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May 13 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT
The Honorable Spiros Ferderigos, Special Referee

Appellate Case No. 2023-001376

Justin McGeeRespondent,

v.

Lindsay F. McGee.....Petitioner.

**Respondent Justin McGee’s Exceptions and Objections
to the Special Referee’s Report and Proposed Findings Dated May 3, 2024**

In August 2023, Petitioner Lindsay F. McGee (“Wife”) filed her Motion to Suppress against Respondent Justin McGee (“Husband”) under the Homeland Security Act, S.C. Code Ann. 17-30-10 to -145, 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. Wife Amended her Motion on September 1, 2023, and Husband responded with a motion to dismiss, which was denied.¹ Husband then denied and defended against the allegations in his Return filed September 29, 2023.

After entertaining several motions and briefing, this Court issued an order certifying the case to the Honorable Spiros Ferderigos, Family Court Judge (“Special Referee”) under S.C. Code

¹ Husband again stands by his jurisdictional and related objections to this Court’s assumed original jurisdiction as previously raised in his Motion to Dismiss and related briefing.

Ann. § 14-8-280, to “supervise additional discovery related to the Petitioner’s motion and to issue a report with its proposed findings as to what, if any, of Respondent’s actions constituted violations under the [Homeland Security] Act.” (Order, Dec. 5, 2024.)

After roughly five months of limited discovery and five hearings, all during which the underlying divorce and custody proceedings have been stayed, the Special Referee issued his Report and Proposed findings dated May 3, 2024 (the “Report”). The Report makes two proposed findings that should end this Court’s inquiry:

- “That there is no direct evidence presented to the Family Court that [Husband] has intercepted or attempted to intercept any audio records from the CAMDUCK or other spying device.”
- “That there is no circumstantial evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK.”

(Report at 3, ¶¶ I(k)–(l).)

If these two proposed findings do not end the matter for some reason, however, Husband takes exception to many of the underlying proposed findings and the manner in which the Report arrived at those proposed findings. Husband’s exceptions and objections to the Report are outlined below. Husband further asks to be hard on the issues raised in the Report before the Court takes the drastic step of suppressing any evidence in this contentious divorce and custody proceeding, much less suppressing “Plaintiff’s Complaint,” and “[a]ll allegations in the complaint and supporting affidavits related to [Wife’s] parenting,” as Wife has requested during discovery.

In these proceedings, this Court has applied both the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure. By certifying certain issues to the Special Referee, the Court has interjected yet another potential source of procedure—the rescinded Circuit

Court Rules—as those rules governed “the same powers as are now possessed by the circuit courts of the State for the appointment of referees to take testimony and report thereon,” when the certification statute was enacted in 1979. *See* S.C. Code Ann. § 14-8-280; *see also* S.C. Cir. Ct. R. 16 (1977) (“The Master or Referee in all cases of reference, having prepared his report, shall file the same in the Clerk's office, and at the same time give notice to the attorneys engaged in the cause of such filing, and the party who shall be dissatisfied therewith shall, within ten days after such notice, serve his exceptions thereto. Such notice of the filing of the Master’s or Referee’s report shall be deemed and taken as service of such report.”). Put plainly, there is simply no rulebook for the proceedings that this Court continues to entertain (erroneously, in Husband’s view) under the Homeland Security Act. For this reason, Husband files exceptions and objections to the Report. *In re Mathis*, 258 SC 321, 188 SE2d 466 (1972) (requiring exceptions to Master’s report to be filed with the certifying court for error preservation); *Carsten v. Wilson*, 241 S.C. 516, 520, 129 S.E.2d 431, 434 (1963) (requiring exceptions to Special Referee’s report to be filed with the certifying court for error preservation); *White v. Livingston*, 231 S.C. 301, 311, 98 S.E.2d 534, 539 (1957) (applying ten-day requirement for exceptions to equity cases). To the extent necessary, however, Husband asks that this Court treat these exceptions as a Motion to Reconsider under Rule 59, SCRCR, or a Motion for Rehearing under Rule 221, SCACR.

Exceptions

Except for the two proposed findings set forth in the introduction above, (Report at 3, ¶¶ I(k)–(l)), Husband takes exception to the Special Referee’s Report in its entirety. The Special Referee has cited facts that are not supported on the record, omitted material facts, cited to the record selectively and thus inaccurately, erred in interpreting the law and this Court’s Certification Order, and erred in the application and interpretation of the law. This Court should issue an Order

dismissing this matter or, in the alternative, issue an Order concluding that Husband has not violated the Homeland Security Act.

A. Jurisdictional Errors

Husband takes exception with the following jurisdictional errors in the Report:

1. The Special Referee erred in determining that it had jurisdiction over the subject matter over the December 20, 2023 Objections filed by Husband and continuously raised throughout the proceedings. The Homeland Security Act's suppression provision under S.C. Code Ann. § 17-30-110 is not intended to apply to civil actions or actions arising out of the Family Court.

2. The Special Referee erred in determining that it had personal jurisdiction over Husband in light of the lack of process and lack of service of process.

3. The Special Referee erred in determining that it had authority to proceed under S.C. Code Ann. § 14-8-280, especially in light of his current service as a sitting Family Court Judge, *see id.*

B. Factual Errors

Husband takes exception with the following erroneous and/or omitted facts in the Report:

4. For the reasons detailed in paragraph 9 of Husband's proposed findings,² the Special Referee erred in relying on the router logs from McCutchen House under Rules 802, 901, 1002, and 403. In the face of Husband's repeated objections to the reliability of these logs and evidence he submitted showing how those logs could not have been accurate, Wife has provided no evidence as to the authenticity or admissibility of these third-party records. Because the South

² Husband filed his Response to Wife's Proposed Findings of Fact and Supporting Appendix with the Special Referee on April 9, 2024. The Special Referee references them throughout the report. (*See, e.g.*, Report at 5, ¶ II(c)(ii); at 6, ¶¶ II(f)(b),(i)(c); at 7, ¶¶ III(a)(ii), (b)(ii).) Husband files the proposed findings as a supplement to his filed exceptions as **Exhibit 1**.

Carolina Rules of Evidence apply, S.C. Code Ann. § 17-30-110(A)(3), Husband takes exception to the Report's references and use of these router logs.

5. The Special Referee erred in his discussion of Husband leaving his cell phone in his car, (*see* Report at 2, ¶ I(d)), because (a) this is irrelevant to Wife's Homeland Security Act claim as the cell was locked and not recording any video or audio; and (b) the allegation is inaccurate because the phone was left in his own car that Wife used.

6. The Special Referee erred in proposing that the Camduck "did record/intercept audio" because the purchase records confirm that the Camduck did not have audio enabled and Husband testified that he did not enable any audio recording capabilities on that device.

7. The Special Referee erred in proposing that downloading the CIXICM application gave Husband the ability to intercept audio because the purchase records confirm that the Camduck did not have audio enabled, Husband testified that he did not enable any audio recording capabilities on that device, and the unsubstantiated records about the application provided by Wife's purported expert is misleading and related to a newer application version not available to Husband at the time of the alleged interception.

8. The Special Referee erred in proposing that *circumstantial* evidence existed showing that Husband "attempted" to intercept audio recordings by "viewing/deleting recordings," because no competent evidence existed establishing that Husband ever viewed or deleted any records and, Wife failed to establish that recordings were not automatically deleted because of the size-limitations of the device and/or storage unrelated to Husband's alleged actions.

9. The Special Referee erred in proposing that Husband admitted to using nanny cameras as the vast majority of the cameras addressed by the Special Referee had no audio capabilities, causing them to fall outside of the Homeland Security Act. Thus, these non-audio

cameras would fall outside of the scope of the certification and are not actionable under S.C. Code Ann. § 17-30-110.

10. The Special Referee erred in relying on a text message from Husband dated May 17, 2021, as to the parties' state of mind because that message was sent before any of the alleged spy cameras were even purchased.

11. The Special Referee erred in proposing, without deciding from the conflicting evidence, that "[t]here is evidence to support that [Husband] did not reside at [McCutchen House] from June 2021 until May 30, 2022." (Report at 5, ¶ II(d).) Husband provided ample evidence to that he did reside at McCutchen House, yet the Special Referee failed to propose any definitive findings on this topic.

12. The Special Referee erred in failing to address the means and method by which Wife's purported experts manipulated data on the Camduck's SD card to access audio recordings that had previously been encrypted and not accessible to Husband over Husband's objections to the means and method by which this evidence was procured.

13. The Special Referee erred by declining to require the production of evidence Wife sought to be suppressed, or even requiring Wife to identify the evidence that she is asking to be suppressed. At least one of these is a pre-requisite for making any proposed findings because identification or production of that allegedly illegally obtained evidence is a material element of Wife's claim under S.C. Code Ann. § 17-30-110. Otherwise, what is this Court to suppress if Husband has not offered anything into evidence that was illegally obtained, and the Special Referee or Wife has not identified anything in Husband's possession that violates the Homeland Security Act? Surely the alleged suppression remedy cannot be as broad as suppressing the entire complaint or any evidence of Wife's parenting as Wife has claimed.

14. The Special Referee erred by failing to consider Wife's own actions in placing the Camduck in her bedroom as precluding the relief sought. Wife admitted to placing the Camduck in her bedroom, and support for her own actions in causing herself to be recorded exist.

15. The Special Referee erred in its reliance on information and evidence related to non-audio-recording cameras as those types of cameras are not actionable under the Homeland Security Act or under S.C. Code Ann. § 17-30-110.

16. The Special Referee erred in basing its proposed finding, on Wife's allegation "upon information and belief," as such information and belief is not supported by evidence in the record. (*See* Report at 7, ¶ III(b).)

17. The Special Referee erred in considering a photo it believed to be taken by Wife, which was actually taken by Husband. (*See* Report 7–8, ¶ III(f)(i).) Further, the Special Referee erred in concluding that the Camduck was "located and powered" in McCutchen House by this photo, as such a proposed finding is not supported by the record. The device in the photo could easily have been another, non-camera, device owned by the parties.

18. The Special Referee erred in proposing that the Camduck did have audio enabled on the device, that the application available for the Camduck during the relevant time period permitted activation of the audio function through the CIXICM application, or that the Camduck stored audio for review by an everyday user as the record does not support such a proposed finding. There is also no evidence to support that Husband contacted the manufacturer of the Camduck to enable audio on the device, and no attempts were made by Wife to carry her burden of establishing this crucial fact through third-party discovery.

19. The Special Referee erred in proposing that an individual remotely reconfigured the device to place the Camduck into loop recording as such a proposed finding is not supported

by the record. Such a reconfiguration could have just as easily been caused by unplugging the device, or a hurricane-related power outage and the device restoring to its factory settings.

20. The Special Referee erred in proposing that a device identified in a photo from the kitchen was an audio-enabled device as the record is silent to which device is depicted in the photo. (*See* Report at 11, ¶ IV(e).) The record establishes that this device likely was a non-audio-enabled camera that Wife located in her garage and has since admitted does not record audio, so it is not actionable under the Homeland Security Act.

C. Legal Errors

Husband takes exception with the following legal errors in the Report:

21. For the reasons detailed in Section II of Husband's proposed findings beginning on page 28, the Special Referee erred in relying on Wife's purported experts and their opinions because (1) they have contradicted their prior testimony; (2) their financial interest in the outcome of this case undermines their credibility and establishes bias; and (3) the Special Referee engaged in no analysis under Rule 702, SCRE about the admissibility of their opinions. Husband takes exception to the Report's references and use of these information, exhibits, and opinions supplied by these purported experts.

22. For the reasons detailed in paragraph 4.2 of Husband's proposed findings beginning on page 3, the Special Referee erred in relying on proposed June 6, 2022 stipulation under Rule 408, SCRE. Husband provided this draft stipulation to Wife as part of settlement negotiations between the parties, so the draft and any facts referenced therein are inadmissible. In any event, Wife rejected the draft stipulation, making it a nullity and non-binding. Husband takes exception to the Report's references and use of this document.

23. For the reasons detailed in Section III of Husband’s proposed findings starting on page 34, the Special Referee erred in failing to consider Wife’s unclean hands. Wife specifically directed a material witness to delete text messages she sent him after the divorce had been filed, and admittedly used ephemeral messaging services without providing those messages during the limited discovery. Because Wife comes to the Court with unclean hands, Husband takes exception to the Special Referee’s failure to consider Wife’s actions in the Report.

24. For the reasons detailed in Section VII of Husband’s proposed findings beginning on page 58, the Special Referee erred in not concluding in his Report that no violation of the Homeland Security Act occurred because merely that an individual *could have* recorded audio unbeknownst to the alleged intercepting party is not sufficient to state a claim. *See Carson v. Emergency MD, LLC*, 621 F. Supp. 3d 610, 618 (D.S.C. 2022) (rejecting argument that an “alleged ability to access and review” communications was sufficient under the Homeland Security Act and granting summary judgment on that claim), *vacated as to the Stored Communications Act claim and remanded sub nom. Carson v. EmergencyMD, LLC*, No. 22-1139, 2023 WL 1861053, at *2 n.5 (4th Cir. Feb. 9, 2023).³

25. Although the Special Referee was correct that “there is no evidence that [Husband] contemporaneously intercepted or attempted to intercept any audio recording made by the [Camduck],” (Report ¶ I(h)), the Special Referee erred in not concluding in his Report that no violation of the Homeland Security Act occurred because this contemporaneousness requirement is fatal to Wife’s claims. *See Cronin v. Cronin*, Appellate Case No. 2023-000959, Order (Sept. 6,

³ 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” in state court. *State v. Guerrero-Flores*, 402 S.C. 540, 534, 741 S.E.2d 577, 580 (Ct. App. 2013).

2023); *Ducharme v. Madewell Concrete, LLC*, No. CV 6:20-1620-HMH, 2021 WL 2141728, at *8 (D.S.C. May 26, 2021) (“a qualifying ‘intercept’ occurs only where the acquisition of the communication occurs contemporaneously with its transmission by its sender.” (citing *Glob. Pol’y Partners, LLC v. Yessin*, 686 F. Supp. 2d 631, 638 (E.D. Va. 2009) (collecting cases)); *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.”)).

26. Although the Special Referee correctly concluded that Wife holds the burden of proof, (*see* Report ¶ I(m)), the Special Referee erred in expressly declining to determine whether attempting to intercept, merely possibility of interception, or having no evidence available suppression was actionable under the Homeland Security Act.

27. The Special Referee erred in its reference to the Administrative Office of the United States Courts as the statute referenced has no application in proceedings outside of those before the Court of General Sessions. (*See* Report ¶ III(l), n.2.)

28. If the Report is accepted as it is, another problem is manifested: there is no case or controversy on which to base this Court’s jurisdiction, and this action must be dismissed. Plaintiff asserts no injury and seeks no redress available under the Homeland Security Act. The record discloses neither an interested individual nor a case or controversy—both essential elements for the assertion of this Court’s jurisdiction.

D. Procedural Errors

Husband takes exception with the following procedural errors in the Report:

29. Because of the numerous factual issues hotly contested by the parties, the Special Referee erred by not permitting Husband to depose or cross-examine Wife and her admitted

paramour, Daniel Fowler. This is especially true following Wife's decision to place her and Husband's credibility at issue in this case with her affidavits filed in reply to the proposed findings. Husband takes exception to the Special Referee's limited discovery permitted and the lack of clarity as to the procedural rules to be utilized in these proceedings.

30. Because of the numerous purported expert opinions and related issues hotly contested by the parties, the Special Referee erred by not permitting Husband access to the reports and documents exchanged between Wife's counsel, third parties, and her purported expert witnesses. Despite numerous requests, the Special Referee erred in limiting the discovery on Wife's claims and Husband's defenses. This was error given state law's directive to the Special Referee to "supervise additional discovery relating to the Petitioner's motion," and to "resolve any discovery requests relevant to the motion to suppress . . ." Husband takes exception to the Special Referee's limited discovery permitted and the lack of clarity as to the procedural rules to be utilized in these proceedings.

31. Because of the numerous purported expert opinions and related issues hotly contested by the parties, the Special Referee erred by not permitting Husband to depose or cross-examine Wife's purported expert witnesses. Despite numerous requests, Husband was not afforded the opportunity to evaluate their opinions or the facts on which those opinions were based as required by Rule 705, SCRE. This was error given state law's directive that this Court may appoint "referees to take testimony and report thereon . . ." S.C. Code Ann. § 14-8-280. Husband takes exception to the Special Referee's limited discovery permitted and the lack of clarity as to the procedural rules to be utilized in these proceedings.

32. The Special Referee erred by not conducting an evidentiary hearing or trial at which the testimony from both sides is presented and subject to cross examination.⁴ Without such a hearing, the Special Referee could not meaningfully address the factual disputes caused by the inconsistencies and biases set forth above. Thus, Husband takes exception to the Special Referee's proceedings and the lack of clarity as to the procedural rules to be utilized in these proceedings.

33. The Special Referee erred by not addressing the evidentiary objections raised by Husband as required by S.C. Code Ann. § 15-31-70 (1977) ("Masters and referees . . . shall hear and decide any objection which may be made to the competency, relevancy or admissibility of any testimony which may be offered."), which was in effect as of the passage of S.C. Code Ann. § 14-8-280. Thus, Husband takes exception to the Special Referee's failure to address his objections set forth above and the lack of clarity as to the procedural rules to be utilized in these proceedings.

Conclusion

For the reasons set forth above, Husband respectfully requests an Order dismissing this matter or, in the alternative, issue an Order concluding that Husband has not violated the Homeland Security Act. Should any doubts as to Husband's lack of liability under the Homeland Security Act still linger, however, Husband respectfully requests that he be heard at the appropriate time and through the appropriate procedural mechanism to argue (1) why no violations of the Homeland Security Act occurred; (2) why suppression is not warranted, even in a limited fashion; (3) what remedies, if any, are available to Wife; and (4) why these proceedings are jurisdictionally and procedurally improper.

[Signature on following page.]

⁴ In a similar vein, the procedure employed has prevented Husband from asserting his right to a jury trial for any claims under the Homeland Security Act.

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May 13, 2024