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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 Motion to File Supplemental Reply to Respondent's Return to Motion to Suppress

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Respondent Justin McGee ("Husband") respectfully requests this Court deny Petitioner Lindsay F. McGee's ("Wife") Motion to File Supplemental Reply to Respondent's Return to Motion to Suppress.[1] Wife's Reply was due and timely filed with the Court on October 6, 2023. Except for a passing reference to *Cronin v. Cronin*—which Husband argued in his Return—both Wife's Motion to Suppress and Reply were completely devoid of caselaw. In her Supplemental Reply, Wife adds seven new case citations from other jurisdictions. With the exception of one, all of these cases are nearly ten years old. Accordingly, Wife is merely trying to augment—not supplement with recently issued authority—both of her filings with caselaw to avoid giving Husband an opportunity to rebut these arguments. Wife cannot escape the burden to support her Motion to Suppress both legally and factually by merely "supplementing" her Reply after the filing deadline. For this reason, the Court should deny the current Motion as procedurally improper.

[1] Wife's Motion is entitled "Motion to File Supplemental Reply to Respondent's Return to Motion to *Dismiss*." (emphasis added). Husband believes this was a typographical error.

If the Court allows Wife to file a Supplemental Reply, it should still deny the underlying Motion to Suppress. As an initial matter, each additional case cited in the Supplemental Reply is persuasive, not mandatory. *See Walker v. Carter*, 820 F. Supp. 1095 (C.D. Ill. 1993); *Heggy v. Heggy*, 699 F. Supp. 1514 (W.D. Okla. 1988); *United States v. Ortiz-Lopez*, EP-22-CR-00638, 2023 WL 2923317, at *1 (W.D. Tex. Jan. 18, 2023); *Zaratzian v. Abadir*, No. 10 CV 9049, 2014 WL 4467919, at *1 (S.D.N.Y. Sept. 2, 2014); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983); *Anderson v. City of Columbus*, 374 F. Supp. 2d 1240 (M.D. Ga. 2005); *In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003). Further, the cases are unnecessary to the Court's resolution of the Motion to Suppress.

Presumably as to the nanny camera, Wife cites *Walker*, 820 F. Supp. at 1097, and *Heggy*, 699 F. Supp. at 1516–17, to support her proposition that the Wire and Electronic Communications Interception and Interception of Oral Communications Act ("the Federal Act")[2] applies to *nonconsensual*, interspousal interceptions within the marital home. (Suppl. Reply at 5). Husband has never argued that one spouse can intercept the communications of the other spouse merely because they are married. Rather, Husband has argued (1) Wife impliedly consented to the nanny camera, (2) the nanny camera had no audio recording capabilities, and (3) the nanny camera could neither record nor contemporaneously monitor Wife's communications. (Return at 15–17). These cases, therefore, provide Wife no support.

Next, Wife cites *Ortiz-Lopez*, 2023 WL 2923317, at *10–11, to argue a "change in the relationship, such as the one presented here, signals a clear revocation of any prior consent" for Husband to access Wife's law firm email account. (Suppl. Reply at 6). Wife further cites *Watkins*, 704 F.2d at 581–82, to argue that when Husband filed his divorce action in October 2022, "any

[2] 18 U.S.C. §§ 2510–23.

prior consent for [Husband] to access [Wife]'s email account was revoked, if not expressly, then impliedly[,]" because consent "should never be lightly implied . . . ." (Suppl. Reply at 7–8). These arguments ignore that Husband's role as a global administrator of the law firm's SharePoint and Exchange was not due to his marriage but was instead due to his role as the only continuously employed member of the law firm. Wife was aware of this role, and it remained notwithstanding a change in the marital relationship.

Wife similarly cites *Zaratzian*, 2014 WL 4467919, at *8, to argue that asking Husband "to unlink two other firm email address[es] from her email account does not give authority, neither express nor implied, to access her email communications." (Suppl. Reply at 6). Wife further cites *Anderson*, 374 F. Supp. 2d at 1250, to argue "[m]ere knowledge of monitoring capability cannot be equated to implied consent." (Suppl. Reply at 7). Again, Wife misstates Husband's argument. Husband did not argue Wife's consent stemmed from her asking him to unlink two other email addresses from her firm account. Husband also did not argue that Wife's knowledge of his monitoring capability *alone* demonstrated implied consent. Rather, Husband argued Wife impliedly consented to his access because (1) Wife knew Husband was a global administrator, (2) Wife had the same access rights for at least a portion of her employment at the law firm, (3) Wife asked Husband to act in his administrative capacity by accessing her email on at least one occasion, *and* (4) Wife was aware of Husband acting in this capacity on at least one additional occasion without any semblance of revocation. (Return at 9–10).

Wife later re-cites *Zaratzian*, 2014 WL 4467919, at *8, to support her argument that Husband's instructions for his digital forensics expert to search Wife's law firm email account were "clearly for [Husband's] domestic case" and, therefore, "veer[] from any legitimate business pursuit." (Suppl. Reply 7–8). However, the court in *Zaratzian* carefully noted that cases involving

"professional email accounts" are "factually inapposite" to cases involving personal email accounts. 2014 WL 4467919, at *9. Accordingly, Wife's reliance on *Zaratzian* cannot support her argument as to the law firm email account. In fact, it stands for quite the opposite.

Finally, Wife cites *In re Pharmatrak, Inc.*, 329 F.3d at 19, to argue the "burden of persuasion is on the party seeking the benefit of the consent exception" to the Federal Act. (Suppl. Reply at 8). Even assuming this is true, it provides yet another reason why the merits of Wife's Motion to Suppress should be left for the Family Court to decide in the first instance. Without a hearing to subject witnesses to cross-examination and examine their credibility, it becomes impossible for either party to definitively prove or disprove consent based on affidavits alone. Merely citing a twenty-year-old case from another jurisdiction does little to establish the merits of Wife's Motion to Suppress, especially given the belated nature of the filing.

Conclusion

Because Wife's Motion to File Supplemental Reply to Respondent's Return to Motion to Suppress is procedurally improper and provides no additional basis upon which to grant her Motion to Suppress, Husband requests this Court deny both motions.

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Proof of Service

I, the undersigned associate 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 Motion to File Supplemental Reply to Respondent's Return to Motion to Suppress**

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Dear Counsel,

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find attached a Return to Petitioner's Motion to File Supplemental Reply to Respondent's Return to Motion to Suppress and a Proof of Service.

Thank you,
Morgan

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