismiss or alternatively for summary judgment. In support of this motion, defendants rely on the complaint, accompanying memorandum and attached exhibits. The grounds are set forth in the memorandum filed in support of this motion. For the reasons stated in that memorandum, this Court should grant the motion and enter judgment in favor of defendants and against plaintiff. A proposed order is attached.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland



ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318



JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

(91595)

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of June, I sent by first class mail, postage prepaid, a copy of Defendants' Motion to Dismiss or for Summary Judgment, supporting Memorandum, Request for Hearing and a proposed order, to David B. Shapiro, Esq., 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.

ANDREW H. BAIDA

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

* * * * * * *

ORDER

Upon consideration of defendants' motion to dismiss or for summary judgment, and plaintiffs' opposition thereto, it is this ___ day of ______, 1994, ORDERED that defendants' motion be, and it hereby is, GRANTED, and that judgment is hereby entered in favor of defendants and against plaintiffs.

JUDGE
CIRCUIT COURT FOR BALTIMORE CITY

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
-2 PM 3:57
CIVIL DIVISION

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

INTRODUCTION

Eleven present and former employees of the Department of General Services of the State of Maryland ("DGS") have filed this suit seeking monetary relief against the State, DGS and Frederick W. DeJong, who is a former DGS Superintendent of Building Services and former supervisor of the plaintiffs. The principal allegations of the complaint, which contains six separate counts, revolve around Mr. DeJong's purported placement of wiretapping and electronic listening devices throughout the DGS Saratoga State Center facility in which Mr. DeJong and the plaintiffs worked. The complaint also alleges that the plaintiffs were forced to work under physically unsafe employment conditions characterized by fumes, dust, excessive heat and cold, lead and asbestos, that the plaintiffs were subjected to Mr. DeJong's harassment and intimidation in the form of reprimands and threats of termination, and that the plaintiffs were required to carry a beeper and be on call 24 hours a day without additional remuneration.

The complaint seeks compensatory damages on theories of negligence (Count One), the State's and DGS's negligent retention of Mr. DeJong (Count Two), invasion of privacy and "intrusion upon seclusion" (Count Three), intentional infliction of emotional

distress (Count Four), strict liability for abnormally dangerous activities (Count Five), and breach of contract (Count Six).

Plaintiffs' claims against the State and DGS should be dismissed because they are not covered by the Maryland Tort Claims Act and thus are barred by sovereign immunity, and because plaintiffs' sole remedy is under either the State employee merit system grievance procedures set forth in Md. State Pers. & Pens. Code §§ 10-101, *et seq*. (1993), or the Workers' Compensation Act, Md. Labor & Empl. Code §§ 9-101, *et seq*. (1991 Repl. Vol.). Defendant DeJong is similarly entitled to the entry of judgment in his favor because the complaint fails to state a claim upon which relief can be granted against Mr. DeJong and because there is no genuine dispute as to any material fact and, therefore, he is entitled to judgment in his favor as a matter of law. For the reasons stated more fully below, this Court should grant defendants' motion and enter judgment in their favor.

ARGUMENT

I. ALL CLAIMS AGAINST THE STATE AND DGS SHOULD BE DISMISSED.

A. COUNT ONE (NEGLIGENCE).

Count One and a major portion of the rest of the plaintiffs' complaint centers on the allegation "[t]hat in January 1993, Sergeant Wright and other members of the Maryland State Police conducted a [sic] unannounced investigation at the Saratoga Center and recovered numerous electronic listening devices and recording equipment belonging to or under the control and possession of Defendant DeJong." Complaint ¶ 13. This allegation permeates Count One and the remainder of the complaint and is a dominant component of the plaintiffs' claims against the State and DGS. *See, e.g., id.* ¶ 10

(factual allegation common to all counts stating that "for a period of years and continuing through until January 1993, Defendant DeJong conducted unlawful wiretapping and electronic surveillance, a felonious act if convicted in the State of Maryland pursuant to the Courts and Judicial Proceedings Article of the Maryland Annotated Code, Sections 10-401 to 10-414, against the Plaintiffs which included, but was not limited to, the placement and use of electronic listening devices hidden in the ceilings, walls and around the telephone system at the Saratoga Center facility."). *See also id.* ¶¶ 20-21 (Count One), ¶¶ 28-30, 32 (Count Two), ¶ 35 (Count Three), ¶ 40 (Count Four).

As set forth in Section II A below, this allegation is factually untrue; indeed, the Maryland State Police who plaintiffs claim "discovered the hidden listening devices and recording tapes kept in Mr. DeJong's office," Complaint ¶ 29, have submitted an affidavit that flatly denies that they found any such equipment or devices or any physical evidence of unlawful wiretapping at the Saratoga Center facility. But even if Mr. DeJong had engaged in this wiretapping activity as the plaintiffs allege, the State and DGS are entitled to sovereign immunity with respect to any damages that arise out of that activity because it was "not within the scope of the public duties" of Mr. DeJong and it was "made with malice or gross negligence. . . ." Md. Cts. & Jud. Proc. Code § 5-399.2(a)(4)(i), (ii) (1993 Cum. Supp.). Plaintiffs' remaining claims against the State and DGS in Count One should also be dismissed because any injury that plaintiffs sustained as a result of the conduct described in that Count is compensable only under either the State employee merit system grievance procedures or the Workers' Compensation Act.

i. Plaintiffs' wiretapping claims in Count One are barred by sovereign immunity.

1. The General Assembly has waived the State's immunity only as to tortious acts made within the scope of public duties without malice or gross negligence.

Plaintiffs' wiretapping claims against the State and DGS must be dismissed because the monetary relief that plaintiffs' seek as a result of that alleged conduct is barred by the doctrine of sovereign immunity. "[T]he policy underlying the State's sovereign immunity not only protects the public treasury but also protects the State and its instrumentalities from standing trial." *State v. Hogg*, 311 Md. 446, 455 (1988). The presence of legislative authorization is a fundamental prerequisite to suing the State or one of its agencies. *See generally Kee v. State Highway Administration*, 313 Md. 445, 455 (1988); *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507-08 (1979); *Calvert Associates Limited Partnership v. Department of Employment and Social Services*, 277 Md. 372, 380 (1976). While the General Assembly has effected a limited waiver of the State's immunity from tort claims, plaintiffs' wiretapping claims are nevertheless barred by immunity because they fail to satisfy the conditions that the legislature has stated a plaintiff must meet in order to sue the State.

Md. State Govt. Code § 12-104 (1993 Repl. Vol) in pertinent part provides:

Waiver of immunity.

(a) *In general.* -- Subject to the exclusions and limitations in this subtitle, the immunity of the State and of its units is waived as to a tort action, in a court of the State, to the extent of insurance coverage under Title 9 of the State Finance and Procurement Article.

(b) *Exclusions and limitations.* -- Immunity is not waived under this section as described in § 5-399.2 (a) of the Courts and Judicial Proceedings Article.

Md. Cts. & Jud. Proc. Code § 5-399.2(a) (1993 Cum. Supp.) states as follows:

> (a) *Tort liability -- Exclusions from waiver under § 12-104 of the State Government Article.* -- Immunity of the State is not waived under § 12-104 of the State Government Article for:
> (4) Any tortious act or omission of State personnel that:
> (i) Is not made within the scope of the public duties of the State personnel; or
> (ii) Is made with malice or gross negligence. . . .

Plaintiffs' wiretapping claims against the State and DGS in Count One should be dismissed because the General Assembly did not waive the State's and DGS's immunity with respect to the conduct giving rise to these claims.

2. Mr. DeJong's alleged wiretapping activities were not within the scope of his public duties.

The Court of Appeals has held that "the phrase 'scope of the public duties' in the Tort Claims Act is coextensive with the common law concept of 'scope of employment' under the doctrine of respondeat superior. . . ." *Sawyer v. Humphries*, 322 Md. 247, 254 (1991). "The general test set forth in numerous Maryland cases for determining if an employee's tortious acts were within the scope of his employment is whether they were in furtherance of the employer's business and were 'authorized' by the employer." *Id.* at 255. Plaintiffs contend that the State and DGS are liable for Mr. DeJong's alleged wiretapping activities because these activities were committed "while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong . . . , the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of his employment." Complaint ¶ 22. This contention reflects a fundamental misunderstanding of both the doctrine of respondeat superior and the term "scope of employment."

Contrary to the plaintiffs' assertion, an employee's actions do not fall within the

"scope of employment" merely because those actions occurred while that employee was "on duty." Indeed, in *Sawyer v. Humphries*, in which the plaintiffs brought an action against a state trooper for assault and battery, the Court of Appeals rejected precisely the theory that plaintiffs advance here, stating that "[e]ven though a police officer may be said to be 'on duty' all of the time, cases regularly hold that a police officer acts outside the scope of his employment where he acts for his own personal reasons and not in furtherance of his employer's law enforcement function." 322 Md. at 259. "In fact," the Court of Appeals in *Sawyer* added, "in virtually all of the cases in which this Court has held that an assault by an employee was outside the scope of employment, the assault occurred at a time when the employee was 'on duty.'" *Id., citing Henley v. Prince George's County*, 305 Md. 320, 330 n.2 (1986); *LePore v. Gulf Oil Corp.*, 237 Md. 591 (1965); *Carroll v. Hillendale Golf Corp.*, 156 Md. 542 (1929); *Steinman v. Laundry Co.*, 109 Md. 62 (1908); *Central Railway Co. v. Peacock*, 69 Md. 257 (1888).

Thus, plaintiffs are just plain wrong in contending that Mr. DeJong's alleged wiretapping activities were committed within the scope of his employment merely because they supposedly took place while he was "on duty." Instead, the Court of Appeals has stated that "particularly in cases involving intentional torts committed by an employee, this Court has emphasized that where an employee's actions are personal, *or* where they represent a departure from the purpose of furthering the employer's business, *or* where the employee is acting to protect his own interests, even if during normal duty hours and at an authorized locality, the employee's actions are outside the scope of his employment." *Sawyer v. Humphries*, 322 Md. at 256-57 (emphases added). The allegations in the complaint amply demonstrate that Mr. DeJong's purported behavior

falls outside the scope of employment for at least two independent reasons.

First, the very nature of the actions that the plaintiffs accuse Mr. DeJong of engaging in refute plaintiffs' conclusory allegation that these actions somehow were "in furtherance of Defendant State's and DGS's interests. . . ." Complaint ¶ 22. Plaintiffs readily acknowledge that the wiretapping and electronic surveillance activity that Mr. DeJong allegedly committed is unlawful conduct under Md. Cts. & Jud. Proc. Code §§ 10-401 - 10-414 (1989 Repl. Vol.) and constitutes a felony under Maryland law. *See* Complaint ¶ 10. That unlawful activity in no way advanced any interest of the State of Maryland; indeed, it directly contravened it. *See also Terra Nova Insurance Co., Ltd. v. Chillum Corp.*, 71 Md. App. 552, 559 (1987) ("Patterson's alleged criminal activities did not fit within the scope of his employment."), *cert. denied*, 311 Md. 22 (1987); *Restatement of Agency*, § 229 (1933) (stating that whether conduct is within the scope of employment depends in part on "whether or not the act is seriously criminal"), *quoted in Sawyer v. Humphries*, 322 Md. at 256.

Nor could Mr. DeJong's alleged actions in any way further the interests of DGS, which is a principal department of State government. *See* Md. State Fin. & Proc. Code § 4-201 (1988). DGS is statutorily authorized to hire superintendents such as Mr. DeJong "to supervise designated improvements, grounds, and multiservice centers under the jurisdiction of the Department. . . ." *Id.*, § 4-602(a). It is inconceivable how Mr. DeJong's alleged wiretapping activities either fulfilled those responsibilities or advanced DGS's statutory powers and duties as set forth in Md. State Fin. & Proc. Code § 4-604 (1988) with respect to the operation, maintenance and protection of public improvements and grounds. *See also Ennis v. Crenca,* 322 Md. 285, 294 (1991) ("It is difficult to

understand how Ms. Crenca could have been fulfilling her duties as a local legislator, or in any way furthering Montgomery County's business, by publicly accusing Ms. Ennis of offering her money to pay campaign debts in order to influence her vote on a controversial development proposal, when the defamatory conduct took place 76 days after the alleged bribe and long after the council's vote.").

The allegations of the complaint thus make quite clear that Mr. DeJong's alleged wiretapping activities "represent a departure from the purpose of furthering the employer's business. . . ." *Sawyer v. Humphries*, 322 Md. at 257. For this reason alone, Mr. DeJong's alleged conduct was not "within the scope of the *public* duties" that he was authorized to discharge. *See also Cebula v. General Electric Co.*, 614 F.Supp. 260, 268 (N.D. Ill. 1985) (holding that an employer was not liable for a supervisor's tape recording of a meeting in violation of the Illinois Eavesdropping Act when no claim was made that the employer "'knowingly derived any benefit or information from [the] illegal use' of the tape") (*quoting* Illinois Act).

Second, the complaint also conclusively establishes that Mr. DeJong, assuming he engaged in this behavior, was "acting to protect his own interests. . . ." *Sawyer*, 322 Md. at 257. The Court of Appeals has recognized that "'[w]here the conduct of the servant is unprovoked, highly unusual, and quite outrageous,' courts tend to hold 'that this in itself is sufficient to indicate that the motive was a purely personal one' and the conduct outside the scope of employment." *Id.*, *quoting Prosser and Keaton On The Law Of Torts*, at 506 (5th Ed. 1984). Here, plaintiffs explicitly admit -- as they must -- that "[t]he listening and recording of private conversations of the Plaintiffs would be *highly offensive* to any reasonable person." Complaint ¶ 35 (emphasis added). The highly

offensive nature of the activity that the plaintiffs accuse Mr. DeJong of committing demonstrates that his motive in pursuing this purported activity was purely personal and not in any way related to his position at DGS.

This Court should hold, therefore, that Mr. DeJong's alleged wiretapping activities were not committed within the scope of his employment because they were not in furtherance of the interests of the State or DGS and were performed to advance Mr. DeJong's personal interests only. *See Bussen v. South Central Bell Telephone Co.*, 682 F.Supp. 319, 325 (S.D.Miss. 1987) (holding that telephone company was not liable for employee accused of accessing customer billing records and divulging information to customer's ex-husband when the employee "was neither authorized to access the plaintiff's billing or toll records nor empowered to divulge such information" and "had departed from her employer's business for purposes of her own").

3. Mr. DeJong's alleged wiretapping activities were made with malice or gross negligence.

Even if Mr. DeJong's alleged wiretapping activities were committed within the scope of his employment, the State and DGS are immune from any liability because those activities, as a matter of law, were "made with malice or gross negligence. . . ." Md. Cts. & Jud. Proc. Code § 5-399.2(a)(4)(ii). As stated earlier, electronic eavesdropping is a felony and unlawful under Maryland's wiretapping and electronic surveillance statute. Moreover, plaintiffs confirm that these acts were made with malice or gross negligence, as they allege that Mr. DeJong "improperly and recklessly recorded these conversations which contained personal and private matters about the Plaintiffs." Complaint ¶ 35. The General Assembly did not waive the State's and DGS's immunity from claims arising out

of this alleged conduct. *See Catterton v. Coale*, 84 Md. App. 337, 343-44 (1990), *cert. denied*, 321 Md. 638 (1991); *Ritchie v. Donnelly*, 324 Md. 344, 374 n.14 (1991). For these reasons, this Court should hold that the State and DGS are immune from these claims in Count One.

ii. The remaining claims in Count One should be dismissed because plaintiffs' sole remedy is under either the State employee merit system grievance procedures or the Workers' Compensation Act.

Plaintiffs also allege in Count One that the State and DGS breached their "duty to the Plaintiffs that they not be harassed on or off the job by their supervisors, not be intimidated with unwarranted reprimands or threats of termination, not be placed in dangerous work environments, and not be forced to work without compensation." Complaint ¶ 24. Plaintiffs contend that they suffered physical, psychological and other injuries as a result of the State's and DGS's alleged breach of this duty. *See* Complaint ¶¶ 25, 26. None of these allegations provides a basis for any relief in this litigation against the State or DGS.

Plaintiffs' claims of harassment in the form of unwarranted reprimands and threats of termination do not expose the State or DGS to any liability because the acts upon which those claims are based were not committed within the scope of Mr. DeJong's employment. *See Hardy v. State,* 685 P.2d 610, 611 (Wash.App. 1984) ("Baker was not acting within the scope of her employment when she harassed and ridiculed Hardy. A supervisor's intentional actions directed towards a subordinate, occasioned solely by ill will, jealousy, hatred or other ill feelings, are not, as a matter of law, within the scope

of the supervisor's employment.").[1] In any event, these claims, as well as the plaintiffs' claims concerning dangerous work environments and work without pay, are subject to exhaustion principles that require that these claims be brought before the Secretary of Personnel under the State employee merit system grievance procedures established in Md. State Pers. & Pens. Code, §§ 10-101, *et seq.* (1993).

Plaintiffs' harassment, dangerous work environments and work without pay claims are a classic attempt to bypass the mandatory exhaustion provisions set forth in the State employee merit system grievance procedures. Md. State Pers. & Pens. Code §§ 10-101 - 10-210 (1993) provides a compulsory remedy for state employees who, as do plaintiffs, challenge "the interpretation of and application to the employee of (1) a personnel policy or regulation adopted by the Secretary [of Personnel]; or (2) any other policy or regulation over which management has control." *Id.*, § 10-101. The grievance procedures authorize the Secretary of Personnel to rectify the precise type of complaint that the plaintiffs have filed here, and specifically provide that "[t]he Secretary may order an appointing authority to grant back pay in any grievance proceeding." *Id.*, § 10-210(a). Plaintiffs thus have a mandatory and adequate remedy available under the State employee grievance procedures for their harassment, dangerous work environments and work without pay claims, and their failure to exhaust this remedy bars these claims. *See Prince George's County Health Department v. Briscoe*, 79 Md. App. 325, 344-45 (1989) ("Appellants contend that the RICA social workers, who never filed a grievance at the agency level, should not have been allowed to intervene when the case reached the circuit

[1] Moreover, plaintiffs' harassment claims involve malicious or grossly negligent behavior from which the State and DGS are immune.

court on appeal. We agree. . . . [T]he administrative procedures to be followed by a State employee who wishes to file a grievance are set out in the Merit System's grievance procedures, [former] Art. 64A, § 52-56."), *aff'd*, 323 Md. 439 (1991).

Moreover, even if plaintiffs' harassment and dangerous work environment claims were not subject to these exhaustion requirements, those claims would be redressable only before the Workers' Compensation Commission for the reasons set forth in the rest of this Section A ii.[2] The Workers' Compensation Act constitutes "a delicate balance between workers and employers. Workers lost their right to sue their employers for negligence but gained the right to quick and certain compensation for injuries sustained during the course of their employment, regardless of fault." *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 250 (1986). The Act applies to physical and psychological injuries that an employee sustains during the course of his or her employment, *see Belcher v. T. Rowe Price Foundation, Inc.*, 329 Md. 709 (1993), and provides that "the terms 'injury,' 'personal injury,' 'accidental injury' and 'accidental personal injury' include 'an injury caused by the wilful or negligent act of a third person directed against an employee in the course of his employment." *May Dept. Stores Co. v. Harryman*, 307 Md. 692, 694 (1986), *quoting* former Md. Code Art. 101, § 67(6) (presently Md. Labor & Empl. Code § 9-101(b) (1991 Repl. Vol.)). "Under Maryland

---

[2] With respect to plaintiffs' claims concerning work without pay, those claims are contractual claims, not tort claims sounding in negligence, which is the exclusive theory of Count One. *See Abramson v. Reiss*, 334 Md. 193, 204 (1994) ("In determining whether an action is in contract or in tort, we must examine the basic allegations contained in the complaint rather than the form adopted by the party who has chosen to present the case.") (footnote omitted). These contractual claims, even if not subject to the mandatory State employee merit system grievance procedures, are barred by the doctrine of sovereign immunity. *See* Section I E, *infra*.

law, the *exclusive* remedy for an employee who is injured during the course and within the scope of his employment is to file a claim under the provisions of the Workmen's Compensation Law. In other words, . . . the Act does not permit the 'common law' liability of the employer to include accidental injuries caused by the gross, wanton, wilful or reckless negligence of the employer, except when such injury is intentional. . . ." *Johnson v. Mountaire Farms*, 305 Md. at 253 (emphasis added). *See also* Md. Labor & Empl. Code § 9-509 (1991 Repl. Vol.).

Applying this well-established law to claims asserting even more extreme behavior than that referenced in plaintiffs' dangerous work environment claims, the Court of Appeals in *Johnson v. Mountaire Farms* affirmed the dismissal of a wrongful death and survivorship action brought by the mother of an employee who was electrocuted as a result of allegedly unsafe working conditions, and held that her claim must be brought under the Workers' Compensation Act. The plaintiff in *Johnson* complained of conduct that was even more wilful than that which the plaintiffs complain of in this case, and asserted that the employee's injury was "caused by the reckless, wanton or wilful misconduct of the employer resulting in unsafe working conditions." 305 Md. at 248. *Compare with* Complaint ¶ 24 (alleging that the State and DGS owed a duty to the plaintiffs that they "not be placed in dangerous work environments"); *id.*, ¶ 25 (alleging that the State and DGS breached this duty and were negligent because they "had knowledge of prior acts of Mr. DeJong that placed other State employees in physical and emotional danger, including, but not limited to, the failure to monitor the activities of Mr. DeJong, and, in general, the failure to consider and take the appropriate precautions to prevent the harmful acts against the Plaintiffs."). The Court of Appeals held that even

these allegations were insufficient to divest the Workers' Compensation Commission of exclusive jurisdiction over the plaintiff's claim.

Quoting from a leading treatise on workers' compensation law, the Court of Appeals first observed that an employer's mere awareness of a dangerous working environment is not enough to allow a plaintiff to circumvent the Workers' Compensation Act:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, *wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.*

305 Md. at 254 (emphasis in original), *quoting* 2A A. Larson, *The Law of Workmen's Compensation* § 68.13, at 13-22 to 26 (1983).

The Court of Appeals then held that because the plaintiff did not contend that the employer deliberately intended to injure the worker, the employer's knowledge of unsafe working conditions did not render inapplicable the exclusivity portions of the Workers' Compensation Act (305 Md. at 255):

> In this case, there are no facts alleged to show that the employer had a "desire" to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure Rodney. Here, the employer's failure to warn of the dangerous electrical lines or failure to provide safe conditions, deliberately placing Rodney in a dangerous position and wilfully violating governmental regulations, does not constitute an intentional tort for purposes of overcoming the exclusivity provision of the Workmen's Compensation Act.

Johnson is dispositive of plaintiffs' dangerous work environment claims. As in *Johnson*, plaintiffs have alleged no facts "that the employer decided to injure [them] or an employee like [them], that the employer performed some act to accomplish this goal, and that as a direct result of the employer's act [they were] injured." 305 Md. at 258.

Rather, they have alleged only that the State and DGS "had knowledge" that "State employees [were] in physical and emotional danger" and yet "failed to take the appropriate precautions" in the face of that knowledge. Complaint ¶ 25. *See also* Complaint ¶¶ 46, 47 (alleging that "Defendants were aware that the Saratoga Center facility posed serious health problems to the Plaintiffs" but "allowed these dangerous environmental conditions to continue"). As stated earlier, this conduct is less extreme than that complained of in *Johnson*, which makes clear that neither constructive nor actual knowledge of unsafe employment conditions is enough to avoid the exclusivity provisions of the Workers' Compensation Act.

Those provisions also apply to plaintiffs' harassment claims. One exception to the Act's exclusivity provisions allows an employee to bring an action for damages against his or her employer if the "employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee. . . ." Md. Labor & Empl. Code § 9-509(d). The Court of Appeals has interpreted this provision to allow a direct suit against an employer for "the intentional torts of an employee committed within the scope of employment. . . ." *Federated Dept. Stores Inc. v. Le*, 324 Md. 71, 86 (1991). Addressing a virtually identical provision under the State of Washington's workers' compensation statute, the court in *Hardy v. State* held that Washington's compensation scheme barred an employee's action for damages against the State based on a supervisor's acts of harassment because those acts did not fall within the scope of the supervisor's employment and thus did not satisfy the intentional tort exception. *See* 685 P.2d at 611. Plaintiffs' harassment claims here also involve behavior that falls outside the scope of Mr. DeJong's employment and must similarly be filed under the Workers' Compensation Act.

For this same reason, plaintiffs' wiretapping allegations, which as previously stated are barred by sovereign immunity, are in any event subject to the exclusivity provisions of the Act because Mr. DeJong's alleged wiretapping conduct was not committed within the scope of his employment. Therefore, all of plaintiffs' claims in Count One should be dismissed.

B. COUNT TWO (NEGLIGENT RETENTION).

Repeating essentially the same allegations set forth in Count One of the complaint, plaintiffs contend in Count Two that the State and DGS are responsible for Mr. DeJong's wiretapping activities and other alleged wrongful acts, Complaint ¶¶ 28-32, that "Defendant State and DGS, knew, or should have known, that Defendant DeJong was not competent or fit for the duties of Superintendent at the Saratoga Center," Complaint ¶ 32, and that the plaintiffs have been injured "as a result of the State's and DGS's breach of duty and negligence in retaining Defendant DeJong. . . ." Complaint ¶ 33. Plaintiffs' negligent retention claims against the State and DGS should be dismissed because these claims are subject to the exclusivity provisions of the Workers' Compensation Act.[3]

As stated earlier, "the Workmen's Compensation Act substituted for the common law liability of an employer for negligence, subject to the corresponding common law defenses, an absolute, but limited, liability regardless of fault, and made that fault exclusive. . . ." *Baltimore Transit Co. v. State*, 183 Md. 674, 677 (1944). At common law, "[a]mong the nondelegable duties which the employer owed his employees was the

[3] Although Count Two is entitled "Negligent Retention of DeJong by State and DGS", *see* Complaint at 10, plaintiffs in Count Two suggest that they also seek to hold the State and DGS directly "responsible for all of the acts committed by Defendant DeJong within the scope of his employment." Complaint ¶ 30. To the extent that Count Two relies on this theory of liability, it should be dismissed for the reasons discussed in the preceding Section A above.

duty to provide a safe place to work, and the duty to select and retain competent employees." *Athas v. Hill*, 300 Md. 133, 139 (1984) (citations omitted). Thus, the Workers' Compensation Act provides the exclusive remedy for an employer's breach of either of these nondelegable duties. Just as an employer's alleged failure to provide safe working conditions does not give rise to a claim for damages against the employer, *see Johnson v. Mountaire Farms, supra*, the exclusivity provisions of the Workers' Compensation Act similarly provide the only redress for an employee's injury caused by an employer's alleged failure to use reasonable care in retaining another employee.

Parenthetically, this is precisely the result that the Court of Appeals reached in *Athas v. Hill*. In that case, the employee, who was attacked with a butcher knife by a coemployee, first filed for and received an award from the employer under the Workers' Compensation Act. *See* 300 Md. at 135.[4] The injured employee then sued several supervisory employees on the theory that they negligently breached their duties in providing employees a reasonably safe workplace and in using reasonable care in the selection and retention of competent, nonviolent employees. *Id.* The Court of Appeals held that these were the employer's duties only and that no relief could be obtained from the supervisory employees. *Id.* at 148-50. *Athas* thus confirms that plaintiffs' sole remedy is under the Workers' Compensation Act.

For these reasons, this Court should dismiss Count Two.

---

[4] The plaintiff in *Athas* thus recognized what the plaintiffs here do not: that his only recourse against his employer for the injuries that he suffered was under the Workers' Compensation Act.

C. COUNTS THREE (INVASION OF PRIVACY) AND FOUR (INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS).

Count Three (Invasion of Privacy -- Intrusion Upon Seclusion) and Count Four (Infliction of Emotional Distress -- Intentional) each rely exclusively on the wiretapping allegations discussed earlier. These Counts should be dismissed because they are based upon conduct from which the State and DGS are immune from any liability, and because that conduct is redressable only under the Workers' Compensation Act. *See* Section A above. *See also Hardy v. State*, 685 P.2d at 611 (holding that the Washington Industrial Insurance Act provides the exclusive remedy for an employee's claim for intentional infliction of emotional distress based on a supervisor's acts of harassment).

D. COUNT FIVE (STRICT LIABILITY FOR ABNORMALLY DANGEROUS ACTIVITIES).

In Count Five, plaintiffs allege that they "sustained serious injury to their persons by being exposed to asbestos, lead and noxious fumes over a period of years, such injuries being the result of the Defendants' conduct in allowing these dangerous environmental conditions to remain their property." Complaint ¶ 50. This Count should be dismissed. *See Johnson v. Mountaire Farms.*

E. COUNT SIX (BREACH OF CONTRACT).

For the reasons stated previously, plaintiffs' work without pay claim, which plaintiffs reallege against the State and DGS in Count Six in the form of a breach of contract claim, should be dismissed because it is subject to mandatory exhaustion principles before the Secretary of Personnel under the State employee merit system grievance procedures. This claim is also barred by sovereign immunity. Count Six

alleges that plaintiffs were required, pursuant to a memorandum that Mr. DeJong wrote in 1989, to be available for work at all times, but that plaintiffs were not paid any additional compensation for that work. *See* Complaint ¶¶ 52-61 and Exhibit 1 attached to the complaint. Md. State Govt. Code § 12-201(a) (1993 Repl. Vol.) waives the defense of immunity in a contract action only to the extent that such an action is "based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee." No such written contract exists here. Rather, plaintiffs point only to a memorandum that merely states that affected employees must be "readily available to respond to an emergency during your off hours or vacation." Exhibit 1 to the complaint. The memorandum says nothing about the "payment of overtime wages," Complaint ¶ 54, nor does it refer in any way to the issue of compensation. Absent such language, plaintiffs' contract claim is barred because it is not based upon a written contract executed on behalf of the State. *See Mass Transit Administration v. Granite Construction Co.*, 57 Md. App. 766, 780 (1980).

Although plaintiffs contend that "[i]t would be inequitable for Defendants to enjoy these additional services without providing compensation to the Plaintiffs," Complaint ¶ 61, the Court of Special Appeals has held that "recovery for unjust enrichment is based upon an implied in law contract. . . . However meritorious a claim based upon an implied contract may be, if that claim is against the State or any of its agencies, it is barred because it is not based upon a written contract." *Mass Transit Administration v. Granite Construction Co.*, 57 Md. App. at 780. Thus, plaintiffs' breach of contract claim in Count Six against the State and DGS should be dismissed. *See also Leese v. Baltimore*

County, 64 Md. App. 442, 478-79, *cert. denied*, 305 Md. 106 (1985).

For the reasons stated, this Court should dismiss all of the plaintiffs' claims against the State and DGS.

II. FREDERICK DEJONG IS ENTITLED TO THE ENTRY OF JUDGMENT IN HIS FAVOR.

Mr. DeJong is entitled to judgment in his favor because the allegations made against him fail to state a claim upon which relief can be granted and because there is no genuine dispute as to any material fact and he is entitled to judgment as a matter of law.

A. COUNT ONE (NEGLIGENCE).

The principal claim made against Mr. DeJong in the complaint is based on the allegation "[t]hat in January 1993, Sergeant Wright and other members of the Maryland State Police conducted a [sic] unannounced investigation at the Saratoga Center and recovered numerous electronic listening devices and recording equipment belonging to or under the control and possession of Defendant DeJong." Complaint ¶ 13. Thus, plaintiffs allege in Count One that "[t]he Maryland State Police were notified and conducted an investigation at the DGS facility and discovered the hidden listening devices located throughout the facility and found recording tapes kept in Mr. DeJong's office. These tapes contained personal conversations, and were recorded unbeknownst to the Plaintiffs and without their knowledge or permission. . . ." *Id.*, ¶ 20. These allegations are, in a word, untrue.

The affidavit of Maryland State Police Sergeant James S. Wright, which is attached as Exhibit 1 to this memorandum, sets forth that on January 13, 1993, members of the Maryland State Police conducted a search of the Saratoga Center facility in an attempt

to locate electronic listening devices. Wright Aff. ¶ 4. Sergeant Wright states in that affidavit that no listening devices were found. *Id.*, ¶ 5. He also states that the Maryland State Police found no unauthorized tape recordings of any personal conversations of the plaintiffs. *Id.* Rather, the only tape recording of employee conversations that the Maryland State Police located was one concerning a staff meeting at which it was apparent from the tape that all present at the meeting were aware that the meeting was being tape recorded. *Id*, ¶ 6. This affidavit conclusively establishes that there is no merit in the principal set of allegations against Mr. DeJong.

In addition, even if Mr. DeJong did engage in these activities, plaintiffs are unable to sue both the State and DGS *and* Mr. DeJong. If the Court were to hold that these alleged activities were within the scope of Mr. DeJong's employment and made without malice or gross negligence, then Mr. DeJong is immune from any claim arising out of these activities. *See* Md. Cts. & Jud. Proc. Code § 5-399.2(b) (1993 Cum. Supp.) ("State personnel are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence. . . ."); *Simpson v. Moore*, 323 Md. 215 (1991). Conversely, if the Court were to hold that Mr. DeJong acted beyond the scope of his employment or with malice or gross negligence, then the State and DGS are immune. *See* Md. Cts. & Jud. Proc. Code § 5-399.2(a). Plaintiffs cannot, however, sue all three defendants. In any event, this Court need not decide this issue because the affidavit of Sergeant Wright refutes plaintiffs' wiretapping allegations.

Shorn of its wiretapping allegations, Count One states no claim upon which any relief can be granted against Mr. DeJong. Plaintiffs' assertions that Mr. DeJong

"harassed" them on and off the job, and that he intimidated them with "unwarranted reprimands or threats of termination," Complaint ¶ 24, give rise to no monetary relief but rather, at most, comprise grievances that plaintiffs were obligated to pursue under the State employee grievance procedures. Similarly, plaintiffs' objection that they were "forced to work without compensation," Complaint ¶ 24, fails to state a claim for negligence and also constitutes a grievance that they must exhaust with the Secretary of Personnel.

Finally, plaintiffs' allegation that Mr. DeJong was negligent in placing them "in dangerous work environments," Complaint ¶ 24, fails to state a claim because "[u]nder Maryland law the *employer* owes his employees a nondelegable duty to provide a safe place to work. . . . Therefore, a supervisory coemployee who performs the nondelegable duty of the employer does not thereby assume a personal duty toward his fellow employees." *Athas v. Hill*, 300 Md. at 148 (emphasis added). Because Mr. DeJong owed no personal duty to provide a safe workplace for plaintiffs, he "cannot be held liable for negligently performing the employer's nondelegable duties." *Id.* at 149. Moreover, even if Mr. DeJong owed and breached a personal duty, plaintiffs' claims against him should be dismissed because he would be immune from liability, *see* Md. Cts. & Jud. Proc. Code § 5.399.2(b), and because those claims are subject to exhaustion under the merit system grievance procedures.

For these reasons, this Court should dismiss all claims in Count One made against Mr. DeJong.

B. COUNT TWO (NEGLIGENT RETENTION).

Although the prayer for relief in Count Two seeks compensatory damages against

all defendants, including Mr. DeJong, the theory that this Count espouses is that the State and DGS were negligent in their retention of Mr. DeJong. This Count states no claim for relief against Mr. DeJong and should be dismissed.

C. COUNTS THREE (INVASION OF PRIVACY) AND FOUR (INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS).

These Counts seek relief against Mr. DeJong solely because of his alleged wiretapping activities. These Counts should be dismissed because, as stated earlier, no such activities occurred. Additionally, for the reasons set forth above, plaintiffs as a matter of law cannot sue both the State and DGS *and* Mr. DeJong with respect to these wiretapping activities.

D. COUNT FIVE (STRICT LIABILITY FOR ABNORMALLY DANGEROUS ACTIVITIES).

Count Five, as stated previously, seeks relief because of injuries plaintiffs claimed they suffered as a result of being exposed to dangerous environmental conditions. These claims should be dismissed against Mr. DeJong because he owed no personal duty toward his coemployees with respect to providing a safe place to work. *See Athas v. Hill*, 300 Md. at 148-50. In any event, he is entitled to immunity from these claims, which must also be exhausted before the Secretary of Personnel.

E. COUNT SIX (BREACH OF CONTRACT).

The plaintiffs' breach of contract claim against Mr. DeJong in Count Six should be dismissed for the same reasons that plaintiffs' claim against the State and DGS should be dismissed. In addition, plaintiffs' claim against Mr. DeJong should be dismissed because any contract claim that plaintiffs have is against the State which is the entity that

employed plaintiffs. *See Wu v. Thomas*, 847 F.2d 1480, 1486 (11th Cir. 1988); *Vakharia v. Swedish Covenant Hospital*, 765 F.Supp. 461, 472 (N.D. Ill. 1991). Mr. DeJong was not a party to that alleged contract. *See Porter v. General Boiler Casing Co.*, 284 Md. 402, 409 (1979).

CONCLUSION

For the reasons stated, this Court should grant defendants' motion and dismiss the complaint.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

KENNETH FITCH, et al.	: IN THE
PLAINTIFFS	: CIRCUIT COURT
vs.	: FOR
FREDERICK W. DEJONG, et al.	: BALTIMORE CITY
	: Case No. 94077005/CL177675

: : : : : : : : : : : :

AFFIDAVIT OF JAMES S. WRIGHT

I, JAMES S. WRIGHT, SOLEMNLY SWEAR AND AFFIRM as follows:

1. I am over the age of 18 and I am competent to be a witness.

2. This affidavit is made on my personal knowledge.

3. I am a Sergeant in the Maryland State Police and I have been a Maryland State Police trooper since 1980.

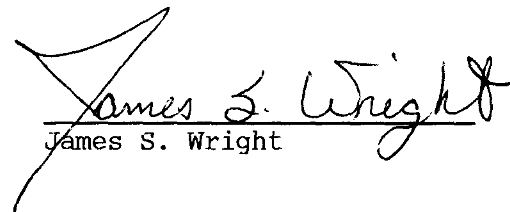
4. On January 8, 1993, I was assigned to investigate allegations that Frederick DeJong had engaged in illegal wiretapping, electronic eavesdropping, or recording of telephone conversations at the Saratoga State Center in Baltimore, Maryland. My investigation consisted of searching the premises, including the office of Frederick DeJong, for wiretapping or other electronic eavesdropping equipment, and interviewing numerous individuals, including employees of the Department of General Services who worked at the Saratoga State Center. The employees interviewed included Jennis Daniels, Ronald David Smith, Harold "Sonny" Morris, Hector Juan Candelario, Kenneth Fitch, and others. A thorough electronic "sweep" of the premises was conducted on January 13, 1993 by Sgt. James Schroyer of the Maryland State Police in my presence and at my request to search for electronic eavesdropping equipment.

EXHIBIT 1

5. My investigation failed to develop probable cause to support allegations that Frederick DeJong (1) conducted unlawful wiretapping or other unlawful electronic surveillance of any telephone conversations of any employees who worked at Saratoga State Center; (2) used electronic listening devices hidden in ceilings, walls, around the telephone system, or anywhere else at Saratoga State Center; or (3) made unauthorized tape recordings of conversations of employees at Saratoga State Center. No wiretapping or electronic listening devices or equipment and no unauthorized tape recordings of conversations of employees were found.

6. During my investigation I found in Mr. DeJong's desk one tape recording of employees at the Saratoga State Center but this recording was of a routine business meeting among Mr. DeJong and other employees of the Department of General Services, and it was made clear in the conversation recorded that all present at the meeting were aware that it was being recorded.

June 1, 1994
Date


James S. Wright

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 JUN -2 PM 3:57
CIVIL DIVISION

KENNETH FITCH, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, *et al.*,	*	BALTIMORE CITY
Defendants.	*	Case No. 94077005/CL177675

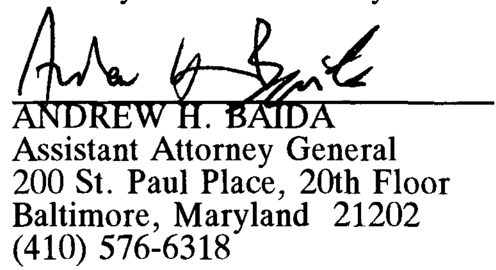
* * * * * * *

DEFENDANTS' REQUEST FOR A HEARING

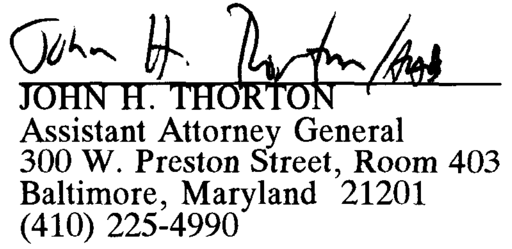
Defendants respectfully request a hearing on their motion to dismiss or for summary judgment.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland



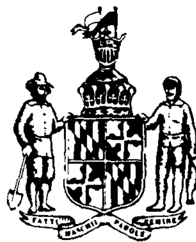
ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318



JOHN H. THORTON
Assistant Attorney General
300 W. Preston Street, Room 403
Baltimore, Maryland 21201
(410) 225-4990

Attorneys for Defendants

J. JOSEPH CURRAN, JR.
Attorney General



NORMAN E. PARKER, JR.
RALPH S. TYLER
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER No.
(410) 576-6955

June 2, 1994

WRITER'S DIRECT DIAL No.
(410) 576-6318

The Honorable Joseph H. H. Kaplan
Circuit Court for Baltimore City
Courthouse East
111 N. Calvert Street
Baltimore, MD 21202

Re: *Kenneth Fitch, et al. v. Frederick W. DeJong, et al.*,
Case No. 94077005/CL177675

Dear Judge Kaplan:

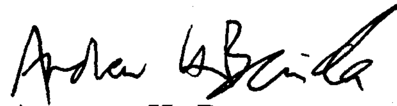
I am writing to request that the above case and the enclosed motion to dismiss or for summary judgment be specially assigned to a judge of the Circuit Court for Baltimore City. I believe that the seriousness of the plaintiffs' claims and the complicated nature of the State's defenses set forth in the enclosed motion warrants the special assignment of this case.

The plaintiffs in this action are eleven present and former employees of the Department of General Services of the State of Maryland ("DGS") who seek monetary relief against the State, DGS, and a former supervisor of the plaintiffs, principally because of that supervisor's alleged placement of wiretapping and electronic listening devices throughout the plaintiffs' workplace. The plaintiffs also claim that they were unlawfully exposed to physically dangerous working environments, that they were harassed and intimidated with unwarranted reprimands and threats of employment termination, and that they were required to be on call 24 hours a day without additional remuneration. The defendants dispute the plaintiffs' right to relief on the ground that the plaintiffs' claims are not covered by the Maryland Tort Claims Act and thus are barred by sovereign immunity, and because plaintiffs' sole remedy is under either the State employee merit system grievance procedures set forth in Md. Pers. & Pens. Code §§ 10-101, *et. seq.* (1993), or the Workers' Compensation Act, Md. Labor & Empl. Code §§ 9-101, *et seq.* (1991 Repl. Vol.).

200 Saint Paul Place ♦ Baltimore, Maryland 21202-2021
Telephone Numbers: (410) 576-6300 ♦ D.C. Metro 470-7534
Telephone for Deaf: (410) 576-6372 ♦ D.C. Metro 565-0451

Because of the number of plaintiffs that this case involves, and the character of their claims and the State's defenses, I respectfully suggest that special assignment is in the interest of the Court and all parties. Thank you for your consideration.

Sincerely,



ANDREW H. BAIDA
Assistant Attorney General

cc: David B. Shapiro, Esq. (Counsel for Plaintiffs)
John H. Thorton, Assistant Attorney General
Clerk's office

RECEIVED
APR 28 1994
(5)
CIRCUIT COURT
FOR BALTIMORE CITY

KENNETH FITCH, et al.	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, et al.	*	BALTIMORE CITY
	*	Case No. 94077005/CL177675

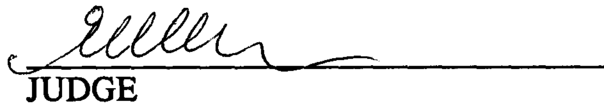
* *

ORDER

Upon consideration of Defendant's Motion for Extension of Time, and for good cause shown, it is this 26 day of April, 1994,

ORDERED that the motion be, and the same hereby is, GRANTED, and it is

FURTHER ORDERED that defendants' responsive pleading will be due on or before June 3, 1994.



JUDGE

CIRCUIT COURT FOR BALTIMORE CITY MSV534 DATE: 04/25/94
TERMINAL: V147 EVENT DATA TIME: 14:04

CASE NUMBER: 94077005 FITCH, ETAL DEJONG, ETAL CL177675
CATEGORY: OTORT
ORIG COURT: CL TRANSCRIPT PAGES: TERMINATION DATE: 04/22/95
STATUS: F CONSOLIDATED: LAST CHANGE: 04/25/94
STATUS DATE: 03/18/94 PROTRACTED:

DATE: CODE: EVENT TEXT
031894 FILE COMPLAINT & ELECTION FOR JURY TRIAL. (1)
032294 PROC DEF DEJONG, FREDERPRIVATE CREATED: 03/22/94 SERVED: / / .
032294 PROC DEF STATE OF MARYLPRIVATE CREATED: 03/22/94 SERVED: / / .
032294 PROC DEF MARYLAND DEPT PRIVATE CREATED: 03/22/94 SERVED: / / .
042094 PLEA AFFDT OF SERVICE (EVELYN O. CANNON 4-14-94))(2)
042094 PLEA AFFDT OF SERVICE (FREDERICK W. DEJONG 4-4-94) (3)
042294 MOTN DEFTS MOTION FOR EXTENSION OF TIME FD.(4)
042594 MEMO CASE SENT TO JUDGE HELLER ON ENTRY 4

4
ay

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
94 APR 22 PM 4:10
CIVIL DIVISION

KENNETH FITCH, et al.	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
FREDERICK W. DEJONG, et al.	*	BALTIMORE CITY
	*	Case No. 94077005/CL177675

* *

MOTION FOR EXTENSION OF TIME

Defendants move to extend the time to file a responsive pleading to June 3, 1994, in order for the Attorney General's Office to conduct an investigation as required by State Gov't Art. §12-304. Plaintiff's counsel has stated that he does not object to the extension of time.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Andrew H. Baida
ANDREW H. BAIDA
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22d day of April, 1994, a copy of the foregoing was mailed first class, postage prepaid to David B. Shapiro, 1101 St. Paul Street, Suite 407, Baltimore, Maryland 21202.

Andrew H. Baida

3 V13

Kenneth Fitch, *et al.*	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
Frederick W. DeJong, *et al.*	*	BALTIMORE CITY
Defendant	*	Case No.: 94077005 CL177675

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1994 APR 20 A 9:18
CIVIL DIVISION

* * * * * * * * * * * * * *

AFFIDAVIT OF SERVICE

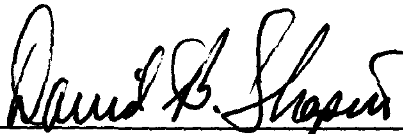
1. I, DAVID B. SHAPIRO, am at least 18 years of age, competent to testify, and not a party to this action.

2. On April 4, 1994, service of the original of the attached process was made upon Frederick W. DeJong by delivery to him via certified mail at:

1554 Glen Keith Blvd.
Towson, Maryland 21204

3. Also attached is the original of the certified mail receipt.

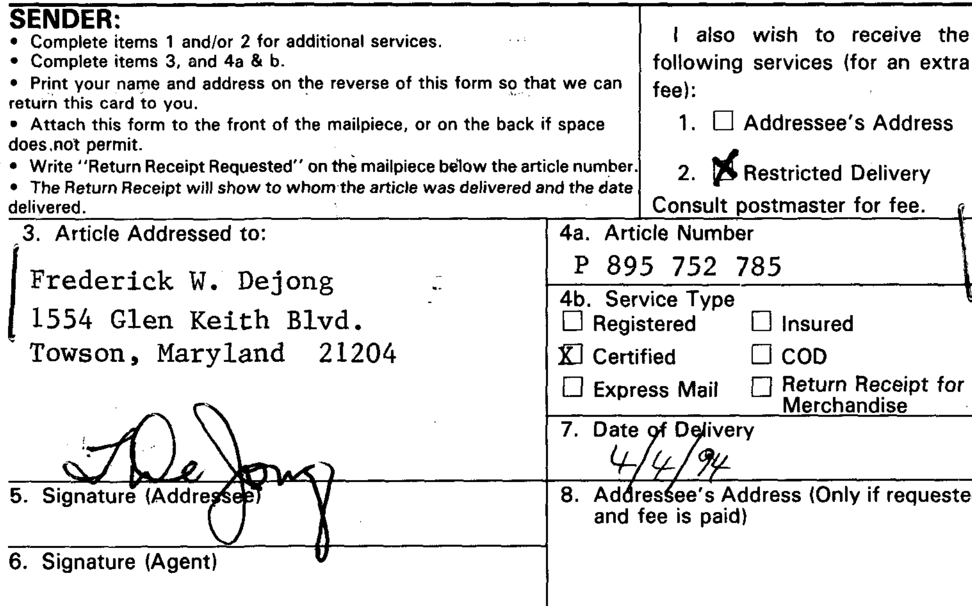
I solemnly affirm under the penalties of perjury that the contents of the foregoing affidavit are true to the best of my knowledge, information and belief.



DAVID B. SHAPIRO
1101 St. Paul Street, Suite 407
Baltimore, Maryland 21202
(410) 576-9100

Kenneth Fitch, et al.	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
Frederick W. DeJong, et al.	*	BALTIMORE CITY
Defendant	*	Case No.: 94077005 CL177675

* * * * * * * * * * * * * *



SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☒ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Frederick W. Dejong
1554 Glen Keith Blvd.
Towson, Maryland 21204

4a. Article Number
P 895 752 785

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

5. Signature (Addressee) F. DeJong

6. Signature (Agent)

7. Date of Delivery 4/4/94

8. Addressee's Address (Only if requested and fee is paid)

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

PS Form 3811, December 1991 ★U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

CIRCUIT COURT FOR BALTIMORE CITY
SAUNDRA E. BANKS, CLERK
111 N. CALVERT ST. - ROOM 462
BALTIMORE, MD. 21202

WRIT OF SUMMONS CASE NUMBER 94077005 CL177675

STATE OF MARYLAND, COUNTY TO WIT PRIVATE PROCESS

TO:

FREDERICK W. DEJONG
1554 GLEN KEITH BLVD.
TOWSON MD 21204

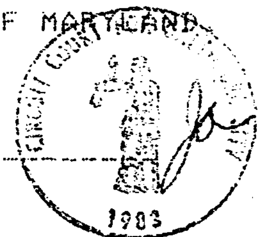
YOU ARE HEREBY SUMMONED TO FILE A WRITTEN RESPONSE BY PLEADING OR MOTION IN THIS COURT TO THE ATTACHED COMPLAINT FILED BY

KENNETH FITCH, ETAL
5214 SILVER SPRING RD #8 PERRY HALL MD 21128

WITHIN 30 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU.
WITNESS THE HONORABLE CHIEF JUDGE OF THE EIGHTH JUDICIAL CIRCUIT OF MARYLAND.

DATE ISSUED 03/22/94

Clerk CLERK
Circuit Court for Balto. City



TO THE PERSON SUMMONED:

1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.

2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGEMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

SHERIFF(S) RETURN.

PERSON SERVED________________________________ TIME ______ DATE ______

PERSON SERVED________________________________ TIME ______ DATE ______

NON EST(REASON) ____

FEE $ ________ SHERIFF ________________ ____________

NOTE

1. THIS SUMMONS IS EFFECTIVE FOR SERVICE ONLY IF SERVED WITHIN 60 DAYS AFTER THE DATE IS ISSUED.

2. PROOF OF SERVICE SHALL SET OUT THE NAME OF THE PERSON SERVED, DATE AND THE PARTICULAR PLACE AND MANNER OF SERVICE. IF SERVICE IS NOT MADE, PLEASE STATE THE REASONS.

3. RETURN OF SERVED OR UNSERVED PROCESS SHALL BE MADE PROMPTLY AND IN ACCORDANCE WITH RULE 2-126.

4. IF THIS SUMMONS IS SERVED BY PRIVATE PROCESS, PROCESS SERVER SHALL FILE A SEPERATE AFFIDAVIT AS REQUIRED BY RULE 2-126(A).

2VB

Kenneth Fitch, et al.	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
Frederick W. DeJong, et al.	*	BALTIMORE CITY
Defendant	*	Case No.: 94077005 CL177675

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1994 APR 20 A 9:18
CIVIL DIVISION

* * * * * * * * * * * * * *

AFFIDAVIT OF SERVICE

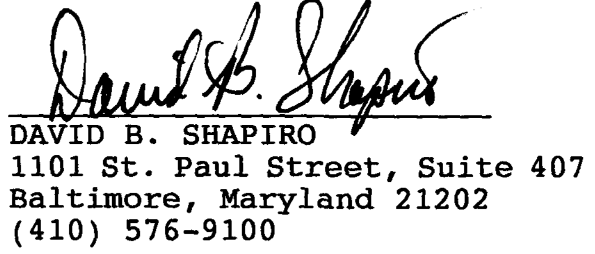
1. I, DAVID B. SHAPIRO, am at least 18 years of age, competent to testify, and not a party to this action.

2. On April 4, 1994, service of the original of the attached process was made upon the State of Maryland, served on Evelyn O. Cannon, Esq. by delivery to her via certified mail at:

200 St. Paul Place - 20th Floor
Baltimore, Maryland 21202

3. Also attached is the original of the certified mail receipt.

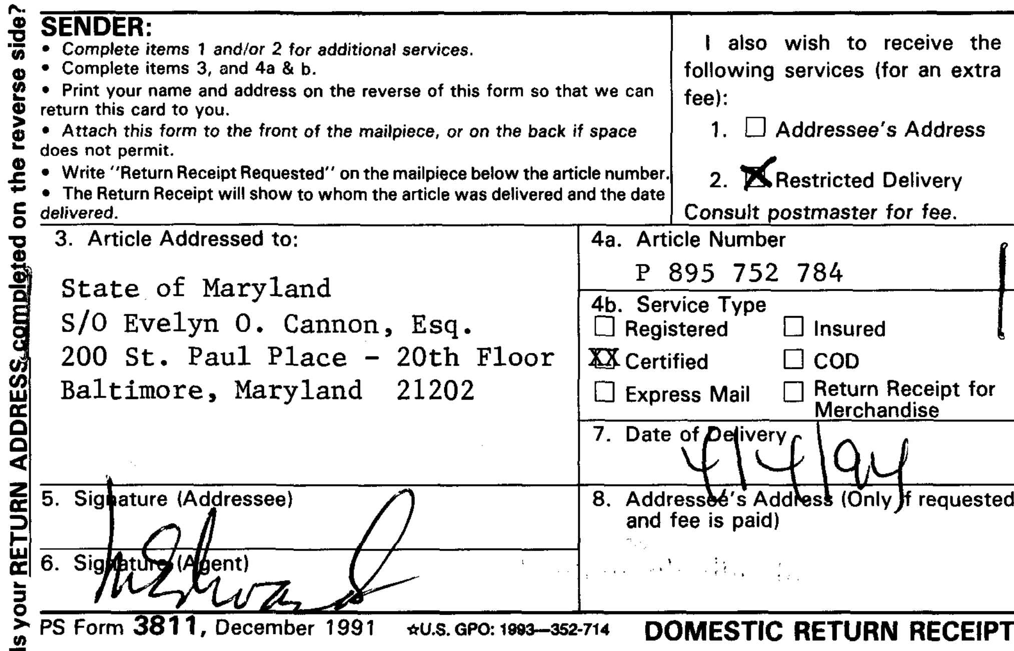
I solemnly affirm under the penalties of perjury that the contents of the foregoing affidavit are true to the best of my knowledge, information and belief.



DAVID B. SHAPIRO
1101 St. Paul Street, Suite 407
Baltimore, Maryland 21202
(410) 576-9100

Kenneth Fitch, et al.	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
Frederick W. DeJong, et al.	*	BALTIMORE CITY
Defendant	*	Case No.: 94077005 CL177675

* * * * * * * * * * * * * *



Is your RETURN ADDRESS completed on the reverse side?

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☒ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

State of Maryland
S/O Evelyn O. Cannon, Esq.
200 St. Paul Place - 20th Floor
Baltimore, Maryland 21202

4a. Article Number
P 895 752 784

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
4/4/94

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

Thank you for using Return Receipt Service.

CIRCUIT COURT FOR BALTIMORE CITY
SAUNDRA E. BANKS, CLERK
111 N. CALVERT ST. - ROOM 462
BALTIMORE, MD. 21202

WRIT OF SUMMONS CASE NUMBER 94077005 CL177675

STATE OF MARYLAND, COUNTY TO WIT: PRIVATE PROCESS

TO: STATE OF MARYLAND
S/O EVELYN O. CANNON, ESQ.
200 ST. PAUL PLACE-20TH FL.
BALTIMORE MD 21202

YOU ARE HEREBY SUMMONED TO FILE A WRITTEN RESPONSE BY PLEADING OR MOTION IN THIS COURT TO THE ATTACHED COMPLAINT FILED BY

KENNETH FITCH, ETAL
5214 SILVER SPRING RD #8 PERRY HALL MD 21128

WITHIN 30 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU.
WITNESS THE HONORABLE CHIEF JUDGE OF THE EIGHTH JUDICIAL CIRCUIT OF MARYLAND.

DATE ISSUED 03/22/94

CLERK
Circuit Court for Balto. City

TO THE PERSON SUMMONED:

1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.

2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGEMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

SHERIFF(S) RETURN.

PERSON SERVED ______________________ TIME ______ DATE ______

PERSON SERVED ______________________ TIME ______ DATE ______

NON EST(REASON) ______________________

FEE $______ SHERIFF ______________________
NOTE

1. THIS SUMMONS IS EFFECTIVE FOR SERVICE ONLY IF SERVED WITHIN 60 DAYS AFTER THE DATE IS ISSUED.

2. PROOF OF SERVICE SHALL SET OUT THE NAME OF THE PERSON SERVED, DATE AND THE PARTICULAR PLACE AND MANNER OF SERVICE.
IF SERVICE IS NOT MADE, PLEASE STATE THE REASONS.

3. RETURN OF SERVED OR UNSERVED PROCESS SHALL BE MADE PROMPTLY AND IN ACCORDANCE WITH RULE 2-126.

4. IF THIS SUMMONS IS SERVED BY PRIVATE PROCESS, PROCESS SERVER SHALL FILE A SEPERATE AFFIDAVIT AS REQUIRED BY RULE 2-126(A).

CIRCUIT COURT FOR BALTIMORE CITY
SAUNDRA E. BANKS, CLERK
111 N. CALVERT ST. - ROOM 462
BALTIMORE, MD. 21202

WRIT OF SUMMONS CASE NUMBER 94077005 CL177675

STATE OF MARYLAND, COUNTY TO WIT: PRIVATE PROCESS

TO: MARYLAND DEPT. OF GENERAL SERVICES
S/O ALAN BLUMBERG, ESQUIRE
200 ST. PAUL PLACE-20TH FL.
BALTIMORE MD 21202

YOU ARE HEREBY SUMMONED TO FILE A WRITTEN RESPONSE BY PLEADING OR MOTION IN THIS COURT TO THE ATTACHED COMPLAINT FILED BY

KENNETH FITCH, ETAL
5214 SILVER SPRING RD #8 PERRY HALL MD 21128

WITHIN 30 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU.
WITNESS THE HONORABLE CHIEF JUDGE OF THE EIGHTH JUDICIAL CIRCUIT OF MARYLAND.

Saundra E. Banks
Clerk
Circuit Court for Balto. City
CLERK

DATE ISSUED 03/22/94

TO THE PERSON SUMMONED:

1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.

2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGEMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

SHERIFF(S) RETURN.

PERSON SERVED________________ TIME ______ DATE ______

PERSON SERVED________________ TIME ______ DATE ______

NON EST(REASON) ________________

FEE $______ SHERIFF________________
NOTE:

1. THIS SUMMONS IS EFFECTIVE FOR SERVICE ONLY IF SERVED WITHIN 60 DAYS AFTER THE DATE IS ISSUED.

2. PROOF OF SERVICE SHALL SET OUT THE NAME OF THE PERSON SERVED, DATE AND THE PARTICULAR PLACE AND MANNER OF SERVICE.
IF SERVICE IS NOT MADE, PLEASE STATE THE REASONS.

3. RETURN OF SERVED OR UNSERVED PROCESS SHALL BE MADE PROMPTLY AND IN ACCORDANCE WITH RULE 2-126.

4. IF THIS SUMMONS IS SERVED BY PRIVATE PROCESS. PROCESS SERVER SHALL FILE A SEPERATE AFFIDAVIT AS REQUIRED BY RULE 2-126(A).

CIRCUIT COURT FOR BALTIMORE CITY
SAUNDRA E. BANKS, CLERK
111 N. CALVERT ST. - ROOM 462
BALTIMORE, MD. 21202

WRIT OF SUMMONS CASE NUMBER 94077005 CL177675

STATE OF MARYLAND, COUNTY TO WIT: PRIVATE PROCESS

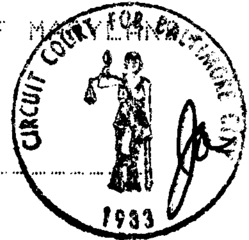
TO: STATE OF MARYLAND
S/O EVELYN O. CANNON, ESQ.
200 ST. PAUL PLACE-20TH FL.
BALTIMORE MD 21202

YOU ARE HEREBY SUMMONED TO FILE A WRITTEN RESPONSE BY PLEADING OR MOTION IN THIS COURT TO THE ATTACHED COMPLAINT FILED BY

KENNETH FITCH, ETAL
5214 SILVER SPRING RD #8 PERTY HALL MD 21128

WITHIN 30 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU.
WITNESS THE HONORABLE CHIEF JUDGE OF THE EIGHTH JUDICIAL CIRCUIT OF MARYLAND.

Saundra E. Banks
Clerk
Circuit Court for Balto. City
CLERK



DATE ISSUED 03/22/94

TO THE PERSON SUMMONED:

1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.

2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGEMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

SHERIFF(S) RETURN.

PERSON SERVED ______ TIME ______ DATE ______

PERSON SERVED ______ TIME ______ DATE ______

NON EST(REASON) ______

FEE $______ SHERIFF ______

NOTE:

1. THIS SUMMONS IS EFFECTIVE FOR SERVICE ONLY IF SERVED WITHIN 60 DAYS AFTER THE DATE IS ISSUED.

2. PROOF OF SERVICE SHALL SET OUT THE NAME OF THE PERSON SERVED, DATE AND THE PARTICULAR PLACE AND MANNER OF SERVICE.
IF SERVICE IS NOT MADE, PLEASE STATE THE REASONS.

3. RETURN OF SERVED OR UNSERVED PROCESS SHALL BE MADE PROMPTLY AND IN ACCORDANCE WITH RULE 2-126.

4. IF THIS SUMMONS IS SERVED BY PRIVATE PROCESS. PROCESS SERVER SHALL FILE A SEPERATE AFFIDAVIT AS REQUIRED BY RULE 2-126(A).

CIRCUIT COURT FOR BALTIMORE CITY
SAUNDRA E. BANKS, CLERK
111 N. CALVERT ST. - ROOM 462
BALTIMORE, MD. 21202

WRIT OF SUMMONS CASE NUMBER 94077005 CL177675

STATE OF MARYLAND, COUNTY TO WIT: PRIVATE PROCESS

TO:

FREDERICK W. DEJONG
1554 GLEN KEITH BLVD.
TOWSON MD 21204

YOU ARE HEREBY SUMMONED TO FILE A WRITTEN RESPONSE BY PLEADING OR MOTION IN THIS COURT TO THE ATTACHED COMPLAINT FILED BY

KENNETH FITCH, ETAL
5214 SILVER SPRING RD #8 PERTY HALL MD 21128

WITHIN 30 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU.
WITNESS THE HONORABLE CHIEF JUDGE OF THE EIGHTH JUDICIAL CIRCUIT OF MARYLAND.

Saundra E. Banks
Clerk
Circuit Court for Balto. City
CLERK

DATE ISSUED 03/22/94

TO THE PERSON SUMMONED:

1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.

2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGEMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

SHERIFF(S) RETURN.

PERSON SERVED__________ TIME ____ DATE ____

PERSON SERVED__________ TIME ____ DATE ____

NON EST(REASON) __________

FEE $____ SHERIFF__________

NOTE:

1. THIS SUMMONS IS EFFECTIVE FOR SERVICE ONLY IF SERVED WITHIN 60 DAYS AFTER THE DATE IS ISSUED.

2. PROOF OF SERVICE SHALL SET OUT THE NAME OF THE PERSON SERVED, DATE AND THE PARTICULAR PLACE AND MANNER OF SERVICE.
IF SERVICE IS NOT MADE, PLEASE STATE THE REASONS.

3. RETURN OF SERVED OR UNSERVED PROCESS SHALL BE MADE PROMPTLY AND IN ACCORDANCE WITH RULE 2-126.

4. IF THIS SUMMONS IS SERVED BY PRIVATE PROCESS. PROCESS SERVER SHALL FILE A SEPERATE AFFIDAVIT AS REQUIRED BY RULE 2-126(A).

141563

94077005/

CL177615

RECEIVED CIRCUIT COURT FOR BALTIMORE CITY #8 MAR 18 AM 11:27 CIVIL DIVISION

KENNETH FITCH 5214 Silver Spring Rd., #8 Perry Hall, MD 21128		IN THE CIRCUIT COURT
HARRY L. BIEDENBACK 7704 Beekay Road Edgemere, MD 21219	*	FOR BALTIMORE CITY
HAROLD H. MORRIS, JR. 6111 Shipview Way Baltimore, MD 21224	* *	
KENNETH A. SMITH C-94 Holiday Mobile Est Jessup, MD 20794	* *	
JENNIS H. DANIELS 4701 Chatford Ave. Baltimore, MD 21206	* *	
FRANK LIN RANDALL 1220 Kevin Road Baltimore, MD 21229	* *	
HECTOR JUAN CANDELARIO 128-S. Broadway Baltimore, MD 21231	* *	
KENNETH A. KORITZER, SR. 6012 Eurith Ave. Baltimore, MD 21206	* *	
HERBERT G. NICKLES 1673 Manchester Road Westminster, MD 21157	* *	
MAURICE DALE MCDONALD 5043 Wright Avenue Baltimore, MD 21205	* *	
RONALD D. SMITH 4601 Mainfield Avenue Baltimore, MD 21214	* *	
PLAINTIFFS	*	
v.	*	
FREDERICK W. DEJONG 1554 Glen Keith Blvd. Towson, MD 21204	* *	CASE NO.:

11:39AM03/18/94 002#4008 A ####
#0940770
#0000005

CIVIL	$80.00
LIBRA	$10.00
**TTL	$90.00
CHECK	$90.00
CHNG	$0.00

PP

STATE OF MARYLAND *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: EVELYN O. CANNON, Esq. *
Office of the Attorney General
200 St. Paul Pl., 20th Fl. *
Baltimore, MD 21202
*
and
*
MARYLAND DEPARTMENT OF
GENERAL SERVICES *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: ALAN BLUMBERG, Esq. *
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202 *

DEFENDANTS *

* * * * * * * * * * * * * *

COMPLAINT
Negligence Against the State

Kenneth Fitch, Harry L. Biedenback, Harold H. Morris, Jr., Kenneth A. Smith, Jennis H. Daniels, Frank Lin Randall, Herbert Juan Candelario, Kenneth A. Koritzer, Sr., Herbert G. Nickles, Maurice Dale McDonald, and Ronald D. Smith, Plaintiffs, by their attorney, David B. Shapiro, sue Frederick W. DeJong, the State of Maryland (hereinafter "the State"), and the Maryland Department of General Services (hereinafter "the DGS"), Defendants, and state as follows:

PARTIES, JURISDICTION, VENUE

1. That Plaintiffs are residents of the State of Maryland and, at all relevant times, were employed by the State of Maryland in Baltimore City, State of Maryland.

2. That at all relevant times, Plaintiffs were employed by

the State and the DGS at the Saratoga Street Center facility located in Baltimore City, State of Maryland.

3. That Defendant DeJong, who resides at 1554 Glen Keith Blvd., Towson, MD, 21204, is a resident of Baltimore County, MD.

4. That Defendant DGS is an executive department of the Maryland State Government, which is responsible for, and which, through its agents, servants and employees, operates and maintains State owned and leased facilities.

FACTS COMMON TO ALL COUNTS

5. The State of Maryland Department of General Services' Saratoga State Center facility (hereinafter "the Saratoga Center"), is located at 310 West Saratoga Street in Baltimore, Maryland. The Saratoga Center is one of the four divisions within the DGS' Office of Facilities Management, which is responsible for providing technical assistance to help operate and maintain State facilities. The Saratoga Center division was created in 1986 and, among other charges, operates, maintains, and secures State buildings at 310 W. Saratoga Street and 220-230 N. Howard Street in Baltimore City, MD.

6. The Defendants, at all relevant times herein, were assigned to the Central-North Public Buildings and Grounds division of the DGS and worked out of the Saratoga Center's first floor, using this area for administering the agency's maintenance program in it's nine facilities located in Anne Arundel, Baltimore, Cecil, Harford, Howard, and Calvert Counties, and Baltimore City. Employees also utilized other portions of this facility for it's maintenance shops (electrical, carpentry, plumbing, supply,

janitorial, and mechanics).

7. Defendant Frederick W. DeJong, at all relevant times herein, was Superintendent of the Saratoga State Center Division and supervised directly or indirectly through his agents, servants and employees, all of the named Plaintiffs who were assigned to Saratoga State Center.

8. Defendants, the State, the DGS, and Mr. DeJong, at all times relevant herein, through their agents, servants and employees, including Defendant DeJong and Eugene Gunter, his assistant, were responsible for the supervision of the Plaintiffs, all employees at the Saratoga Center facility. The acts of the Defendants against the Plaintiffs as described herein were committed within the scope of their employment with the State of Maryland, in that they were committed while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong and Mr. Gunter, the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of their employment.

9. That on July 28, 1989, Defendant DeJong issued a memorandum to the Plaintiffs, who were all maintenance personnel at the Saratoga Center, directing them to carry their electronic pagers with them at all times in order to make themselves available during off hours or vacations. The effect of this memorandum was to require the Plaintiffs to be on duty at all times without the benefit of additional wages. A copy of this memorandum is attached hereto as Exhibit 1.

10. For a period of years and continuing through until January 1993, Defendant DeJong conducted unlawful wiretapping and electronic surveillance, a felonious act if convicted in the State of Maryland pursuant to the Courts and Judicial Proceedings Article of the Maryland Annotated Code, Sections 10-401 to 10-414, against the Plaintiffs which included, but was not limited to, the placement and use of electronic listening devices hidden in the ceilings, walls and around the telephone system at the Saratoga Center facility. Defendant DeJong monitored these devices from his office and from other locations, intercepting oral communications and making unauthorized tape recordings of conversations made by the Plaintiffs. That Defendant DeJong ordered the fingerprinting and photographing of some of the Plaintiffs.

11. That the Defendants were aware that the Saratoga Center facility posed serious health problems to the Plaintiffs which were generated by fumes and dust from maintenance shop activities (saw dust, paint thinner, etc.), excessive heat and humidity in summer, cold and dampness in winter, lack of air circulation, as well as unsafe levels of lead and asbestos.

12. That in December 1992 and after excessive harassment by Defendant DeJong and Mr. Gunter, Plaintiff Kenneth Fitch submitted his resignation to the State Personnel Department and threatened to inform the press about certain improper activities taking place at the Saratoga Center unless an immediate investigation is initiated.

13. That in January 1993, Sergeant Wright and other members of the Maryland State Police conducted a unannounced investigation

at the Saratoga Center and recovered numerous electronic listening devices and recording equipment belonging to or under the control and possession of Defendant DeJong.

14. That in January 1993, Defendant DeJong was relieved of his duties as Superintendent of the Saratoga State Center Division and shortly thereafter left State service.

15. On January 30, 1993, Lieutenant Commander H. Frank Rayne, of the Maryland State Police, issued Memorandum No. 93-01-02 indicating that effective February 1, 1993, Mr. Fred DeJong is not permitted on State property at either the Baltimore, Annapolis, or Saratoga Street complex and that he will be arrested should he be found trespassing on the premises. A copy of this memorandum is attached hereto as Exhibit 2.

16. On June 12, 1993, within one hundred and eighty days after the plaintiffs became aware of the Plaintiff's activities against them, Plaintiffs filed a claim for injuries and damages to the State Treasurer by certified mail/return receipt requested. The filing of this claim satisfied the notice requirement under the Maryland Tort Claims Act, Md. State Gov't Code Ann. Sections 12-101 to 12-109. A copy of this claim is attached hereto as Exhibit 3.

17. By letter dated September 3, 1993, the State Treasurer's office provided the Plaintiff with an official and final denial of this claim against the State. A copy of this letter is attached hereto as Exhibit 4.

COUNT ONE

Negligence

18. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Seventeen of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

19. That Defendant DGS is a legal entity and the administrative agency of the State of Maryland, which was *responsible for, and which through its agents, servants and* employees, including Defendant DeJong, approved the purchase and placement of the listening devices which were used to monitor the activities and conversations of the Plaintiffs.

20. That on information and belief, due to the continuing pattern of harassment by Mr. DeJong and his assistant, Mr. Gene Gunter, in December 1993, Plaintiff Kenneth Fitch submitted his resignation and threatened to contact members of the press regarding the irregularities at the Saratoga Center. The Maryland State Police were notified and conducted an investigation at the DGS facility and discovered the hidden listening devices located throughout the facility and found recording tapes kept in Mr. DeJong's office. These tapes contained personal conversations, and were recorded unbeknownst to the Plaintiffs and without their knowledge or permission; said tapes were an invasion of the Plaintiffs' right of privacy and were made with the intention to embarrass or place the Plaintiffs in an uncomfortable position, intending to injure the Plaintiffs in their profession and employment, and further, to continue in a general pattern of harassment.

21. Defendants had a duty to exercise reasonable care with regard to the safety and well-being of their employees. Defendants, due to their position of authority over the Plaintiffs, were in a position to know what problems, if any, existed between Plaintiff employees and Defendant DeJong and Mr. Gunter and take the appropriate steps to insure that the safety of their employees would not be placed in jeopardy during the course of their employment. This duty of reasonable care extended to Plaintiffs as employees of the State of Maryland. But, by reason of the events related hereinabove, Defendants breached that duty. The breach was the direct and proximate cause of severe injuries to the Plaintiffs, as follows:

a. Defendants negligently allowed Mr. DeJong and Mr. Gunter to harass and intimidate the Plaintiffs, subject the Plaintiffs to unlawful wiretapping and electronic surveillance in violation of State law, and expose the Plaintiffs to hazardous working conditions.

b. Defendants negligently failed to give adequate warnings to Mr. DeJong and Mr. Gunter to cease their harmful actions against the Plaintiffs.

22. Defendants, the State, the DGS, and Mr. DeJong, at all times relevant herein, through their agents, servants and employees, including Defendant DeJong and Eugene Gunter, his assistant, were responsible for the supervision of the Plaintiffs, who were all employees at the Saratoga Center facility. The acts of the Defendants against the Plaintiffs as described herein were

committed within the scope of their employment with the State of Maryland, in that they were committed while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong and Mr. Gunter, the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of their employment.

23. The State, the DGS, and Mr. DeJong, through their agents, servants and employees, as the parties responsible for the injuries suffered by the Plaintiffs, participated in, supervised, directed and approved the actions against the Plaintiffs.

24. The State, the DGS, and Mr. DeJong owed a duty to the Plaintiffs that they not be harassed on or off the job by their supervisors, not be intimidated with unwarranted reprimands or threats of termination, not be placed in dangerous work environments, and not be forced to work without compensation.

25. The State, the DGS, and Mr. DeJong breached this duty and were negligent by participating in, supervising, directing and allowing the continued employment of Mr. Fred DeJong and Mr. Eugene Gunter, despite the fact that they had knowledge of prior acts of Mr. DeJong that placed other State employees in physical and emotional danger, including, but not limited to, the failure to monitor the activities of Mr. DeJong, and, in general, the failure to consider and take the appropriate precautions to prevent the harmful acts against the Plaintiffs.

26. As a result of this breach of duty on the part of the State, the DGS and Mr. DeJong, the Plaintiffs have sustained, and

will continue to sustain, substantial damage to their physical and psychological health and well-being, damage to their ability to maintain their employment or ability to advance with the State Classified system, damage from inconvenience and aggravation, and damage from the expenditure of funds for investigation and litigation of their claim against the State, DGS, DeJong and other parties.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT TWO

Negligence Retention of DeJong by State and DGS

27. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Twenty-Six of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

28. That Defendant DGS is a legal entity and the administrative agency of the State of Maryland, which was responsible for, and which through its agents, servants and employees, including Defendant DeJong, approved the purchase and placement of the listening devices which were used to monitor the activities and conversations of the Plaintiffs.

29. That on information and belief, due to the continuing pattern of harassment by Mr. DeJong and his assistant, Mr. Gene Gunter, in December 1993, Plaintiff Kenneth Fitch submitted his resignation and threatened to contact members of the press regarding the irregularities at the Saratoga Center. The Maryland State Police were notified and conducted an investigation at the DGS *facility and discovered the hidden listening devices and* recording tapes kept in Mr. DeJong's office. These tapes contained personal conversations, and were recorded unbeknownst to the Plaintiffs and without their knowledge or permission; said tapes were an invasion of the Plaintiffs' right of privacy and were made with the intention to embarrass or place the Plaintiffs in an uncomfortable position, intending to injure the Plaintiffs in their profession and employment, and further, to continue in a general pattern of harassment.

30. That Defendant State, through the DGS, its agents, servants and employees, including Defendant DeJong, as the parties responsible for the supervision of the Plaintiffs, all employees at the Saratoga Center facility, participated in, supervised, directed and approved the actions regarding the clandestine surveillance of the Plaintiffs. The above described acts of the Defendants were committed within the scope of their employment with the State of Maryland, in that they committed them while on duty at the Saratoga Center facility and in furtherance of Defendant State's and DGS's interests and that as the employer and supervisor of Defendant DeJong, the State and DGS was responsible for all of the acts

committed by Defendant DeJong within the scope of his employment.

31. That the State, with its executive agency DGS, had a duty to use reasonable care to select employees who were competent and fit to perform the necessary duties with respect to the supervision of the employees at the Saratoga Center. Defendant DeJong had a duty to the Plaintiffs to insure their safety, welfare, privacy where appropriate, and general well being as an employee with due care and pursuant to proper standards and practices so as to prevent harm and injury. Despite knowing of prior irregularities and improprieties concerning the activities of Defendant DeJong, the State and the DGS did nothing to prevent Defendant DeJong from conducting improper and in some instances, illegal activities against the Plaintiffs. Defendant State and DGS, knew, or should have known, that Defendant DeJong would be likely to engage in improper and in some instances, illegal activities against the Plaintiffs. Plaintiffs, employees under the supervision of Defendant DeJong, were such individuals who would foreseeable come into contact with Defendant DeJong. Therefore, Defendant State and DGS owed such a duty to Plaintiffs, and such duty was breached.

32. That the State and the DGS further breached this duty and was negligent by participating in, supervising, and approving the actions of its employee Defendants DeJong, which resulted in Plaintiffs being subjected to constant patterns of harassment, unreasonably requiring Plaintiffs to be available and on call, without additional remuneration 24 hours a day, 365 days of the year, exposed over a long period of time to environmentally

dangerous indoor air conditions, and invasion of their personal privacy by tape recording their private conversations. Defendants actions and inactions against the Plaintiffs, in contravention of a clear mandate of public policy, breached Defendants' duty to Plaintiff and constitute negligence, per se. In addition, because of Defendants' knowledge of Defendant's DeJong past indiscretions, the likelihood of the risk of continued abuse of the Plaintiffs was foreseeable. Defendant State and DGS, knew, or should have known, that Defendant DeJong was not competent or fit for the duties of Superintendent at the Saratoga Center. Defendant State and DGS breached its duty to use reasonable care in retaining their employee, Defendant DeJong.

33. That as a result of the State's and DGS's breach of duty and negligence in retaining Defendant DeJong, Plaintiffs have sustained, and will continue to sustain, substantial damage to their physical and psychological health and well-being, damage to their ability to maintain their employment or ability to advance with the State Classified system, damage from inconvenience and aggravation, and damage from the expenditure of funds for investigation and litigation of their claim against the State, DGS, DeJong and other parties.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with

interest and costs and such other and further relief as the Court deems proper.

COUNT THREE

Invasion of Privacy - Intrusion Upon Seclusion

34. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Thirty-Three of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

35. That Defendant DeJong, while employed by Defendants State and DGS and without the Plaintiffs' knowledge or consent, secretly placed unlawful wiretaps and other electronic listening devices in the ceilings, walls, and around the telephone systems located at the Saratoga Center and conducted electronic eavesdropping activities on the private conversations of the Plaintiffs. Defendant improperly and recklessly recorded these conversations which contained personal and private matters about the Plaintiffs. The listening and recording of private conversations of the Plaintiffs would be highly offensive to any reasonable person.

36. That the conduct of Defendant DeJong, which constituted an intentional intrusion into the privacy of the Plaintiffs, was highly offensive to a reasonable person.

37. As a result of the intrusion upon Plaintiffs' seclusion by Defendant DeJong, Plaintiffs suffered humiliation and mental distress.

38. The above described acts of Defendant DeJong were committed within the scope of his employment with the State and the

DGS, in that he committed them while on duty, and in furtherance of Defendant State's and DGS' interests and that as the employer of Defendant DeJong and Mr. Gunter, the Defendants are responsible for all of the acts committed by Defendant DeJong or those he supervised within the scope of their employment.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT FOUR

Infliction of emotional distress - Intentional

39. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Thirty-Eight of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

40. That Defendant DeJong, without the Plaintiffs' knowledge or consent, hid unlawful wiretaps and electronic listening devices in the ceilings, walls, and around the telephones at the Saratoga Center and eavesdropped on the private conversations of the Plaintiffs. Defendant improperly and recklessly recorded these conversations which contained personal and private matters about the Plaintiffs. The listening and recording of private conversations of the Plaintiffs would be highly offensive to any

reasonable person. This action resulted in the Plaintiffs becoming highly embarrassed and in causing this action to occur, Defendant acted with knowledge of the severe distress it would cause the Plaintiffs.

41. The Defendant DeJong's intentional and reckless conduct was extreme and outrageous and in deliberate disregard of a high degree of probability that emotional distress would result to the Plaintiffs and these actions of the Defendant caused Plaintiffs great emotional distress.

42. Plaintiffs suffered such distress from Defendant DeJong's treatment that they have suffered psychological trauma that has compromised their ability to relate to co-workers, supervisory personnel at the State of Maryland as well as family and friends.

43. That Plaintiffs were in such emotional distress that they required psychotherapy and other medical attention.

44. That by reason of the Defendant's conduct and actions, Plaintiffs have suffered, and will continue to suffer, damages including, but not limited to, severe and extreme emotional distress, and embarrassment.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT FIVE

Strict Liability for Abnormally Dangerous Activities

45. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Forty-Four of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

46. That the Defendants were aware that the Saratoga Center facility posed serious health problems to the Plaintiffs which were generated by fumes and dust from maintenance shop activities (saw dust, paint thinner, etc.), excessive heat and humidity in summer, cold and dampness in winter, lack of air circulation, as well as unsafe levels of lead and asbestos.

47. That Defendants allowed these dangerous environmental conditions to continue, unabated for more than 4 years.

48. That Defendants' conduct in allowing the Plaintiffs to be exposed to such dangerous conditions constituted an abnormally dangerous activity which exposed the Plaintiffs to an unreasonable risk of harm.

49. At all times relevant herein, Defendants maintained control over the abnormally dangerous activity of allowing these dangerous environmental conditions to remain to the detriment of the Plaintiffs.

50. Plaintiffs sustained serious injury to their persons by being exposed to asbestos, lead and noxious fumes over a period of years, such injuries being the result of the Defendants' conduct in allowing these dangerous environmental conditions to remain on

their property.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages, or, in the alternative, One Hundred Thousand Dollars ($100,000.00) if a pertinent law should allow no recovery beyond that amount, with interest and costs and such other and further relief as the Court deems proper.

COUNT SIX

Breach of Contract

51. That the Plaintiffs incorporate by reference all of the relevant allegations contained in Paragraphs One through Fifty of this Complaint and realleges each of them with the same force and effect as if restated herein in their entirety.

52. That at all times relevant herein, Defendants State, DGS and DeJong directed the terms of employment and compensation of the Plaintiffs, all classified employees of the State of Maryland.

53. That through the State's agents, servants and employees, including Defendant DGS and DeJong, as well as the Department of Personnel, employees who are required to be on duty, even if not on the job location, must receive compensation for being available for work-related duties.

54. That Defendant DeJong, in his capacity as Superintendent for the Saratoga Street Center division, was responsible for the hours of employment and payment of overtime wages as necessary and directed the Plaintiffs to be available for work 24 hours a day, 7

days a week, 365 days a year.

55. That Plaintiffs, pursuant to Defendant DeJong's July 8, 1989 memorandum, made themselves available yet were not paid in accordance with State of Maryland requirements for compensation.

56. That Defendants acted with knowledge of the requirement to compensate employees who make themselves available for service even when not on the job site and with the intent to materially breach their contractual obligation to compensate the Plaintiffs.

57. That Plaintiffs suffered a loss of income associated with the thousands of hours worked without compensation.

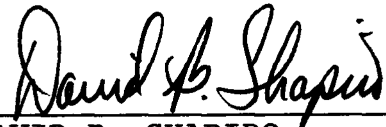
58. That the above described acts of the Defendant were committed within the scope of their employment with the State of Maryland, in that they committed them while on duty, at the State's property, and in furtherance of the State's interests.

59. That as the employer of Defendant DeJong, the State, through DGS, is responsible for all of the acts committed by Defendant DeJong within the scope of his employment.

60. That Plaintiffs have performed all conditions precedent under the terms of their respective MS-22 job descriptions and Defendant State, through the actions of Defendant DeJong, materially breached their employment contract with the Plaintiffs.

61. The Defendants' acceptance and retention of the benefit of services above and beyond the duties negotiated for in the Plaintiffs' employment contracts continues to the present time. It would be inequitable for Defendants to enjoy these additional services without providing compensation to the Plaintiffs.

WHEREFORE, each Plaintiff demands judgment against Defendants, State, DGS and DeJong, jointly and severally, for the sum of One Hundred Thousand Dollars ($100,000.00), in compensatory damages with interest and costs and such other and further relief as the Court deems proper.



DAVID B. SHAPIRO
1101 St. Paul Street, Ste. 407
Baltimore, Maryland 21202
(410) 576-9100
Attorney for Plaintiffs

KENNETH FITCH 5214 Silver Spring Rd., #8 Perry Hall, MD 21128	* *	IN THE CIRCUIT COURT
HARRY L. BIEDENBACK 7704 Beekay Road Edgemere, MD 21219	* *	FOR BALTIMORE CITY
HAROLD H. MORRIS, JR. 6111 Shipview Way Baltimore, MD 21224	* *	
KENNETH A. SMITH C-94 Holiday Mobile Est Jessup, MD 20794	* *	
JENNIS H. DANIELS 4701 Chatford Ave. Baltimore, MD 21206	* *	
FRANK LIN RANDALL 1220 Kevin Road Baltimore, MD 21229	* *	
HECTOR JUAN CANDELARIO 128-S. Broadway Baltimore, MD 21231	* *	
KENNETH A. KORITZER, SR. 6012 Eurith Ave. Baltimore, MD 21206	* *	
HERBERT G. NICKLES 1673 Manchester Road Westminster, MD 21157	* *	
MAURICE DALE MCDONALD 5043 Wright Avenue Baltimore, MD 21205	* *	
RONALD D. SMITH 4601 Mainfield Avenue Baltimore, MD 21214	* *	
PLAINTIFFS	*	
v.	*	
FREDERICK W. DEJONG 1554 Glen Keith Blvd. Towson, MD 21204	* *	CASE NO.:

STATE OF MARYLAND *
300 W. Preston Street
Baltimore, MD 21201 *

Serve On: EVELYN O. CANNON, Esq. *
Office of the Attorney General
200 St. Paul Pl., 20th Fl. *
Baltimore, MD 21202
*
and
*
MARYLAND DEPARTMENT OF
GENERAL SERVICES *
300 W. Preston Street
Baltimore, MD 21201 *

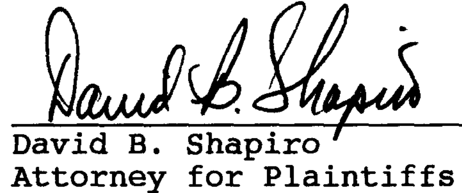
Serve On: ALAN BLUMBERG, Esq. *
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202 *

DEFENDANTS *

* * * * * * * * * * * * * *

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues.



David B. Shapiro
Attorney for Plaintiffs

Exhibit 1

STATE OF MARYLAND

MEMORANDUM

DEPARTMENT OF GENERAL SERVICES
SARATOGA STATE CENTER

DATE: July 28, 1989

TO: ALL MAINTENANCE PERSONNEL

FROM: Fred DeJong, Superintendent

SUBJECT: PAGERS/EMERGENCY CALLS

Since the opening of our building, we have experienced unexpected emergencies that required your attention and services during off hours, weekends, and holidays.

As a reminder, it is still your responsibility to carry your pager with you at all times in order to make yourself readily available to respond to an emergency during your off hours or vacation. If you must leave the metropolitan area for any reason, please notify Security immediately by calling 333-6404.

In addition, it is also the responsibility of each employee to submit to the Superintendent's Office his most recent address and telephone number, whether listed or unlisted, within 24 hours of a change.

I have always been very proud to boast to my superiors of the cooperation and dedication of our personnel since the opening of our facilities. I am confident that you will adhere to this policy as in the past.

I have read this policy, reviewed it, and understand it thoroughly.

Signed: ________________________________

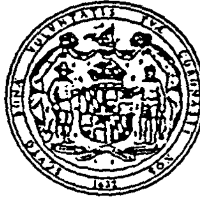
FDJ:pk

Exhibit 2

State of Maryland
Department of General Services

WILLIAM DONALD SCHAEFER
Governor

MARTIN W. WALSH, JR.
Secretary



FINANCE & ADMINISTRATION
SERVICES & LOGISTICS
FACILITIES MANAGEMENT
TELECOMMUNICATIONS
REAL ESTATE

JANUARY 30, 1993

DEPARTMENT OF GENERAL SERVICES POLICE
BALTIMORE DETACHMENT

MEMORANDUM NO. 93-01-02

TO : ALL PERSONNEL (Confidential)
SUBJECT: Mr. Fred DeJong

Effective February 1, 1993 Mr. DeJong is not permitted on State property at either the Baltimore, Annapolis, or Saratoga Street complexes, unless he has official business. This does not include general public access areas (e.g. State Employees Credit Union).

Should Mr. DeJong be observed the shift supervisor will immediately be notified and the following procedures applied:

* The shift supervisor will notify the Detachment Commander promptly and personally meet with Mr. DeJong

* An inquiry will be made as to the nature of Mr. DeJong's business

* The shift supervisor will obtain the contact person's name, telephone number, etc. and verify if Mr. DeJong has official business with them

* If verification is made no further DGSP action is needed

* If verification is not made Mr. DeJong will be told to leave the premises and his failure to do so could result in his arrest for trespassing

* If Mr. DeJong fails to obey an arrest will be made.

Finally, this situation should be treated seriously and caution should be used when confronting this individual. A complete profile and photograph are included with this memorandum for which all personnel will acknowledge via DGSP Form 42.

This memorandum supercedes any other order in conflict herewith.

H. Frank Rayne

H. Frank Rayne, Lieutenant
Commander, DGSP
Maryland State Police

Baltimore Public Buildings & Grounds
301 WEST PRESTON STREET, ROOM M-6, BALTIMORE, MARYLAND 21201 (301) 225-4409
TTY for the Deaf: Balto Area 383-7555
D.C. Metro 565-0451

Exhibit 3

DAVID B. SHAPIRO
ATTORNEY AT LAW

SUITE 407
1101 SAINT PAUL STREET
BALTIMORE, MARYLAND 21202

(410) 576-9100
FAX (410) 576-9102

ALSO ADMITTED TO PRACTICE IN
THE DISTRICT OF COLUMBIA

June 11, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lucille Maurer, Treasurer
State Treasury Building
P.O. Box 666
Annapolis, Maryland 21404

Re: Maurice Dale McDonald, Harry Biedenbock, Harold H. Morris, Jr., Ken Smith, Jennis Daniels, Frank Lin Randall, Hector Juan Candelario, Ken Fitch, Kenneth A. Koritzer, Sr., Herbert Nickles and Ronald D. Smith v. The State of Maryland

Date of Loss: December 15, 1992

Dear Ms. Maurer:

Please be advised that I have been retained as private counsel to represent the eleven (11) state employees listed-above who work within the Department of General Services for the State of Maryland. This notice is to present claims on behalf of the aforementioned individuals under the Maryland Tort Claims Act. In accordance with the requirements of the Act, specifically Section 12-107(a) of the Maryland State Government article, I provide the following information:

As early as 1989 and continuing until January 31, 1993, all claimants have been either directly or indirectly supervised by Fred W. DeJong and Eugene Gunter at the 310 W. Saratoga Street facility operated by the Department of General Services. During this period of time, Messrs. DeJong and Gunter have engaged in outrageous conduct towards the eleven claimants.

Said conduct involves the following:

1. Messrs. DeJong and Gunter placed or caused to be placed electronic listening and recording devices throughout the Saratoga Street facility, including telephones and bathrooms, for the purpose of eavesdropping on the claimants and violating their right and expectation of privacy;

2. Messrs. DeJong and Gunter directed some of the claimants to have their finger prints and photographs taken and kept on file for purposes unknown to them;

3. Messrs. DeJong and Gunter unreasonably required claimants to perform a variety of tasks under extremely stressful circumstances. These tasks ranged from the requirement that claimants were to be on call for work duties, 24 hours per day, 7 days a week without compensation to threatening claimants with layoffs or other personnel sanctions if the claimants attempted to file grievances or attempted to receive medical attention for injuries or illnesses.

4. Messrs. DeJong and Gunter and the State of Maryland knew or should have known of the dangerous environmental conditions at the Saratoga Street facility, however, no work has been done to correct the serious conditions and, as a result, claimants have suffered serious health problems due to their exposure to asbestos, saw dust, paint thinner, and other hazardous materials.

Throughout this period, Messrs. DeJong and Gunter have engaged in a pattern of behavior against my clients that has also included harassment, intimidation, verbal abuse, constant threats that they will be reprimanded for the slightest infraction, actual or imagined and other numerous forms of inappropriate behavior.

The State of Maryland knew, or should have known of the activities described above, however, did nothing to reprimand or remove Messrs. DeJong or Gunter from their positions. The specific claims against the State of Maryland include the violation of the claimants' right to privacy under the Maryland Constitution and the Federal Constitution, negligent retention on the part of the State for keeping Messrs. DeJong and Gunter employed despite the State of Maryland's knowledge of their outrageous behavior towards the claimants, violation of State Personnel guidelines and Fair Labor Standards by requiring claimants as early as 1989 to be on call 24 hours of the day, 7 days a week to respond to beeper calls from Messrs DeJong, Gunter or others in supervisory positions.

On behalf of my clients, a claim is made against the State of Maryland for the sum of $500,000.00 for each of the claimants. The names and addresses of each of the claimants are as follows:

DAVID B. SHAPIRO
ATTORNEY AT LAW

Maurice Dale McDonald
5043 Wright Avenue
Baltimore, MD 21205

Ronald David Smith
4601 Mainfield Avenue
Baltimore, MD 21214

Harold H. Morris, Jr.
6111 Shipview Way
Baltimore, MD 21224

Kenneth Fitch
5214 Silver Spring Rd., #8
Perry Hall, MD 21128

Hector Juan Candelario
128-S. Broadway
Baltimore, MD 21231

Frank Lin Randall
1220 Kevin Road
Baltimore, MD 21229

Ronald D. Smith
4601 Mainfield Avenue
Baltimore, MD 21214

Harry Leroy Biedenbock
7704 Beekay Road
Edgemere, MD 21219

Herbert George Nickles
1673 Manchester Road
Westminster, MD 21157

Ken Smith
C-94 Holiday Mobile Est
Jessup, MD 20794

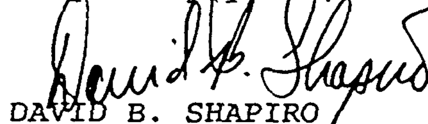
Kenneth Albert Koritzer, Sr.
6012 Eurith Ave.
Baltimore, MD 21206

Jennis A. Daniels
4701 Chatford Ave.
Baltimore, MD 21206

Herbert Nickles
1673 Manchester Road
Westminster, MD 21157

As attorney for these claimants, I would request that all communications and correspondence regarding this matter be directed to me at the address listed above. If you have any further questions or require additional information, please feel free to contact me.

Very truly yours,



DAVID B. SHAPIRO

DBS/br

cc: Claimants

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece next to the article number.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
LUCILLE MAURER, TREASURER
STATE TREASURY BUILDING
P. BOX 666
ANNAPOLIS, MD 21404

4a. Article Number
P 636 698 740

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
JUN 15 1993

Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

Signature (Agent)

Form 3811, October 1990 ☆U.S. GPO: 1990—273-861 DOMESTIC RETURN RECEIPT

P 636 698 740

Certified Mail Receipt
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

UNITED STATES POSTAL SERVICE

Sent to: LUCILLE MAURER, TREAS.	
Street & No.: STATE TREASURY BLDNG	
P.O., State & ZIP Code: P.O. BOX 666, ANNAPOLIS, MD 21404	
Postage	$ .29
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.00
Return Receipt Showing to Whom, Date, & Address of Delivery	
TOTAL Postage & Fees	$2.29
Postmark or Date	

USPS JUN 1993 MOWS BALTIMORE MD

PS Form 3800, June 1990

Exhibit 4

LUCILLE MAURER
TREASURER

MARK A. REGER
ACTING CHIEF DEPUTY

DEPUTIES
GARY M. AAMOLD
BERNADETTE T. BENIK
MARION B. MEIDENBAUER
GUSTAVO MERCANTI
H. BYRON MATTHEWS
ROBERT L. RICHTER
JUDITH A. SMITH
EMMA STINCHCOMB

MARYLAND STATE TREASURER
LOUIS L. GOLDSTEIN TREASURY BUILDING
ANNAPOLIS, MARYLAND 21401

CERTIFIED-RETURN RECEIPT REQUESTED

SEPTEMBER,3 1993

DAVID SHAPIRO
SUITE 407
BALTIMORE, MD 21202

RE: **CLAIMANT:** **MAURICE MCDONALD, AND ELEVEN OTHER CLMTS.**
CLAIM NUMBER: 01MD93TG1678
DATE OF ACCIDENT: 12/15/92

Dear MR. SHAPIRO:

This will acknowledge receipt of your claim.

The Maryland Tort Claims Act (Section 12-106 of the State Government Article) establishes very strict standards under which a claim may be considered by the State Treasurer. In particular, the Maryland Tort Claims Act requires that the claimant must submit a written claim to the Treasurer within 180 days of the accident.

Since your claim was not filed within the 180 day period, the claim may not be considered.

Very truly yours,

Michael J. Fullerton /BW

Michael J. Fullerton
Claims Manager

MJF:brw

TELEPHONE NUMBERS:
410-974-3533 D.C. AREA TOLL FREE 858-5419 TTY 410-974-2609

DAVID B. SHAPIRO
ATTORNEY AT LAW

SUITE 407
1101 SAINT PAUL STREET
BALTIMORE, MARYLAND 21202

(410) 576-9100
FAX (410) 576-9102

ALSO ADMITTED TO PRACTICE IN
THE DISTRICT OF COLUMBIA

March 18, 1994

Clerk, Civil Division
Circuit Court for Baltimore City
111 N. Calvert Street
Baltimore, Maryland 21202

Re: Fitch v. DeJong, et al.
Civil Case

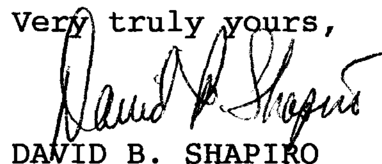
Dear Sir/Madam:

Enclosed please find a Complaint and Demand for Jury Trial for the above-referenced matter. As there are three (3) named defendants, I request that you prepare the necessary summons for service upon the defendants named therein by a private process server and return the summons to me.

Also enclosed is my check in the amount of $90.00 made payable to Clerk, Circuit Court for Baltimore City, to cover the cost of the above-requested filing. Kindly send me a receipt for same.

Thank you for your assistance in this matter.

Very truly yours,



DAVID B. SHAPIRO

DBS/b

Enclosures:

MSAREF.NET, MSA SC 5458
An Archives of Maryland Publication

CCB
2010-02-18
238 images

MSA SC 5458-82-152

Dates: 2010/02/17
Description: Case numbers received from J. Hollander -

BALTIMORE CITY CIRCUIT COURT (Paternity Papers) Arrington v. Rodriguez, 1989, Box 169 Case No. 119070 [MSA T3351-923, CW/16/31/25]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Rolnik v. Union Labor Life Ins. Co., 1987, Case No. 87313071
Case is split between 2 boxes:
Box 387 [MSA T2691-2026, HF/8/35/8]
Box 388 [MSA T2691-2027, HF/8/35/9]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v.The Stuart Hack Co., Box 128 Case No. 88102069 [MSA T2691-2232, HF/11/30/3]
See also for "brick binders":
Box 527 [MSA T2691-2631, HF/11/38/18]
Box 528 [MSA T2691-2632, HF/11/38/19]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Attorney Grievance Commission v. Yacono, 1992, Box 1953 Case No. 92024055 [MSA T2691-4591, OR/12/14/65]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Feldmann v. Coleman, 1993, Box 391 Case No. 93203022 [MSA T2691-5466, OR/22/08/037]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Jefferson v. Ford Motor Credit Corp., 1993, Box 470 Case No. 93251040 [MSA T2691-5545, OR/22/10/20]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack Co. and Blum, Yumkas, Mailman, 1993, Box 518 Case No. 93285087 [MSA T2691-5593, OR/22/11/20]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Booth v. Board of Appeals, 1993, Box 589 Case No. 93330026 [MSA T2691-5665, OR/22/12/45]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Scott v. Dept. of Public Safety, 1993, Box 603 Case No. 93342002 [MSA T2691-5679, OR/22/13/11]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Stubbins v. Md. Parole Comm'n., 1993, Box 616 Case No. 93354003 [MSA T2691-5692, OR/22/13/24]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Fitch v. DeJong, 1994, Box 109 Case No. 94077005 [MSA T2691-5817, OR/28/9/2]
File should be named msa_sc5458_82_152_[full case number]-####

CCB 2-18-10 238 images

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Bowden, 1987, Box 142 Case No. 18721501 [MSA T3372-984, CW/2/23/13]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Redmond, 1988, Box 191 Case No. 48828071 [MSA T3372-1282, HF/11/23/43]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Parker, 1990
Box 100 Case Nos. 290213034,35 [MSA T3372-1476, OR/16/16/8]
Box 104 Case Nos. 290221060,61 [MSA T3372-1480, OR/16/16/12]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Transcripts) State v. Monk, 1991, Box 78 Case No. 591277019 [MSA T3657-403, OR/17/11/21]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CRIMINAL COURT (Transcripts) Eraina Pretty, 1978, Box 43 Case Nos. 57811846, 57811847, 57811848, 57811858, 57811859, 57811860 [MSA T496-3990, OR/18/22/41]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Johnson (or Johnson-Bey), 1987, Box 11 Case No. 28701917 [MSA T3372-853, CW/2/20/26]

Accession No.: MSA SC 5458-82-152

Date Entered: 02/17/2010
Date Completed:
No. Pages: 0
Amount paid: $0.00
Amount due: $0.00
Tracking No.: T -0

Notes | Edit Database Entry

| **Edit & Modify Entries** | **Search** | **Search MAILREF** | **Contact Webmaster** | **Home** | **End Session**

System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
Programmed in *Microsoft SQL Server* and *Cold Fusion 7.0* by Nancy Bramucci.
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
Version 2.8.1