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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Family Court

Family Court Case No. 2022-DR-10-3072

Appellate Case No. 2023-001376

Justin McGee, Respondent,

v.

Lindsay F. McGee, Petitioner.

MOTION TO FILE SUPPLEMENTAL REPLY TO RESPONDENT'S RETURN TO MOTION TO DISMISS

Petitioner, Lindsay McGee, by and through her undersigned counsel, respectfully moves this Court for permission to supplement her Reply to Respondent's Return to Petitioner's Motion to Suppress Evidence filed on October 6, 2023. The Supplemental Reply attached hereto without exhibits includes citations to case law which was omitted from the Reply. These citations are necessary to support Petitioner's conclusory statements to provide the Court with a comprehensive legal framework to assess the merits of Petitioner's Reply without altering the foundational arguments initially set forth.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

McDOUGALL, SELF, CURRENCE
& McLEOD, LLP

PETER G. CURRENCE Bar No. 0013603
pete@mscmlaw.com
791 Greenlawn Dr. Suite 4
Columbia, South Carolina 29209
(803) 776-3130
Attorney for Petitioner

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SUPPLEMENTAL REPLY TO RESPONDENT'S RETURN TO MOTION TO DISMISS

Petitioner Lindsay McGeE responds to Respondent's *Return to Petitioner's Motion to Suppress Evidence* filed September 29, 2023. This Court should not be distracted by Respondent's Return which contains a voluminous amount of irrelevant information and asserts defenses that are based upon factually inaccurate and/or demonstrably false statements. Conspicuously missing in Respondent's Return is reference to evidence admittedly in Respondent's possession which would unquestionably either support or disprove Respondent's claim that he has not unlawfully intercepted Petitioner's communications.

Background Inaccuracies

1. The undated text exchange (McGee Aff. Ex. Z) indicates that Respondent gave Petitioner his global administrator email credentials to the Petitioner at some point, however, this

is irrelevant since there is no allegation or evidence that Petitioner ever used those credentials to access the McGee Law Firm email system, (Petitioner Aff. ¶¶ 28, 29).

2. Respondent asserts that the parties reconciled, and he moved into the Petitioner's 664 McCutchen Rd. residence ("McCutchen House") in June 2021. (Return p. 2). Petitioner never agreed to reconcile, and the parties never reconciled after separating in February 21, 2021. (Petitioner Aff. ¶¶ 3, 4, 5, 6, 7 (a-e) and 8: see Ex. A-K of Petitioner's Aff.). A Stipulation written and signed by Respondent on June 22, 2022 acknowledged the parties never reconciled from the time they separated on February 21, 2021.[1] (Ex. D to Petitioner Aff.). Texts between the parties reflect that the parties continued to reside in separate residences and that, although he periodically stayed overnight at Petitioner's 664 McCutchen Rd. residence, Respondent did not reside there. (Petitioner Aff. ¶¶ 5, 7(a-e); see Ex. A, E, F, G, H and I to Petitioner's Aff.).

3. Petitioner adamantly denies knowing Respondent had installed "nanny cameras"[2] at home and work. (Petitioner Aff. ¶¶ 9). On August 19, 2021, Petitioner confronted Respondent about her fears that he had a hidden camera, as well as another device, in her house at which time Respondent denied spying on her. (Petitioner Aff. ¶¶ 9, 10 and 11; Ex. O to Petitioner's Aff).[3] The evidence reflects that Petitioner clearly did not know Respondent had installed spy cameras in her house and Respondent was unquestionably not living at the McCutchen House at the time.

4. Respondent's Return states that "over the course of the summer, he removed all but one of the nanny cameras." (Return p.3). Respondent's affidavit, paragraph sixty-two, states that "I removed the cameras from McCutchen House over the Summer of 2022 as I was moving and

[1] Respondent also that his adulterous misconduct was the cause of the breakdown of the marriage, despite his assertions that it was Petitioner's infidelity.
[2] Respondent refers to all cameras, including what he purchased as Spy Cameras, as "nanny cameras."
[3] This is seven months after Respondent began purchasing spy cameras from knowyournanny.com on January 24, 2021, Zetronix on January 4, 2021, The Spy Store on January 4, 2021, and SCS Enterprises though Amazon on July 7, 15, and 29, 2021. (Abrams' Aff. ¶ 5; Leonard Aff. ¶ 19; *See* Ex. D).

removing his belongings." These statements are irreconcilable with Respondent's need to hire a private investigator due to his "concerns over Wife's mental health, her drug and alcohol abuse ...." (Return p. 4) Logic would suggest that Respondent would have a greater need to monitor the children's safety after he moved out, not when he was living there as he falsely claims.

5. Respondent's iPhone that allegedly exploded was named "Megatron". (Petitioner Aff. ¶ 23). Even if named "Justin's iPhone", this would not preclude respondent from renaming his new phone "Juston's iPhone." (Abrams' Supp. Aff. ¶ 15). As recently as July 23, 2023, Justin's iPhone appeared on Petitioner's WiFi. (August 29, 2023 Bumgarner Aff. ¶ 45).

6. Petitioner did not give her iPhone 8 to Respondent as a backup phone for the paw firm, but not for "for the children to play games." Although the oldest child sometimes used it to play games, the children have iPads for that purpose since summer 2022. (Petitioner Aff. ¶ 23).

7. Respondent claims he accessed the McCutchen House regularly after June 2022. (Return p. 3) That is untrue and the two nights he spent the night in July 2022 were because Respondent was too intoxicated to drive. (Petitioner Aff. ¶ 6).

8. Respondent asserts that one camera was inadvertently left on a in the garage, unplugged and uninstalled. The video evidence demonstrates this statement is false. (Abrams' Supp. Aff. ¶¶ 7-11). Additionally, the amount of data being transmitted from Petitioner's WiFi during that time strongly suggests that data from the camera was being transmitted after that time. (Bumgarner Supp. Aff. ¶ 30).

9. Respondent asserts that the camera in the garage did not have audio capabilities. (Return p. 3) Even if true, there were thirteen cameras identified on Petitioner's WiFi network, six of which have the same nomenclature. (Bumgarner Aff. dated August 29, 2023 ¶ 34). Respondent purchased five cameras with audio capability directly through SCS Enterprises. (Leonard Aff. ¶

19; see Ex. E; **Exhibit 1**). It is of significance that Respondent had to select the audio capability. Respondent purchased 4 additional cameras without audio capability from SCS through Amazon. (Leonard Aff. ¶ 19). A reasonable person would conclude that at least one, if not five, of the six similar recording devices identified on Petitioner's WiFi network had audio capability.[4]

10. Respondent claims that he did not access the garage camera through the application or connect the camera to the WiFi. (Return p. 4). The video data indicates this statement is false. (Abrams' Supp. Aff. ¶ 7-11).

11. Sean Leonard's opinion that the 10T Living application does not allow for selective deletion is only partially true. (Bumgarner Supp. Aff. ¶ 32) Regardless, it irrelevant and does not refute the fact that Respondent was monitoring a surveillance camera in Petitioner's garage. (Bumgarner Supp. Aff. ¶ 32; Abrams Supp Aff. ¶ 7-11).

12. Respondent's claim of "growing concerns about Wife's mental health, her drug and alcohol abuse" and suspicions of adultery are irrelevant and disingenuous.[5] (Return p. 4)

13. Respondent's statement states that he filed a for a divorce on the ground of adultery on October 22, 2022, is, again, irrelevant to the motion to suppress evidence and yet another disingenuous attempt to impugn Petitioner's character.[6] (Return p. 4).

Argument

Respondent's Return is factually inaccurate, and his legal analysis is without merit. Further,

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[4] Respondent has not produced the surveillance cameras or recording devices he purchased, his electronic devices including the iPhone 8, nor any information from the IoT Kiving App which were connected to the cameras.

[5] Throughout the marriage and even post separation, Respondent purchased copious amounts of cannabis products and paraphernalia for Petitioner. Records obtained from PayPal also reveal Respondent purchased a kit to grow psilocybin mushrooms. **(Exhibit 2).**

[6] Respondent makes repeated references to Petitioner's infidelity which began approximately eighteen months after the date of separation, despite Respondent, as early as January 2021 prior to the separation, paying for $99.99 monthly for dating sites such as Seeking.com (W8TECH SA), making numerous purchases from OnlyFans, and making multiple Venmo transfers to what appears to be unknown females.(Petitioner's Aff. ¶ 8; See Exhibits J and K)

his defenses to the allegation that he unlawfully intercepted Petitioner's communications are based upon patently and demonstrably false statements of fact. Interestingly, Respondent fails to produce or list the surveillance cameras and recording devices he purchased, fails to produce or list his electronic devices including the iPhone 8, and he does not reference, summarize or disclose the information from the IoT Living App which was connected to the spy cameras. This information would unquestionably enable the court to discern the truth but Respondent refuses to provide it.

I. Respondent unlawfully intercepted Petitioner's communications as prohibited by the Homeland Security Act and the federal Act.

This Court should reject Respondent's argument because the evidence reflects that Respondent unlawfully intercepted Petitioner's communications.

A. The legal argument

The evidence, including Respondent's admission that that he installed spy cameras in Petitioner's home and that he accessed Petitioner's Firm email, establishes that Respondent "unlawfully intercepted" Petitioner's communications. *See Walker v. Carter*, 820 F. Supp. 1095, 1097 (C.D. Ill. 1993) (holding that the Wire Tap Act applies to nonconsensual wiretapping within the marital home, emphasizing that the majority of U.S. Courts of Appeals support this holding); *Heggy v. Heggy*, 699 F. Supp. 1514, 1516-17 (W.D. Okla. 1988) (holding that the federal wiretapping statute's "naked language" does encompass interspousal interceptions).

1. Husband unlawfully intercepted Bank of America's May 16, 2023 email to Petitioner's McGee Law Firm email address.

Respondent then indicates that there is implied consent, yet he points out that the parties are separated, involved in contested litigation, and no longer partners in their law firm and asks this court to believe that she (the Petitioner) gave her separated opposing party (husband) consent to continue monitoring her communications. As this court is aware, any consent given by either party for another party to monitor their electronic communications can be revoked. This revocation

can take place either expressly or when a reasonable person understands that any prior consent had been revoked. *See United States v. Ortiz-Lopez,* No. EP-22-CR-00638-DCG-1, 2023 U.S. Dist. LEXIS 66776, at *20-21 (W.D. Tex. Jan. 18, 2023) (holding that implied consent cannot merely be inferred from the capability of monitoring). A change in the relationship, such as the one presented here, signals a clear revocation of any prior consent.

In this case, the parties' living circumstances had changed, employment circumstances had changed, and they were involved in a hotly contested family court case. Even if this court believes that at some point the Petitioner gave prior consent a reasonable person would clearly know that any prior consent would be revoked once the parties separated and began their own path down the contested family court case. In Respondent's own Return, he states that the parties began living separately in June of 2022. (although an illegal interception of electronic communications could have taken place prior to that day depending on the facts) certainly those interceptions occurred subsequent to June of 2022.

Respondent's contention that Petitioner was aware that he could access Petitioner's Firm email is of no significance as he was the global administrator. However, there is no evidence to suggest that Petitioner ever authorized Respondent to access her lindsay@mcgee-lawfirm.com email account. Specifically, asking Respondent to unlink two other firm email addresses from her email account does not give authority, neither express nor implied, to access her email communications. *See Zaratzian v. Abadir*, No. 10 CV 9049 (VB), 2014 U.S. Dist. LEXIS 129616, at *24 (S.D.N.Y. Sep. 2, 2014) (stating the importance of discerning the scope of consent based on the prevailing facts).

Respondent accessed Petitioner's Firm email again on April 8, 2022 after receiving a telephone call from the SC Bar about a possible administrative suspension. However, Petitioner

did not authorize this access, although she may have later condoned it. It is also significant that, although the parties were separated, marital litigation had not yet commenced. When Husband filed a Summons and Complaint on October 22, 2022, seeking a divorce and other related relief, any prior consent for Respondent to access Petitioner's email account was revoked, if not expressly, then impliedly. *See Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 581-82 (11th Cir. 1983) *("*"Consent under [T]itle III is not to be cavalierly implied. Title III expresses a strong purpose to protect individual privacy by strictly limiting the occasions on which interception may lawfully take place.").

Mere knowledge of monitoring capability cannot be equated to implied consent. *See Anderson v. City of Columbus*, 374 F. Supp. 2d 1240, 1250 (M.D. Ga. 2005) (holding that knowledge and the capability of monitoring alone cannot be considered implied consent). Respondent contends that he had a legitimate purpose to access Petitioner's Firm email account to forward bill—related emails to the Firm's bookkeeper and to respond to potential new clients. (Return p. 10). This is false and Respondent fails to provide one example of such an email. More significant, the Bank of America email was not a Firm bill but was an email regarding Petitioner's personal checking account. Respondent printed the email, manufactured an illicit purpose for the email, and disseminated the email to the family court as "evidence" of some illicit conduct by Petitioner. There was no legitimate business purpose for accessing and disseminating the May 16, 2023 email from Bank of America.

An equally egregious illegitimate purpose was Respondent's instructions to his expert, Sean Leonard, to search Petitioner's Firm email for certain terms including "Zelle", people named Holton, Keys, Fowler, or Forina, "withdrawal", and other terms to show that Petitioner "deleted those items that are evidence in [this] case." **(Exhibit 3)**. Such an act, especially when intended

for a domestic case, veers from any legitimate business pursuit. *See Zaratzian*, No. 10 CV 9049 (VB), 2014 U.S. Dist. LEXIS 129616, at *24 (stating that holding that a person does not have a reasonable expectation of privacy simply because another person's name is on the account would led to a perverse outcome in conflict with the basic notions of privacy). This was clearly for Respondent's domestic case, and not for any "legitimate business purpose."

Respondent makes a conclusory statement that Petitioner lacked a legitimate expectation of privacy, however, he fails provide a factual basis or any facts which correspond with the caselaw he cites. *See Blumofe v. Pharmatrak, Inc. (In re Pharmatrak, Inc. Privacy Litig.)*, 329 F.3d 9, 19 (1st Cir. 2003) (holding that the burden of persuasion is on the party seeking the benefit of the consent exception). Consent to interception of communication should never be lightly implied as Respondent attempts to do. *See Watkins,* 704 F.2d at 581.

2. Unlawfully intercepted text

Mr. Leonard opines that to restore a reset iPhone, it is necessary to have the username and password corresponding with the iCloud account containing the back-up data. (Return, p. 11). Respondent's claim that he claims that he did not know Petitioner's credentials to access her iCloud account, so therefore he could not have restored the iPhone 8 Plus and could not have accessed her text messages and emails. (Return, pp. 11, 12). This is not true. (Bumgarner Aff. ¶¶ 35, 38). Respondent had full and free access to Petitioner's passwords. (Petitioner's Aff. ¶¶ 37, 38).

3. Unlawfully intercepted emails

The Gmail intrusions and Sean Leonard's critique of Mr. Bumgarner's knowledge of the iOS versions on Petitioner's phone are squarely addressed in Mr. Bumgarner's supplemental affidavit. (Bumgarner Aff. ¶ 35-38).

B. Respondent unlawfully intercepted Petitioner's communications using spy cameras at McCutchen House

As already discussed, Respondent's claims that 1) he resided at the McCutchen House from June 2021 until July 2022, 2) that Petitioner knew he installed spy cameras in her home, 3) and that he installed spy cameras for safety reasons are patently false assertions. Respondent did not reside at the McCutchen House. (Petitioner's Aff. ¶¶ 1-7). Petitioner did not know Respondent installed Spy cameras. (Petitioner's Aff. ¶¶ 9-13). Respondent had alternative, less expensive, and more effective means of ensuring the children's safety. (Abrams' Supp. Aff. ¶ 3; Bumgarner Supp. Aff. ¶ 13). He also could have petitioned the family court for protective measures if he believed Petitioner was jeopardizing the children's safety, but he did not. (Petitioner Aff. ¶14).

Respondent's narrative that he installed "nanny cameras" is misleading and inaccurate. Most of the devices so far identified are hidden spy and listening cameras. Respondent's new theory that he could vicariously consent for the cameras to be placed in the children's rooms ignores the realities that there were listening devices as well as cameras, there were thirteen devices placed throughout the house and not just in the children's rooms, Petitioner was inevitably recorded on numerous occasions outside the presence of the children, and Petitioner was being recorded during periods of time when the children were with Respondent.

Finally, Petitioner's claim that Respondent intercepted her communications using spy camera is wholly supported by Respondent's admissions that he installed these devices in the McCutchen House and the router logs corroborating the presence of thirteen recording devices accessed Petitioner's WiFi at the McCutchen House. (Return p. 2; Respondent Aff. ¶¶ 61-66).

While certain alleged facts may be in dispute between the parties the law is not. Under South Carolina Code Section 17-30-65 (A) "When any wire, oral or electronic communication has

been intercepted, no part of the contents of the communication and no evidence derived thereof may be received into evidence in any trial, hearing or other preceding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authorities of this state, or any political subdivision thereof, if the disclosure of that information will be in violation of this chapter.

This matter is before this Court to address given its original jurisdiction (South Carolina code section 17-30-110). It is acknowledged that the issue as to whether or not Respondent violated The Stored Communication Act or the Computer Fraud Abuse Act is not an issue before this court. Respondent provides his Return and extensive exhibits (totaling literally hundreds of pages) but does not address the true issue which is before the Court. What is not before the court is whether there is a violation by Respondent of the Stored Communication Act or the Computer Fraud Abuse Act.

It is clear that there were monitoring devices placed inside Petitioner's residence where she and the children resided post-separation. While it is true that the device that was found in the garage which was purchased from SCS had no audio recording capacity, it is also true that at least five other devices Respondent purchased from did have audio recording capabilities. (Leonard Aff. ¶ 19; Exhibit E).

Respondent attempts to argue that because he "spent at least two nights" at Petitioner's home during the month of July and over the course of the summer that somehow or another this gave him the authority to place these devices in Petitioner's home. It did not. Petitioner never consented to these devices being placed in her home, and on August 19, 2021, she expressed her concerns to Respondent that she suspected that he did have recording devices in her home, which he denied. (Ex. D to Petitioner's Aff.). Respondent's claims that Petitioner consented, or even

knew, that he had installed spy camera in her home is nonsense.

Respondent goes through extensive argument that the Cronin case applies. It does not. Cronin was a case where, as this Court points out, there was subsequent acquisition of certain communication that had been held in an electronic storage. That again is not the issue here. These audio recording devices placed in the home by the husband recorded conversations in real time at the time the conversations took place.

Finally, Respondent's summary argument that Petitioner's claims are founded only on her expert's working theory ignores, among other evidence, 1) Respondent's admission that he installed spy cameras in Petitioner's home, 2) his spy camera purchases, and 3) Petitioner's router logs indicating thirteen cameras in her home. (Respondent Aff. ¶¶ 61-66; Bumgarner Aff. ¶25). Moreover, Husband has possession of the cameras, the devices he used to monitor the cameras, and the web application that is used to monitor the cameras and while this evidence would conclusively establish what, if any, interceptions occurred, Respondent refuses to produce it to this court to support his denials and he has yet to produce it in response to Petitioner's requests. A reasonable person could infer that this evidence would be adverse to Respondent.

II. Respondent's violation of the statutes necessitates suppression of all unlawfully obtained evidence, and evidence derived from unlawfully obtained evidence.

A. It is immaterial that Wife's text messages and emails were provided in prior litigation.

During Fall 2022 when Wife produced text messages and emails with Stephen Daniel Fowler, she had not yet determined the extent of information that had been derived from Respondent's interceptions and intrusions. The messages that she provided in response to discovery in this case were prior to the time the Motion to Suppress Evidence was filed. Providing that information in no way gave consent for Respondent to disseminate them.

B. No evidence derived from illegally intercepted communications may be received as evidence in any trial or hearing.

Respondent argues that the Fruit of the Poisonous Tree Doctrine has no application to this case. However, once again Respondent ignores the clear language of the statute itself which alleges "whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived there from may be received as evidence at any trial, hearing,..." (South Carolina Code section 17-30-65). There is no need to argue whether or not the doctrine of Fruit of the Poisonous Tree Doctrine is applicable or not as the court has specifically set out in its Statute that no evidence derived from the illegally intercepted communications may be received as evidence.

C. Wife's communications may not be used to impeach her testimony.

Respondent continues with his attempt to create an exception for use to impeach the Petitioner. Again, the clear reading is this statute makes no exception for the use of the contents of the unlawfully obtained communications, once again, the plain reading of Section 17-30-65 does not allow it.

III. This Court has jurisdiction to rule on Petitioner's Motion to Suppress.

The Homeland Security Act clearly sets out, pursuant to South Carolina Code section 17-30-110, that The South Carolina Court of Appeals is the original jurisdiction to hear the Motion to Suppress. There is no requirement that the family court issue its order prior to this Court addressing the issue. In fact, such an argument is contrary to what is set out in the statute.

The phrase "renewing authority" does not mean renewing a lower court's order, "renewing authority" is to review the allegations of the Motion to Suppress and to issue its Order as to whether or not the suppression is appropriate.

IV. Conclusion

Petitioner's Motion to Suppress should be granted based upon the illegal interception of her communications with non-parties, as well as illegal interceptions of her emails and text messages. Alternatively, any questions as to whether these recordings occurred and what in fact occurred, can be remedied by this court issuing an order requiring Respondent to turn over all surveillance cameras and recording devices he purchased, his electronic devices including the iPhone 8, and information from the IoT Living App which was connected to the cameras for the experts to examine. In addition, any records that Respondent has concerning the alleged interception likewise should be turned over followed by Supplemental Affidavits, arguments, by counsel.

Additionally, petitioner asks the Court to consider Respondent's contradictory statements, his demonstrably false statements, and his propensity for dishonesty in its ruling on the Motion to Suppress Evidence. (Petitioner's Aff.; See Section E).

Respectfully submitted,

McDOUGALL, SELF, CURRENCE
& McLEOD, LLP

PETER G. CURRENCE Bar No. 0013603
pete@mscmlaw.com
791 Greenlawn Dr. Suite 4
Columbia, South Carolina 29209
(803) 776-3130
Attorney for Petitioner

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v.

Lindsay McGee, ...Petitioner

PROOF OF SERVICE

I certify that I have served the MOTION TO FILE SUPPLEMENTAL REPLY TO RESPONDENT'S RETURN TO MOTION TO DISMISS on Respondent, by email addressed below:

Mr. Jerry N. Theos
Theos Law Firm, LLC
11 State Street
Charleston SC 29401
jerry@theoslaw.com

Ms. Marie-Louise Ramsdale
Ramsdale Law Firm
1476 Ben Sawyer Blvd., Suite 5
Mt. Pleasant, SC 29464
ml@ramsdalelaw.com

Ms. Elizabeth J. Stringer
Stringer Law
753 Folly Road
Charleston, SC 29412
liz@stringerlaw.us

Mr. Matthew Abee
Nelson Mullins
1320 Main Street
Columbia, SC 29201
Matt.abbe@nelsonmullins.com

Ms. Morgan Spires
Nelson Mullins
1320 Main Street
Columbia, SC 29201
Morgan.spires@nelsonmullins.com

Richard G. Whiting
Law Offices of Richard Whiting
1515 Lady Street
Columbia, SC 29201
Dick.whiting@whitinglaw.com

Peter G. Currence
McDougall, Self, Currence & McLeod, LLP
791 Greenlawn Drive, Suite 4
Post Office Box 90860
Columbia, SC 29290-1860
(803) 776-3130

ATTORNEYS FOR PETITIONER

October 6, 2023

McDougall | Self | Currence | McLeod

John O. McDougall*†
Peter G. Currence
Ryan A. McLeod*‡
Alyssa H. Richardson
R. Jason Hall^
Adam Pickworth

Of Counsel: Michael W. Self

791 Greenlawn Dr., Suite 4, Columbia, SC 29209-2641
P.O. Box 90860, Columbia, SC 29290-1860
(803) 776-3130 phone; (803) 961-6653 fax

21 East Calhoun St., Sumter, SC 29150-4315
P.O. Box 2197, Sumter, SC 29151-2197
(803) 778-5062 phone; (803) 778-6908 fax

October 13, 2023

VIA EMAIL ONLY
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

RE: Justin McGee v Lindsay McGee
Case #. 2022-DR-10-3072
Appellate Case #2023-001376

Dear Ms. Kitchings:

Enclosed please find the MOTION TO FILE SUPPLEMENTAL REPLY TO RESPONDENT'S RETURN TO MOTION TO DISMISS in regard to the above matter. Please return a filed stamped copy to me. I am forwarding the filing fee of $50.00 to you by mail today.

Thank you for your assistance in regard to the above.

With kind regards.

Sincerely,

PETER G. CURRENCE

PGC:lr
Enclosure
cc: Ms. Lindsay McGee (via email only)
Mr. Jerry Theos (via email only)
Ms. Marie-Louise Ramsdale (via email only)
Mr. Matthew Abee (via email only)
Ms. Morgan Spires (via email only)
Mr. Richard Whiting (via email only)
Ms. Elizabeth Stringer (via email only)