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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT

Appellate Case No. 2023-001376

Justin McGee .....Respondent,

v.

Lindsay F. McGee.....Petitioner.

Return to Petitioner's Amended Motion to Suppress Evidence

Petitioner Lindsay F. McGee ("Wife") and Respondent Justin McGee ("Husband") are currently involved in divorce proceedings in Charleston County. No final order of divorce has been entered—only a temporary order requiring the parties to share custody and placing limitations on the parties has been entered.

One month ago, Wife filed an Amended Motion to Suppress Evidence pursuant to South Carolina Code section 17-30-110 ("the Homeland Security Act"). She purports to invoke this Court's original jurisdiction, requesting this appellate court make detailed factual findings and suppress three types of evidence she claims Husband collected in violation of the Homeland Security Act; the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §§ 2510–2523 ("the Federal Act"); the Stored Communications Act, 18 U.S.C. §§ 2701–13; and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. This Court should deny the Motion because it is factually inaccurate, suffers from legal deficiencies, and is procedurally and jurisdictionally improper.

Background

A. Factual Background

The parties met at the Charleston School of Law and formed the McGee Law Firm, LLC, (the "Firm") in July 2011. They are both members of the Firm and both served as global administrators of the Firm's SharePoint and Exchange.[1] (McGee Aff. ¶¶ 79, 85). They married in March of 2012 and now have three children: a nine-year-old son, CHM; a six-year-old son, HMM; and a three-year-old daughter, AJM.

Before February 2021, the family lived together at 7312 Eddy Farm Road. In February 2021, Wife leased a separate property ("McCutchen House") and told Husband she wanted to separate. Later that month, Wife moved from the parties' marital home to McCutchen House. Although Husband remained at their old home, he had almost daily access to McCutchen House, and the children alternated with 50/50 time between homes. (McGee Aff. ¶ 2). After marriage counseling and several family vacations together, Wife agreed to reconcile, and in June 2021, Husband moved to McCutchen House. (McGee Aff. ¶ 16).

While living at McCutchen House, Husband used nanny cameras from SCS Enterprises. Wife knew Husband regularly installed nanny cameras at home and work. (McGee Aff. ¶¶ 57–61; *see* Ex. V to McGee Aff.). Husband installed these cameras for safety and as a nanny camera for the children. (McGee Aff. ¶¶ 12–13; *see* Ex. A to McGee Aff.). The cameras contained outlet extenders and were wired. (McGee Aff. ¶¶ 63, 67). To enable remote viewing, a user must plug the cameras into a power source, download a mobile application (called IoT Living), go into the application, and connect the cameras through the application to a separate Wi-Fi network

[1] Husband removed Wife as a global administrator during the summer of 2022, but Wife had Husband's email credentials until at least May 10, 2023. (McGee Aff. ¶ 86; Ex. Z to McGee Aff.).

beginning with "SCS." (McGee Aff. ¶¶ 71, 77–78). Once plugged in and installed via the application, the cameras were set to activate upon motion and record in one-minute intervals. (McGee Aff. ¶ 67).

On August 3, 2021, Husband's iPhone (named "Justin's iPhone") exploded in a hot car. (McGee Aff. ¶ 27; *see* Ex. E to McGee Aff.). That next month, Husband gifted an iPhone 12 Pro Max to Wife as a belated birthday present. (McGee Aff. ¶ 28). Wife set up the iPhone 12 Pro Max using her existing Apple ID and the phone number 843-XXX-3367. (McGee Aff. ¶ 28). Wife deleted the data from her iPhone 8 Plus, performed a factory reset on the phone, and then gave the phone to Husband for him to use as a backup phone for the Firm and for the children to play games. (McGee Aff. ¶ 28). On September 16, Husband set up the iPhone 8 Plus using a new Apple ID and connected the phone to his AT&T account under the phone number 843-XXX-2853. (McGee Aff. ¶ 29).

When Husband suspected Wife was having an affair in June 2022, he began moving his personal belongings out of McCutchen House. (McGee Aff. ¶¶ 18–19). Husband continued to access McCutchen House regularly. (*See* McGee Aff. ¶ 18). Husband spent at least two nights at McCutchen House during July, and over the course of the summer, he removed all but one of the nanny cameras. (McGee Aff. ¶¶ 18, 62–63). Husband inadvertently left the remaining camera, which was unplugged and uninstalled, on a shelf in the garage. (McGee Aff. ¶ 63). The camera did not have audio capabilities. (McGee Aff. ¶¶ 64, 66; Leonard Aff. ¶¶ 19, 21). In any event, Husband did not plug the garage camera in, access the camera through the application, or connect

the camera to Wi-Fi—all of which would have been required for real-time video monitoring.[2] (*See* McGee Aff. ¶¶ 63, 67–68).

In light of growing concerns over Wife's mental health, her drug and alcohol abuse, as well as to verify suspicions of adultery, Husband hired a private investigator, John Clayton ("Husband's Investigator").[3] (McGee Aff. ¶ 19; *see* Ex. A to McGee Aff.). On September 3, 2022, Husband's Investigator discovered Wife was having an affair. (McGee Aff. ¶ 20). Immediately after getting caught, Wife bought an iPhone 13 from AT&T. (McGee Aff. ¶ 34). Wife set up the iPhone 13 using a new Apple ID and phone number (843-XXX-2168). (McGee Aff. ¶ 34). On October 20, 2022, Husband filed an action for divorce on the ground of adultery. (*See* Ex. 1 to Return). Sometime before November 26, 2022, Wife changed the Wi-Fi password at McCutchen House. (McGee Aff. ¶ 72; Ex. Q to McGee Aff.).

On May 1, 2023, Husband filed a Motion for Temporary Relief, requesting temporary financial relief, an established parenting plan, and drug and alcohol testing for Wife. (*See* Ex. B to McGee Aff.). On May 10, Husband sent Wife a password reset link to allow her to regain access to her Firm email account and help prepare documents in a case Husband was litigating. (McGee Aff. ¶ 83). This was not abnormal, as Wife had a habit of forgetting her passwords. (McGee Aff. ¶ 85 n.53). When Wife accessed her Firm email account, she deleted roughly 39,000 emails *en masse*, many of which were client and billing records that the South Carolina Rules of Professional

[2] Wife suggests Husband deleted portions of the video recordings from December 24, 2022, to April 30, 2023. (Am. Mot. to Suppress Evid. at 6). The IoT Living application allows for bulk deletion of recordings via SD card, but it does not allow for selective deletion. (McGee Aff. ¶ 71; Leonard Aff. ¶ 20). Therefore, no one—much less Husband—could have deleted these videos. Any gaps in recording could have been caused by the camera being unplugged during that time. (McGee Aff. ¶ 71).

[3] Husband hired Clayton on or around June 21, 2022, when he began to suspect Wife was having an affair. (McGee Aff. ¶ 19). Clayton placed a GPS tracker on Wife's vehicle. (McGee Aff. ¶ 19). The location data from that tracker undermines one of Wife's factual allegations, as detailed below.

Conduct require attorneys to retain. (McGee Aff. ¶¶ 89, 93; *see* Rule 417, SCACR). When Husband discovered Wife's mass deletion, he revoked Wife's email access and initiated a litigation hold to prevent the deletion of important emails. (McGee Aff. ¶ 90). Thereafter, Wife filed a Motion for Temporary relief of her own, seeking custody and financial support.

The Honorable Michelle Hurley held a temporary hearing on Husband's motion, during which both parties presented affidavits and exhibits in support of their requests for temporary relief. (*See* McGee Aff. ¶ 25). Each party noted objections to certain submissions at the outset of the hearing. Wife never made an objection alluding to the Homeland Security Act, nor did she allege Husband improperly interfered with her communications. On June 15, the Family Court issued a Temporary Order setting the terms of, among other things, a week-to-week parenting schedule with limitations on Wife's ability to associate with certain individuals in the children's presence. (Ex. D to McGee Aff.). The Temporary Order set a supplemental review hearing for September 18. (Ex. D to McGee Aff.).

Since the Family Court issued its Temporary Order, the parties have engaged in discovery. This included discovery on any experts retained by the parties.[4] Both parties have issued subpoenas[5] involving the issues Wife raises in her Motion to Suppress.[6] Husband has filed motions

[4] Despite repeated requests during discovery, Wife did not provide any information about the purported expert she relies upon in these proceedings, much less did she timely turn over any expert reports. As a result, Husband objects to the Court's consideration of the purported expert affidavit Wife filed in support of her Amended Motion given her gamesmanship of the discovery and other deadlines in the collateral divorce proceedings. This is yet another reason why resolution of these evidentiary matters is more appropriate for the Family Court.

[5] Counsel for Wife objected to many of the subpoenas that were sent by Husband to try and build the record, including subpoenas seeking the same evidence Wife sought.

[6] Some of these subpoenas are outstanding. For example, Bank of America responded to the subpoena after Wife filed her Amended Motion to Suppress requesting a fourteen-day extension to Wife's subpoena. The records Wife sought in this subpoena related to access of certain financial

to compel and contempt actions against Wife's witnesses for failing to respond to subpoenas, as well as a motion to quash subpoenas Wife has issued involving many of the issues purportedly before this Court. These issues, along with all other discovery or evidentiary issues that have arisen since the issuance of the Temporary Order, were set to be heard during the supplemental review hearing on September 18. That hearing was stayed pending this Court's review of Wife's Amended Motion to Suppress.

B. Procedural Background

Just weeks before the supplemental review hearing, Wife filed her Motion to Suppress. (*See* Mot. to Suppress Evid. 1–13). She amended the motion two days later to "clarify the relief requested in the Motion." (*See* Am. Mot. to Suppress Evid. 1–13).

The amended motion makes three broad but largely unsupported claims. *First*, Wife alleges Husband violated the Homeland Security Act and the Federal Act by (1) accessing Wife's Firm email account to intercept a May 16, 2023 email from Bank of America; (2) intercepting Wife's text messages; (3) intercepting Wife's personal email messages; and (3) monitoring and recording Wife's communications using nanny cameras at McCutchen House. (Am. Mot. to Suppress Evid. 8). Husband did no such thing, and his expert's affidavit disproves Wife's claims. *Second*, Wife alleges Husband violated the Stored Communications Act by accessing her Firm email account, her personal email account, and her iCloud account. (Am. Mot. to Suppress Evid. 8–9). *Third*, Wife alleges Husband violated the Computer Fraud and Abuse Act by "accessing a protected computer without authorization and thereby obtaining information contained in a

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information central to the wiretap allegations. Bank of America provided responsive records just days after the Court issued its order staying the family court proceedings.

financial record of Bank of America, a financial institution, on March 13, 2023, through May 16, 2023." (Am. Mot. to Suppress Evid. 9).

Wife seeks (1) to suppress all evidence relating to illegally obtained audio and video recordings, intercepted and/or illegally obtained text and email messages, and the information derived therefrom; (2) immediate listing and disclosure of all audio and video recording devices and documents and/or records concerning the interception of Wife's electronic communications; (3) factual findings regarding how certain evidence has been obtained in this case; and (4) other relief including attorney's fees and expert fees. (Am. Mot. to Suppress Evid. 1).

Husband timely moved to dismiss Wife's Amended Motion, arguing this Court lacked jurisdiction to entertain Wife's claims in its original jurisdiction. (Mot. to Dismiss 1–8). In response, Wife moved to confirm that her Amended Motion automatically stayed the collateral divorce proceedings. (Mot. to Confirm Automatic Stay Pursuant to S.C. Code Ann. § 17-30-110 1–3). Chief Judge H. Bruce Williams denied Husband's Motion to Dismiss for the Court, relying on South Carolina Code subsections 17-30-15(9) and -110(A) as well as the Supreme Court's dicta in *State v. Whitner*, 399 S.C. 547, 551, 732 S.E.2d 861, 863 (2012). The Court stayed all family court proceedings pending its review of Wife's Amended Motion to Suppress.

Husband files this return contesting Wife's factual claims, the legality of the relief she seeks, and the Court's jurisdiction. Because of the summary and expedited nature of these proceedings, Husband reserves the right to move to supplement the record should additional evidence come to light.

Argument

Wife's Amended Motion to Suppress is factually inaccurate, suffers from legal deficiencies, and is procedurally and jurisdictionally improper.

I. Wife's communications were not "intercepted," much less "unlawfully intercepted," by Husband as required by the Homeland Security Act and the Federal Act.

Even if this Court concludes the Homeland Security Act affords the Court jurisdiction to rule on Wife's Amended Motion, the Court should deny the Motion because Wife has not established Husband "unlawfully intercepted" her communications.

A. Wife's claims that Husband unlawfully intercepted emails and text messages are not cognizable and, in any event, did not occur.

Accessing emails or text messages after-the-fact is not cognizable under either the Homeland Security Act or the Federal Act. These statutes "appl[y] only to the acquisition of the contents of electronic communications that occur *contemporaneous* with their transmission[.]" *Cronin v. Cronin,* Appellate Case No. 2023-000959, Order filed Sept. 6, 2023. The statutes do not apply to "the subsequent acquisition of such communications while they are held in electronic storage." *Id.*; *see State v. Guerrero-Flores*, 402 S.C. 540, 534, 741 S.E.2d 577, 580 (Ct. App. 2013) (explaining the Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting provisions of the Homeland Security Act"); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir. 2003) ("Every circuit court to have considered the matter has held that an 'intercept' under the [Federal Act] must occur contemporaneously with transmission.").[7]

[7] As this Court held just last month, the Homeland Security Act does not allow the Court to consider alleged violations of the Stored Communications Act and the Computer Fraud and Abuse Act in its original jurisdiction. *Cronin,* Appellate Case No. 2023-000959, Order filed Sept. 6, 2023, at n.4. Thus, the Court cannot even entertain Wife's claims under these provisions.

1. Husband did not unlawfully intercept Bank of America's May 16 email to Wife's Firm email address.

Under the Homeland Security Act and the Federal Act, it is lawful "for a person not acting under color of law to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to the interception." S.C. Code Ann. § 17-30-30(C); *see* 18 U.S.C. § 2511(2)(d). This provision—commonly referred to as the "prior consent exception"—applies to both express and implied consent. *See Whitner*, 399 S.C. at 555, 732 S.E.2d at 865 ("'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or purpose.' The law recognizes different kinds of consent, including express, implied, informed, voluntary, and parental." (quoting Black's Law Dictionary, *Consent* 346 (9th ed. 2009))); *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990); *United States v. Willoughby*, 860 F.2d 15, 19 (2d Cir. 1988). "Implied consent . . . is inferred from surrounding circumstances indicating that the [party] knowingly agreed to the surveillance." *Berry v. Funk*, 146 F.3d 1003, 1011 (D.C. Cir. 1998) (alteration in original) (internal quotation marks omitted) (quoting *Griggs-Ryan*, 904 F.2d at 117). Under the surrounding circumstances detailed below, Wife impliedly consented to Husband accessing her Firm email account; therefore, the Court should deny Wife's Motion to Suppress the May 16 email from Bank of America to her Firm email address.

When Wife began working outside of the Firm in November 2021, she opened a new checking account with Bank of America to keep her income separate from Husband's. (McGee Aff. ¶ 44). Wife has received emails from Bank of America to her Firm email address (lindsay@mcgee-lawfirm.com) since at least October 2022. (McGee Aff. ¶ 52; *see also* Am. Mot. to Suppress Evid. 8 (admitting Wife used her Firm email account for personal use)). Husband and Wife were global administrators of the Firm's SharePoint and Exchange. (McGee Aff. ¶¶ 79, 85). Accordingly, they both had access to all email accounts within the Firm. (McGee Aff. ¶ 85; *see*

Ex. Z to McGee Aff. & AA to McGee Aff.). The record confirms at least two instances demonstrating Wife was aware Husband could and did access her Firm email account (which, again, included Bank of America emails): (1) on February 23, 2021, Wife asked Husband to unlink two other firm email addresses, admin@mcgee-lawfirm.com and vivian@mcgee-lawfirm.com, from her email account and (2) on April 8, 2022, Husband told Wife that he accessed her Firm email account to help her avoid an administrative suspension from practicing law. (Ex. Y to McGee Aff.; Ex. AA to McGee Aff.).

When Husband discovered Wife undertook a mass deletion of emails on May 10, 2023, he initiated a litigation hold and revoked her Firm email access. (McGee Aff. 19Husband had legitimate business purposes in doing so. Wife was no longer employed at the Firm, and Husband had a duty to preserve existing client and case-related emails. Moreover, given Wife's substance abuse beginning around 2014 and progressing thereafter to the present, her work quality and attentiveness began to wane. (McGee Aff. ¶ 21; Ex. A to McGee Aff.). Wife was no longer showing up for work and was not monitoring her Firm emails. (McGee Aff. ¶ 81 n.51). This meant certain Firm bills, including for shredding, internet, and website services, were going unpaid because they had been emailed to Wife's Firm account with no response. (McGee Aff. ¶ 88). Husband had to access Wife's Firm email account to forward bill-related emails to the Firm's bookkeeper and to respond to potential new clients to secure their business. (McGee Aff. ¶ 88).

Wife not only consented to the search of her Firm emails, but she also lacked a legitimate expectation of privacy in those emails. Courts around the country have refused to award wiretap-like relief to parties who lack this legitimate expectation of privacy. *See Jackson v. State*, 127 So. 3d 447, 469 (Fla. 2013) (rejecting claim for relief because the plaintiff lacked a reasonable expectation of privacy sufficient to establish implied consent to recording); *Holman v. Cent. Ark.*

Broad. Co., 610 F.2d 542, 544–45 (8th Cir. 1979) (finding a claim was not actionable where the plaintiff's remarks were not uttered with an expectation that his communication would be private); *United States v. Zuniga-Perez*, 69 F. App'x 906, 911 (10th Cir. 2003) (explaining a plaintiff must have a subjective and objective expectation of privacy to obtain relief under the Federal Act); *United States v. Larios*, 593 F.3d 82, 92 (1st Cir. 2010) (discussing how the Federal Act incorporates the "reasonable expectation of privacy test").[8]

For these reasons, Husband cannot be said to have "unlawfully" intercepted Wife's email from Bank of America on March 16, 2023, and the Court should deny Wife's Amended Motion to Suppress emails from Wife's Firm email account.

2. Husband did not unlawfully intercept Wife's text messages.

Although Wife conducted a factory reset on her iPhone 8 Plus, Wife did not remove her SIM card from the iPhone 8 Plus. (Am. Mot. to Suppress Evid. at 2). Wife alleges the SIM card allowed Husband "to *restore* the information on [Wife's] iPhone 8" and access to all of her "text messages, emails, and iCloud account information." (Am. Mot. to Suppress Evid. 2 (emphasis added)). This allegation is factually and technologically incorrect.

To restore a reset iPhone, the user must have (1) the username and password corresponding with iCloud account containing the backed-up data, (2) access to a device currently connected to that iCloud account, and (3) a six-digit authorization code sent by Apple to the device currently connected to the iCloud account. (Leonard Aff. ¶ 15). Husband did not know Wife's iCloud credentials, nor did he have access to a device that was already connected to Wife's iCloud

[8] *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864 ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." (quoting *Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804,806 (1982))); *Jackson*, 127 So. 3d at 469 (concluding the Florida Security of Communications Act was "essentially identical" to the Homeland Security Act).

account. (McGee Aff. ¶¶ 8–9). Accordingly, he could not have restored the iPhone 8 Plus and, therefore, could not have accessed Wife's text messages and emails.

Even if the SIM card alone could restore Wife's text messages, emails, and iCloud information, neither the Homeland Security Act nor the Federal Act contemplate the suppression of preexisting data. These statutes "appl[y] only to the acquisition of the contents of electronic communications that occur *contemporaneous* with their transmission[.]" *Cronin*, Appellate Case No. 2023-000959, Order filed Sept. 6, 2023. The statutes do not apply to "the subsequent acquisition of such communications while they are held in electronic storage." *Id.*; *see Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580 (explaining the Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting provisions of the Homeland Security Act"); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir. 2003) ("Every circuit court to have considered the matter has held that an 'intercept' under the [Federal Act] must occur contemporaneously with transmission.").

To the extent Wife implies Husband recovered the iPhone 8 Plus using her iCloud backup and then contemporaneously mirrored her text messages, the evidence undercuts this implication. Wife set up her iPhone 12 Pro Max using the 3367 number on September 13, 2022, and three days later, Husband set up the iPhone 8 Plus using the 2853 number. (McGee Aff. ¶¶ 28–29). From then on, the iPhone 8 Plus—even with Wife's previous SIM card—was unable to send or receive text messages, phone calls, or data using the 3367 number. (Leonard Aff. ¶ 15). In other words, it would have been impossible for Husband to mirror Wife's iPhone 12 Pro Max. (Leonard Aff. ¶ 15).

Bumgarner notes his "working professional theory is that [Husband] used iMazing[9] to make backups of the iPhone 8 linked to [Wife's] iCloud account" and then access Wife's photographs, emails, text messages, and documents. (Bumgarner Aff. ¶¶ 30–31). But this "working professional theory" falls short of meeting Wife's burden of proof and persuasion in these proceedings. Bumgarner supports this theory by speculation—not fact. He points out that Husband's "iMazing purchase coincides with [Wife's] purchase of an iPhone 13, which is also linked to [Wife's] iCloud account." (Bumgarner Aff. ¶ 30). However, Husband used iMazing—which he admittedly purchased one week after discovering Wife's adultery and in anticipation of contentious divorce litigation—solely to back up his iPhone XS and iPhone 14. (McGee Aff. ¶ 39; Ex. K to McGee Aff.; see Leonard Aff. ¶ 18). Wife has not proven Husband intercepted her text messages, and the Court should deny her Amended Motion to Suppress on this ground.

3. Husband did not unlawfully intercept emails to and from Wife's personal email address.

As to Wife's lmcgee9310@gmail.com email account, Bumgarner alleges an unknown iPhone using iOS 16.1.1 logged into the account (1) on March 12, 2023, at 2:46 p.m.; (2) from May 2023 to June 12, 2023, at 9:56 a.m.; and (3) from June 15, 2023, at 3:43 p.m. to June 21, 2023, at 8:15 p.m.[10] (Bumgarner Aff. ¶¶ 13, 19–20).[11] Bumgarner further alleges the iPhone used

[9] Bumgarner explains iMazing is "an application that can be used to create backups of Apple iPhones . . . . from a device that is physically connected to a computer or stored in an iCloud account." (Bumgarner Aff. ¶ 30).

[10] Bumgarner ambiguously states this same iPhone has accessed the account "multiple times between November 2022 and June 2023." However, Bumgarner only provides specific data about these three dates. (Bumgarner Aff. ¶ 18).

[11] Bumgarner supports his affidavit with excerpts from Google's IP Logs. Those same IP Logs demonstrate a large majority of the login entries from before June 22, 2023, were associated with an iPhone 13 running iOS 16.1.1 and an iPhone 12 running iOS 15.6.1. (Leonard Aff. ¶ 9). Wife owned both an iPhone 13 and an iPhone 12 during this time.

to login to the account "has not been updated since at least November 2022 and is most likely an older model of iPhone." (Bumgarner Aff. ¶ 13 (emphasis omitted)). Using this circumstantial evidence, Bumgarner concludes Husband "is the individual that had unauthorized access to [Wife's] Gmail account." (Bumgarner Aff. ¶ 71). As explained below, this conclusion is disproven by the evidence.

The iPhone used to login to the account used iOS version 16.1.1. (Leonard Aff. ¶ 5). Bumgarner claims this could not have been Wife because her iPhone 13 has iOS version 16.6 installed. (Bumgarner Aff. ¶ 71). However, Bumgarner was not retained until July 2023. (Bumgarner Aff. ¶ 2). Therefore, he cannot possibly know what version of iOS Wife was using during the months of March, May, and June. (Leonard Aff. ¶ 7). Moreover, if an iPhone 8 Plus intruded upon the account, the Google IP Logs would have shown a device identifier of "iPhone 10_2" or "iPhone 10,2." (Leonard Aff. ¶ 8). Instead, the Google IP Logs show a device identifier of "iPhone 14_5." (Leonard Aff. ¶ 5). This device identifier exclusively corresponds with an iPhone 13. (Leonard Aff. ¶ 5). Wife is the only party in this case with an iPhone 13, and the activity associated with iOS 16.1.1 during the period is most likely attributable to her. (Leonard Aff. ¶ 9).

Bumgarner also alleges Wife's lmcgee9310@gmail.com account was accessed on March 22, 2023, at 1:06 p.m.[12] (Bumgarner Aff. ¶ 16). Bumgarner claims this login took place on Google Chrome from an "IP Address assigned to the business entity Wide Open West (WOW!)" in Charleston, South Carolina. (Bumgarner Aff. ¶ 16). On this date, the GPS tracker Clayton placed on Wife's vehicle shows the vehicle at Highfalutin Coffee Roasters from 12:55 p.m. to 2:33 p.m.

[12] Bumgarner's affidavit says "March 22, 2022 at 17:06:00 GMT (12:00 EDT)[,]" but Husband believes this was a typographical error in light of the Google IP Logs and time zone.

(McGee Aff. ¶ 49; Ex. O to McGee Aff.). Wife frequently uses Google Chrome on her laptop while at this coffee shop, as evidenced by Husband's affidavit and a photograph Wife texted Husband on March 29. (McGee Aff. ¶ 48; Ex. N to McGee Aff.).

In sum, Wife has not proven Husband intercepted her personal email account, and this Court should deny her Amended Motion to Suppress on this ground.

B. Husband did not unlawfully intercept Wife's communications using a nanny camera at McCutchen House.

Wife alleges that "since September 2021, and beginning the months prior to May 22, 2023, [Husband] has monitored her actions and each and every conversation she has engaged in for conceivable nineteen months inside her home . . . ." (Am. Mot. to Suppress Evid. 10). This allegation is completely false.

As explained above, Husband lived at McCutchen House from June 2021 until June 2022 and spent at least two nights there in July 2022. (McGee Aff. ¶¶ 16, 18). Wife knew Husband habitually installed nanny cameras at home and at work. (McGee Aff. ¶¶ 57–61). Husband installed these cameras for primarily for safety reasons. (McGee Aff. ¶¶ 57–61; *see* Ex. A to McGee Aff.). There is no allegation that Husband, as the children's guardian, could not vicariously consent for these cameras to be placed in the children's rooms for their safety, especially when Wife specifically knew of the cameras.

Accordingly, any allegation of unlawful interception during this period is wholly unfounded under the Homeland Security Act's consent exception. *See* S.C. Code Ann. § 17-30-30(C); 18 U.S.C. § 2511(2)(d); *see Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580.[13]

[13] Under the Federal Act, "[c]onsent may be express or implied." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). The Senate Report accompanying the Federal Act emphasized there are certain situations in which implied consent is inherent: "Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to." *Id.* Given that Wife had

To the extent Wife alleges Husband unlawfully interfered with her communications by using a nanny camera at McCutchen House from August 2022 to May 2023, Husband also denies this allegation. Husband inadvertently left one camera in the garage at McCutchen House in the summer of 2022. (McGee Aff. ¶ 63). Yet that camera was unplugged and uninstalled at the time. (McGee Aff. ¶ 63). As a result, it could not record, much less live monitor, the garage. (*See* McGee Aff. ¶¶ 63, 67). The left-behind camera also had no *audio* recording capabilities. (McGee Aff. ¶¶ 64–66; Leonard Aff. ¶¶ 19, 21). So even assuming the camera was plugged into a power source, installed, and set up for live monitoring—three assumptions belied by the record—no "interception" via live *audio* monitoring could have occurred within the purview of the Homeland Security Act or the Federal Act. *See Thompson v. Johnson Cnty. Cmty. College*, 930 F. Supp. 501, 505 (D. Kan. 1996) ("Virtually every circuit that has addressed the issue of silent video surveillance has held that [the Federal Act] does not prohibit its use."); *see Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580 (explaining the Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting provisions of the Homeland Security Act"). Moreover, any motion-activated recording would not satisfy the contemporaneous requirement of those statutes. *Cronin*, Appellate Case No. 2023-000959, Order filed Sept. 6, 2023; *see Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580 (Ct. App. 2013); *Fraser*, 352 F.3d at 113 ("Every circuit court to have considered the matter has held that an 'intercept' under the [Federal Act] must occur contemporaneously with transmission.").[14]

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advance notice of Husband habitually installing these security cameras, she cannot now complain that they were used at McCutchen House for her and the family's protection.

[14] In any event, Husband does not plan to use any such recordings in the divorce proceedings, whether as evidence or for impeachment, because he is unaware of what any such recordings

In sum, Wife's claim that Husband intercepted her communications using a nanny camera at McCutchen is supported only by her expert's working theory. Husband's expert, however, is unable to definitively disprove this theory because there is no subpoena power in this original proceeding, and he has not had enough time to complete his analysis of Wife's Amended Motion. (Leonard Aff. ¶ 26). This is another reason why the Family Court should resolve these issues in the first instance.

II. Even if there was some technical violation of the statutes Wife cites, she is not permitted to suppress the underlying facts or avoid impeachment with the text and email messages.

A. The text messages and emails Wife seeks to suppress are otherwise discoverable because they were provided by Wife in prior litigation and are subject to third-party subpoenas in this case.

In October 2022, Wife produced the same messages she now seeks to suppress in another divorce proceeding. (McGee Aff. ¶ 76; Ex. V to McGee Aff.). In response to a subpoena in *Keys v. Keys*, Wife—a named paramour in that case—produced all of her communications with Karen Janelle Keys and Jarrett Christopher Forino. (Ex. V to McGee Aff.; Ex. CC to McGee Aff.). These communications include text messages and emails relevant to this divorce proceeding. Subsequently, Husband subpoenaed all of Wife's memorialized communications—again, including text messages and emails produced in the other litigation—with Keys, Fowler, and Forino through third-party subpoenas. Although some of these communications have been provided, Husband's motions to compel production remain outstanding in the Family Court given this Court's stay order. Even still, Wife produced her text messages and emails with Stephen Daniel Fowler in response to Husband's written discovery without objection. Therefore, even if

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contain and does not have access to any recordings from the cameras. (*See* McGee Aff. ¶¶ 77–78).

this Court concludes Husband unlawfully intercepted Wife's text and email messages, any communications obtained either from Wife in the *Keys* case or from Keys, Fowler, and Forino in this case are admissible under both the Homeland Security Act and the Federal Act. *See* S.C. Code Ann. § 17-30-65; 18 U.S.C. § 2515.

B. The Fruit of the Poisonous Tree Doctrine has no application in civil proceedings.

Wife argues for suppression of a large swath of records that she alleges are tainted by the fruit of the poisonous tree doctrine. This exclusionary rule, however, has no application in civil proceedings. As a result, even if Wife could establish some violation of the Homeland Security Act, she is not entitled to the relief she seeks.

The fruit of the poisonous tree doctrine is a corollary of the exclusionary rule, and it was established to prevent law enforcement from using evidence in a criminal prosecution "that is derived from—and is thus tainted by—[an] illegal search or seizure." *Lingo v. City of Salem*, 832 F.3d 953, 957 (9th Cir. 2016); *see Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). The exclusionary rule is not constitutional but is instead a judicially created method of deterring illegal police conduct. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998). Because the rule "is prudential rather than constitutionally mandated," courts apply the rule "only where its deterrence benefits outweigh its substantial social costs." *Id.* (internal quotation marks omitted). Courts generally reason that a narrow application of the rule is appropriate because "[j]urists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *United States v. Janis*, 428 U.S. 433, 448–49 (1976). Thus, suppression of evidence "has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

The exclusionary rule is subject to a host of exceptions. Courts have "held that the rule generally does not apply to grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings." *Lingo*, 832 F.3d at 958. Further, the United States Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." *Scott*, 524 U.S. at 363.

Although South Carolina appellate courts have yet to address the applicability of the fruit of the poisonous tree doctrine in civil cases, the United States District Court for the District of South Carolina has repeatedly held the doctrine has no place in civil practice. For example, Judge Richard Gergel declined to apply the fruit of the poisonous tree doctrine in a § 1983 civil action, noting, "The fruit of the poisonous tree doctrine is merely an extension of the exclusionary rule and as such generally operates 'only in criminal trials.'" *Vaughn v. Whitfield*, No. 8:12-CV-2405, 2013 WL 5144751, at *19 (D.S.C. Sept. 12, 2013) (internal citation omitted) (quoting *Scott*, 524 U.S. at 364 n.4). Judge Gergel is not alone in so holding. *See Johnson v. Cnty. of Greenville*, Civil Action No. 6:13-CV-01652, 2015 WL 4508812, at *6 (D.S.C. July 24, 2015) (Childs, J.); *Nixon v. Applegate*, Civil Action No. 2:06-2560, 2008 WL 471677, at *4 (D.S.C. Feb. 19, 2008) (Currie, J.); *Taylor v. In Home Health, LLC*, Civil Action No. 3:08-3307, 2010 WL 11646740, at *4 (D.S.C. June 29, 2010), *report and recommendation adopted*, Civil Action No. 3:08-3307, 2010 WL 11646735 (D.S.C. Oct. 29, 2010) (Perry, J.).

Courts around the country agree that the exclusionary rule does not apply in civil actions. *See Ware v. James City Cnty.*, 652 F. Supp. 2d 693, 705 (E.D. Va. 2009) ("The Supreme Court has 'never applied the exclusionary rule to civil cases, state or federal.'" (quoting *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997))), *aff'd, Ware v. James City Cnty.*, 380 F. App'x 274 (4th Cir. 2010); *Knickerbocker v. United States*, 858 F. App'x 243, 244 (9th Cir. 2021) ("Knickerbocker

argues that the arrest stems from an unlawful seizure and was thus unlawful as 'fruit of the poisonous tree.' This argument fails for several reasons, including that there was no unlawful seizure[] and that the 'fruit of the poisonous tree' doctrine does not apply in this civil context in any event."); *Lingo*, 832 F.3d at 959 (collecting cases). Accordingly, the doctrine has no application here.[15]

C. Husband can still use Wife's communications to impeach her testimony.

If this Court still concludes (1) Husband unlawfully intercepted Wife's communications and (2) the exclusionary rule and fruit of the poisonous tree doctrine apply in civil cases, Wife's communications are nevertheless admissible for impeachment purposes. *See Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580 (explaining the Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting provisions of the Homeland Security Act"); *Nash v. Byrd*, 298 S.C. 530, 535, 381 S.E.2d 913, 916 (Ct. App. 1989) (explaining the Federal Act permits the use of unlawfully intercepted communications for impeachment purposes); *United States v. Caron*, 474 F.2d 506, 508 (5th Cir. 1973) (explaining that even if a wiretap is unlawful, an unlawfully intercepted communication is admissible for impeachment purposes); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990) (same); *United States v. Vest*, 813 F.2d 477, 484 (1st Cir. 1987) (finding Congress intended an impeachment exception to the Federal Act); *Anthony v. United States*, 667 F.2d 870, 880 (10th Cir. 1981) (same).

[15] Even if the fruit of the poisonous tree doctrine applied in a civil proceeding, its host of exceptions would weigh against applying the doctrine in this case. Any such exclusion would be on a narrow basis and should be determined by the Family Court given its familiarity with the underlying facts of this case.

III. This Court still lacks jurisdiction to rule on Wife's Motion to Suppress.

As the Court recognized this month in *Cronin*, the Homeland Security Act does not allow the Court to consider alleged violations of the Stored Communications Act and the Computer Fraud and Abuse Act in its original jurisdiction. *Cronin*, Appellate Case No. 2023-000959, Order filed Sept. 6, 2023, at n.4; *see* 18 U.S.C. §§ 1030, 2701 (prohibiting unauthorized access to computers and electronic communications stored in an electronic communication service facility); S.C. Code Ann. § 17-30-110(A) (providing "any aggrieved person may move to suppress the contents of any *intercepted* wire, oral, or electronic communication, or evidence derived therefrom, on the ground[s] that the . . . communication was unlawfully intercepted" (emphasis added)).

Turning to Wife's claims under the Homeland Security Act, this Court has previously afforded itself original jurisdiction to review motions to suppress in civil cases. Respectfully, Husband maintains as he did in his Motion to Dismiss that this Court lacks original jurisdiction over this matter and, therefore, cannot rule on the merits of Wife's Amended Motion to Suppress.

It is well established that South Carolina courts must assure themselves of jurisdiction before entertaining the merits of any action. *See Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) ("The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, as is fundamental."); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (holding that a "court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits"). Under the South Carolina Constitution, this Court "shall have such jurisdiction as the General Assembly shall prescribe by general law." S.C. Const. art. V, § 9. General state law provides the Court "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family

court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission." S.C. Code Ann. § 14-8-200(a). These two authorities make no provision for the Court to entertain this action in its original jurisdiction.

Although Wife suggests this Court has original jurisdiction over civil suppression motions and goes so far as to ask the Court to make detailed factual findings, she CITEs no constitutional provision, statute, or court rule providing this Court with that jurisdiction. For example, the Supreme Court's jurisdiction in our Constitution specifically references that court's ability to issue *original* writs. *See* S.C. Const. art. V, § 5; *see also* S.C. Code Ann. § 14-3-310 (referencing the Supreme Court's original jurisdiction). A court rule similarly provides for original proceedings but only in the Supreme Court. Rule 245, SCACR. Husband knows of no such similar grant of original jurisdiction to this Court. In fact, state law makes clear this Court's jurisdiction "is appellate only" and is not original (unlike the jurisdiction statutorily granted to the Supreme Court in some cases). S.C. Code Ann. § 14-8-200(a). The distinction between the two courts' jurisdiction makes sense, given that original jurisdiction in an appellate court is generally reserved for matters addressing novel issues of significant public interest, *see, e.g.*, *Laffitte v. Bridgestone Corp*., 381 S.C. 460, 464, 674 S.E.2d 154, 156–57 (2009), and given the general rule that our Supreme Court will not entertain a matter of original jurisdiction when the matter can be addressed by a trial court in the first instance, *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

The Homeland Security Act also does not expand this Court's appellate jurisdiction. Passed in 2002 and placed in Title 17 (Criminal Procedures), section 17-30-110 establishes the requirements for moving to suppress under the Homeland Security Act: "Prior to any trial, hearing, or proceeding in or before any court, . . . any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the

grounds that the . . . communication was unlawfully intercepted[.]" S.C. Code Ann. § 17-30-110(A)(1). The motion to suppress "must be made before the reviewing authority[16] and must be decided on an expedited basis." *Id.* § 17-30-110(A). "Upon receiving the motion, the reviewing authority must notify the issuing judge who must transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization." *Id.* "After reviewing the materials, the reviewing authority must first determine whether all materials otherwise discoverable under South Carolina law were made available to the aggrieved person." *Id.* If a majority of the reviewing authority "determine[s] that all necessary materials were made available, the reviewing authority must decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter." *Id.*

The circumstances underlying Wife's Amended Motion fall outside of the review contemplated by section 17-30-110 and should be dismissed for two reasons.

First, the phrase "reviewing authority" implies there must be an order for this Court to review in the first instance. *See* S.C. Code Ann. § 14-8-200(a) (providing the Court of Appeals' jurisdiction "is appellate only"); S.C. Code Ann. § 17-30-110(B) (explaining that although the Court of Appeals en banc has initial appellate jurisdiction over the State's appeal of an order granting a motion to suppress, "[a]ll other appellate procedures remain in force and effect"). Section 17-30-110 consistently references the Court's authority to determine whether "the order of authorization or approval" complied with the Homeland Security Act. The requirements for obtaining such an order are set forth in sections 17-30-70 and -80. An application for the order

[16] The Homeland Security Act defines "[r]eviewing authority" to mean "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

"must be initiated by the Chief of [the South Carolina Law Enforcement Division (SLED),]" reviewed by "the Attorney General or his designated Assistant Attorney General[,]" and submitted "to a judge of competent jurisdiction . . . ." S.C. Code Ann. § 17-30-70(A); *see id.* § 17-30-80(A)(1). Upon application, the judge may grant "an order authorizing or approving the interception of wire, oral, or electronic communications" by SLED or an individual contracted by SLED to investigate certain offenses. *Id.* §§ 17-30-70(A)(1)-(3); *see id.* 17-30-80(D). In this case, there is neither an application nor an order addressing the admissibility of the evidence within the jurisdictional parameters of section 17-30-110. Thus, there is nothing for this Court to review.[17]

Second, section 17-30-110 indicates suppression is an appropriate remedy only in cases involving interception by a State agent or employee. This interpretation is bolstered by several factors. As noted above, Title 17—which encompasses the Homeland Security Act—is entitled "Criminal Procedures." Although the Homeland Security Act references civil actions for wrongful interceptions in one section, there are no references to civil liability in section 17-30-110. *See* S.C. Code Ann. § 17-30-135; *see also, e.g.*, *State v. Bixby*, 388 S.C. 528, 548–49, 698 S.E.2d 572, 583 (2010); *Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580. Even in its references to appellate review, section 17-30-110 only guarantees *the State* a right to appeal orders of authorization or approval and orders granting a motion to suppress. *See* S.C. Code Ann. § 17-30-110(B) ("*The State* has the right to appeal an order granting a motion to suppress made under subsection (A)." (emphasis added)); *id.* § 17-30-110(C) ("*The State* has the right to appeal the denial of the

[17] Wife's Amended Motion is inconsistent on this point. In one breath, she asks for this Court to make detailed findings of fact in the first instance. (*See* Am. Mot. to Suppress Evid. at 1). Yet she styles her Motion and Amended Motion as being an "appeal" from Charleston County Family Court. (Am. Mot. to Suppress Evid. at 1). To be clear: there has been no ruling by the Family Court for this Court to review because Wife has made no objection under the Homeland Security Act below.

application of an order of authorization or approval. The appeal must be directed to the reviewing authority and must be conducted in a manner consistent with subsection (A)." (emphasis added)). This limitation suggests suppression is only available in cases involving a State interceptor, which Husband certainly was not.

The Supreme Court's decision in *Whitner*, 399 S.C. at 547, 732 S.E.2d at 861, does not demand a different result. *Whitner* confirms that the Homeland Security Act "parallels" the Federal Act. *Id.* at 553, 732 S.E.2d at 864. The Federal Act imposes similar limitations on the scope of a motion to suppress and the federal government's right to appellate review. *See* 18 U.S.C. § 2518(1), (10)(a) (permitting a motion to suppress "the contents of any wire or oral communication intercepted" pursuant to an order of authorization or approval obtained from "a judge of competent jurisdiction" by an "investigative or law enforcement officer"); *id.* § 2518(10)(b) ("In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay."). Unlike the Homeland Security Act, however, the Federal Act allows a judge of competent jurisdiction—defined to include "a judge of a United States district court or a United States court of appeals"—to both issue the order of authorization or approval and rule on the motion to suppress. *See id.* §§ 2510(9), 2518(1).

Conversely, the Homeland Security Act imposes a two-step process during which (1) a judge of competent jurisdiction must issue an order of approval and authorization and (2) the reviewing authority must separately review a motion to suppress evidence obtained as a result of the order of approval and authorization. That process did not occur in this case. Moreover,

Whitner is factually distinguishable because it arose from a criminal prosecution, which more squarely falls under the criminal procedure provisions of Title 17. For that reason, it makes sense the *Whitner* Court noted, in dicta, that this Court previously conducted a suppression hearing to address the petitioner's challenges to the State's interception of the disputed call recording. *Whitner*, 399 S.C. at 551, 732 S.E.2d at 863. Again, those circumstances are not before this Court, as the collateral action here is a family court divorce proceeding.[18]

Conclusion

Husband vehemently denies the allegations set forth in Wife's Amended Motion. Wife and her experts make factual and legal claims that are debunked by documentary evidence and third-party testimony. Even if Wife could establish some technical violation of the statutes she CITEs, however, the records Wife seeks to exclude are otherwise discoverable. In any event, the proper forum for addressing the merits of those allegations is the Charleston County Family Court, not this Court. Should the Court grant Wife's Amended Motion, Husband requests the Court defer the issue of fees for the Family Court to decide based on the underlying facts.

For these reasons, the Court should deny Wife's Amended Motion.

[Signature on following page.]

[18] Additionally, no process has issued establishing this Court's jurisdiction over Husband. No subpoena or even a rule to show cause accompanied Wife's Amended Motion to Suppress. This reinforces Husband's argument that this type of proceeding is not appropriate before an appellate court absent express jurisdiction being granted by the General Assembly.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Matthew A. Abee*
Matthew A. Abee, SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
Morgan E. Spires, SC Bar No. 105197
E-Mail: morgan.spires@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent Justin McGee

Columbia, South Carolina
September 29, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT

Appellate Case No. 2023-001376

Justin McGee .....Respondent,

v.

Lindsay F. McGee.....Petitioner.

Proof of Service

I, the undersigned partner of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent Justin McGee, certify that I have served all parties in this action with a copy of the document(s) set forth below by email:

Document(s): **Return to Petitioner's Amended Motion to Suppress Evidence**

Counsel Served:

Peter G. Currence
McDougall, Self, Currence & McLeod, LLP
791 Greenlawn Drive, Suite 4
Columbia, SC 29209
pete@mscmlaw.com
Counsel for Petitioner

Richard G. Whiting
Law Offices of Richard Whiting
1515 Lady Street
Columbia, SC 29201
dick.whiting@whitinglawsc.com
Counsel for Petitioner

Elizabeth J. Stringer
Elizabeth J. Stringer LLC
PO Box 12370
Charleston, SC 29422-2370
liz@stringerlaw.us
Guardian ad litem

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Matthew A. Abee*
Matthew A. Abee, SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
Morgan Spires, SC Bar No. 105197
E-Mail: morgan.spires@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Respondent Justin McGee

Columbia, South Carolina
September 29, 2023

Morgan Spires

From: Morgan Spires
Sent: Friday, September 29, 2023 8:12 PM
To: Pete Currence; Dick Whiting
Cc: lizzie@mscmlaw.com; Jerry@Theoslaw.com; Brittany Point; Jackie; ml@ramsdalelaw.com; Lori Ross; liz@stringerlaw.us; Andrew Fischer; Matt Abee; Kevin Werner; Morgan Spires
Subject: Service Copy Email 1 of 5 - Return to Petitioner's Amended Motion to Suppress - McGee v. McGee (No. 2023-001376) - 079821.01501
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Counsel,

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Please feel free to contact me should you have any questions.

Thank you,
Morgan

NELSON MULLINS

MORGAN E. SPIRES ASSOCIATE
morgan.spires@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9343 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO

Morgan Spires

From: Morgan Spires
Sent: Friday, September 29, 2023 8:14 PM
To: Pete Currence; Dick Whiting
Cc: lizzie@mscmlaw.com; Jerry@Theoslaw.com; Brittany Point; Jackie; ml@ramsdalelaw.com; Lori Ross; liz@stringerlaw.us; Andrew Fischer; Matt Abee; Kevin Werner
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Morgan

NELSON MULLINS

MORGAN E. SPIRES ASSOCIATE
morgan.spires@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9343 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO

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Cc: lizzie@mscmlaw.com; Jerry@Theoslaw.com; Brittany Point; Jackie; ml@ramsdalelaw.com; Lori Ross; liz@stringerlaw.us; Andrew Fischer; Matt Abee; Kevin Werner
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Thank you,
Morgan

NELSON MULLINS

MORGAN E. SPIRES ASSOCIATE
morgan.spires@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9343 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO

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Cc: lizzie@mscmlaw.com; Jerry@Theoslaw.com; Brittany Point; Jackie; ml@ramsdalelaw.com; Lori Ross; liz@stringerlaw.us; Andrew Fischer; Matt Abee; Kevin Werner
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Please feel free to contact me should you have any questions.

Thank you,
Morgan

NELSON MULLINS

MORGAN E. SPIRES ASSOCIATE
morgan.spires@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9343 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO

Morgan Spires

From: Morgan Spires
Sent: Friday, September 29, 2023 8:16 PM
To: Pete Currence; Dick Whiting
Cc: lizzie@mscmlaw.com; Jerry@Theoslaw.com; Brittany Point; Jackie; ml@ramsdalelaw.com; Lori Ross; liz@stringerlaw.us; Andrew Fischer; Matt Abee; Kevin Werner
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Morgan

NELSON MULLINS

MORGAN E. SPIRES ASSOCIATE
morgan.spires@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9343 F 803.256.7500
NELSONMULLINS.COM VCARD VIEW BIO