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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.

Respondent's Return to Petitioner's Notice of Motion and Motion for Expedited Hearing to Clarify this Court's Prior Order

More than ten days after this Court filed its Order certifying the case for a second time under S.C. Code Ann. § 12-8-280, Petitioner Lindsay F. McGee ("Wife") filed her Notice of Motion and Motion for Expedited Hearing to Clarify this Court's Prior Order. The motion is not one for reconsideration, rehearing, stay, or supersedeas—indeed, there was no definitive, much less appealable, order from which Wife could seek redress from this Court. Wife cites no statute or rule explaining the authority for the motion.

Respondent Justin McGee ("Husband") is unsure what relief Wife seeks with her motion. Because it is procedurally improper and fails to establish how such relief is appropriate in this Court, Husband files this Return opposing the motion. Even if it were procedurally proper, the Court should deny the motion because it misconstrues the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §§ 2510–23 ("the Federal Act"), and there is no basis for requiring Husband to pay for discovery of videos solely in Wife's possession that are necessary for Wife to meet her burden of proof.

Factual and Procedural Background

Husband and Wife were married on March 10, 2012. The couple had three children and lived together in Charleston County until their May 2022 separation. In October 2022, Husband filed for divorce on the ground of adultery, which Wife has admitted in an affidavit to this Court and elsewhere. Husband later moved for temporary relief, requesting that the Family Court issue an order detailing a set parenting plan and awarding temporary financial relief. Wife thereafter moved for temporary relief of her own.

After a hearing on the parties' motions, the Family Court issued a Temporary Order on June 15, 2023. The Temporary Order required the Guardian *ad Litem* to conduct an initial investigation and then the parties to return for a supplemental temporary hearing within 90 days. This hearing has never been held, and the children's issues have not been addressed in any way, leaving three young children in legal limbo with no ability for redress for nearly a year.

On September 1, 2023, Wife filed an Amended Motion to Suppress Evidence with this Court under the Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145, 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. Husband promptly moved to Dismiss, which this Court denied. It instead certified this matter to the Charleston County Family Court to act as a special referee, filing a report after certain discovery.

After roughly five months of limited discovery and five hearings, all during which the underlying family court proceedings have been stayed, the Honorable Spiros Ferderigos, Family Court Judge ("Special Referee") issued his Report and Proposed findings dated May 3, 2024 (the "Report"). Husband filed exceptions to the Report. Wife did not, thereby waiving any adverse findings in the Report. *See In re Mathis*, 258 SC 321, 188 S.E.2d 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).

A month after the Report was issued, this Court again certified issues to the Special Referee for resolution. This time, however, the certification contemplates 120 days, plus any period of extensions approved by the Court. Thus, the second certification order contemplates a stay of the divorce and custody proceedings for another four months, if not more.

Following the Court's second certification, Husband moved to lift the stay of the divorce and custody proceedings on June 21, 2024. To date, Wife has not filed a return to the motion despite a reminder from undersigned counsel by email and phone.[1] Presumably, then, she has consented to lifting the stay. *See* Rule 240(e), SCACR ("Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.").

The same day, the Special Referee held a status conference in Charleston. Following arguments from the parties' counsel, the Court issued its Order from Fifth Status Conference (the "Order"), which is Exhibit A to Wife's motion. That Order provides relevant background and notified the parties that a second special referee would be appointed to review the alleged 5,000 recordings allegedly containing 833 hours of video from the Camduck device that is in the possession of Wife's purported experts.[2] Although the Order states that the Special Referee

[1] On July 11, 2024, undersigned counsel provided a proposed consent order lifting the stay for consideration by Wife's counsel. As of the filing of this Return, undersigned counsel has not received a response to that proposed order.

[2] Husband disputes this estimation based on the logic of what even a 128 GB SD card would hold. Yet Husband has never seen or accessed the videos, so he has not way to dispute Wife's claims about the number and length of the videos.

"intends to order a 50/50 division of" the costs to review the videos, the Special Referee expressly withheld ruling on the allocation of costs. Likewise, the Order does not actually appoint a second special referee. The only two directives in the Order are (1) for Wife to file a "motion with the Court of Appeals requesting a stay of its" second certification order; and (2) for the parties to "file any affidavits in support of their position regarding the allocation of fees and costs" by 5:00 p.m. June 26, 2024.

As directed by the Special Referee, Husband filed a memorandum and affidavit in opposition at the deadline. (*See* **Exhibit 1**, Husband's Mem. in Opp. to Appointment of a Special Referee and Cost-Sharing.) To date, Husband knows of no affidavit or memorandum filed by Wife as directed by the Special Referee.

The week following the hearing, Wife filed the present Motion. Husband now files his return in opposition.[3]

Argument

Wife's motion is procedurally improper. Even if it could be considered by this Court, Wife misconstrues the Federal Act and the Homeland Security Act. Even so, there is no basis to require Husband to pay Wife's costs in completing discovery of videos in her exclusive possession and which are necessary for Wife to carry her own burden. Thus, the Court should deny the Motion.

I. Wife's motion is not a motion for reconsideration, rehearing, stay, or supersedeas.

Wife's motion is tethered to no known procedural device that would allow an appellate Court to consider an interlocutory order of a Special Referee, much less an order that does not

[3] Husband files this Return subject to his jurisdictional and related objections as set forth in his December 20, 2023 filing with the Special Referee, which are incorporated by reference.

direct Wife to do anything but move to stay and an affidavit (neither of which Wife has accomplished). Thus, the Court should deny it.

Wife's motion cites no statute or rule authorizing its filing. The motion cannot be one for reconsideration under Rule 59(e), SCRCP, because it was filed more than ten days of this Court's second certification order. It also cannot be one for supersedeas or stay, as Wife does not follow the requisite procedure for such a motion. *See* Rule 241, SCACR. Instead, the motion is styled as one for clarification, and requests a hearing to limit the Special Referee's ability to require a review of the Camduck videos central to Wife's claims. There is little, if no, guidance from Wife's filings about what she is asking this Court to do or the authority under which it may do it.

Indeed, there is nothing for an appellate court to clarify or resolve. The Special Referee's two directives were interlocutory and did not actually require much of the parties. Yes, the Special Referee stated what he intended to do in the future. Yet the only things he ordered Wife to do was to (1) file an appropriate motion with this Court; and (2) file an affidavit opposing the appointment of a special referee and allocation of costs. Wife has failed to do either, instead choosing to file this motion with this Court. Her procedural failures do not warrant intervention by this Court.

In light of these procedural shortcomings, the Court should deny Wife's motion.

II. Wife is wrong in arguing that discovery of the Camduck videos is not allowed.

Wife claims that "pursuant to the [Federal Act] and the [Homeland Security Act], an intercepted communication cannot be utilized or disclosed without further violation of the act. . . . Any disclosure of any contents of the illegally intercepted communications . . . also would be a further violation or [sic] the statute." (Mot. at 1.) Wife provides no citation for this claim. It is incorrect. So too are her claims that the videos' contents are "not relevant as to . . . whether an interception took place . . ." (*Id.*)

Although few cases around the country have dealt with the discovery of alleged wiretap evidence, federal cases confirm that Wife's reading of the Federal Act and the Homeland Security Act is incorrect.[4] In discussing the ability of an agency to discover recordings during a civil enforcement proceeding, the Second Circuit Court agreed that the Federal Act did not preclude traditional discovery: "Nothing in [the Federal Act] addresses the rights of other parties to civil litigation to obtain wiretap materials legitimately in the possession of their adversaries through conventional civil discovery." *S.E.C. v. Rajaratnam*, 622 F.3d 159, 175 (2d Cir. 2010). The Second Circuit then balanced the privacy interests of the intercepted party against the agency's need for discovery of the communications, concluding that the records need not be turned over. In so doing, though, the Second Circuit rejected the argument that production during discovery would itself violate the Federal Act. *Id*. at 175. "Criminal sanctions would not be applicable to any disclosure by Appellants pursuant to the order, because 'good faith reliance on a court . . . order . . . is a complete defense against any civil or criminal action' brought under [the Federal Act]." *Id*. (quoting 18 U.S.C. § 2520(d)(1)); *see also In re High Fructose Corn Syrup Antitrust Litig*., 216 F.3d 621, 622–23 (7th Cir. 2000) (permitting civil litigants in antitrust action to subpoena wiretap conversations).

If Wife really is correct that "[a]ny disclosure of any contents" of the Camduck videos would violate the Federal Act or the Homeland Security Act, then Wife has already violated those acts ten times over. Not only has Wife produced screenshots from the allegedly illegally recorded videos during discovery and filed them with the Family Court, but she has also repeatedly

[4] 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).

disclosed, through argument and otherwise, summaries of what is allegedly on the videos. *United States v. Rosenthal*, 763 F.2d 1291, 1294 (11th Cir. 1985) (discussing Federal Act's exception for wiretap evidence already within the public record).

Under the Homeland Security Act, Wife bears the burden of establishing an intentional interception of her audio communications. "Congress made clear that the purpose of the amendment [of the Federal Act in 1986] was to underscore that inadvertent interceptions are not a basis for criminal or civil liability under the ECPA. An act is not intentional if it is the product of inadvertence or mistake." *In re Pharmatrak, Inc*., 329 F.3d 9, 23 (1st Cir. 2003) (citation omitted). "And 'the plain meaning of § 2520(a) [of the Federal Act] requires that an aggrieved person must have suffered an actual illegal interception, disclosure, or use of his or her communications before that person may initiate a civil suit." *Fiore*, 2019 WL 3943055, at *3 (quoting *DirecTV, Inc. v. Wallace*, 347 F. Supp. 2d 559, 565 (M.D. Tenn. 2004)), *aff'd sub nom. B & G Towing, LLC v. City of Detroit, MI*, 828 F. App'x 263 (6th Cir. 2020). Merely that Husband *could have* recorded audio unbeknownst to him 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). Because the "party seeking protection under [the Federal Act] against the use or disclosure of the unlawfully intercepted communications bears the burden of proving that a particular communication was intercepted intentionally in violation of" the Federal Act, *In re HIPAA*

Subpoena, 961 F.3d 59, 65 (1st Cir. 2020), Wife must prove that an interception actually occurred and that it was intentional.[5]

Wife's position that she need not produce the Camduck videos to carry this burden would create an unworkable "just-trust-me" standard for a litigant to carrying her burden under the Homeland Security Act. Under Wife's reading of the Federal Act and Homeland Security Act, a movant seeking suppression would merely have to allege that she located illegally recorded videos and have a purported expert testify that they have intelligible audio to establish a violation of the Homeland Security Act and the drastic suppression remedy. That cannot be the standard. The Court, like Husband, cannot just take Wife's word for what is on the videos, especially in this contentious of litigation. *See McQuade v. Michael Gassner Mech. & Elec. Contractors, Inc.*, 587 F. Supp. 1183, 1188 (D. Conn. 1984) ("If the court were to accept the position urged by plaintiffs—i.e., that § 2515 [of the Federal Act] prohibits the introduction of any evidence derived from the tapes—plaintiffs themselves would be seriously hampered, if not completely foreclosed, from proving their case at trial.").

As Husband has argued, the procedural aspects of this case are already tilted against him—Wife's claim that she cannot share the videos that she claims created the Homeland Security Act violation merely pushes this procedural slant against respondents well passed what should be acceptable as a matter of sound policy and due process. This raises the question: Does Wife not want to subject these videos that are the crux of her case to scrutiny and cross-examination?

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[5] On this point, the Special Referee has already found that (1) "[t]hat there is no <u>direct</u> evidence presented to the Family Court that [Husband] has intercepted or attempted to intercept any audio records from the CAMDUCK or other spying device," and (2) "[t]hat there is no <u>circumstantial</u> evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK." (Report at 3, ¶¶ I(k)–(*l*).) Wife did not file any exceptions to these findings, so her arguments against them are waived. *In re Mathis*, 258 SC at 188 S.E.2d at 466; *Carsten*, 241 S.C. at 520, 129 S.E.2d at 434; *White*, 231 S.C. at 311, 98 S.E.2d at 539.

III. Wife has established no basis for requiring Husband to pay for her to conduct discovery of devices in her own possession that are necessary to establish her own claims.

A. This Court routinely rejects requests for fees and costs on a motion to suppress.

This Court's precedent confirms that fees and costs under the Homeland Security Act cannot be awarded by the Court in resolving a motion to suppress. In *Fulmer v. Buckhannon*, No. 2022-000330, Slip Op. at 5 (S.C. Ct. App. Sep. 2, 2022), the Court refused a successful movant's request for fees, explaining that was an issue to be resolved in separate civil litigation between the parties.[6] The Court had taken this same position by denying "attorney's fees, expenses, and costs" previously in *Terrell v. Terrell*, No. 2020-001071, Slip Op. at 3 n.4 (S.C. Ct. App. Sep. 22, 2020), and then again in *McMaster v. McMaster*, No. 2021-000278, Slip Op. at 3 n.4 (S.C. Ct. App. May 7, 2021). Even when the collateral litigation involves a family court proceeding, this Court has rejected claims for fees and costs under the Homeland Security Act. *See Cronin v. Cronin*, No. 2023-00959, Slip Op. at 3 n.7 (S.C. Ct. App. Sep. 6, 2023). Wife provides no reasons for deviating from this established practice.

B. Wife points to no provision in the Rules of Civil Procedure requiring Husband to pay for discovery of her own records.

If the Court were to ignore its own precedent, however, Wife has established no statute or procedural rule permitting such cost shifting. This Court has applied the South Carolina Rules of Civil Procedure to these proceedings under the Homeland Security Act. So too did the Special

[6] Civil litigation is already pending between the parties. Wife sued Husband in the Charleston County Circuit Court while discovery on her motion to suppress was ongoing. Husband removed that action to federal court, which has been assigned to the Honorable Richard M. Gergel. *See McGee v. McGee*, 2:24-cv-01659-RMG (D.S.C.). Indeed, the parties have already exchanged initial disclosures and requested dates for depositions in that case.

Referee rely on Rules 33, 34, and 36, SCRCP in supervising discovery. Thus, Husband looks to Rule 26, SCRCP for guidance on discovery cost sharing, yet Wife points to no provision permitting the Court to require Husband to fund her litigation.

The federal and state rules of civil procedure have different provisions related to cost sharing in discovery. In 2015, federal Rule 26 was amended to specifically allow courts to "specifying terms, including time and place *or the allocation of expenses*, for the disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(B) (emphasis added). The Committee Notes on the 2015 Amendment was quick to explain that the 2015 amendment "does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding." Fed. R. Civ. P. 26, 2015 Comm. Not. South Carolina's rules were not amended in 2015, however Rule 26(c), SCRCP has no corollary provision allowing the Court to issue a protective order requiring Husband to share in the costs. Nor should it, even if it had the authority.

The discovery ordered by this Court is of videos that are exclusively in Wife's possession. Husband has never seen them or tried to use them as evidence. As is customary, the party who holds the records subject to discovery is responsible for the cost of that discovery. This is especially true where, as here, those records are necessary for Wife to carry her burden of proof on her own claim. It would be inequitable to require Husband to pay for his own defense and then also finance Wife's claims. As explained in his affidavit attached to Exhibit 1, Husband has no present ability to pay for Wife's litigation costs, especially given all the other costs he is unilaterally covering.[7]

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[7] This, in part, is the reason Husband has asked this Court to lift the stay of the divorce and custody litigation. Again, Wife has not opposed that motion, so she is deemed to have agreed to the relief sought in the motion.

C. The Family Court's statutory authority to allocate suit money is also no basis for requiring cost-sharing here.

This action is its own action under the Homeland Security Act and is purportedly within the original jurisdiction of the Court of Appeals—not the family court. Therefore, for cost-sharing, it is irrelevant that the collateral proceedings involve divorce. The statute under which the Court of Appeals has certified this case provides only for the Special Referee to act as just that—a special referee vested with the authority from the appointing court. S.C. Code Ann. § 14-8-280. The Special Referee may only exercise the power held by the appointing court which has been provided by the Second Certification Order. That authority is limited by the certification statute, which only allows "for the appointment of referees to take testimony and report thereon, under such instructions as may be prescribed by the court, in any cases arising in the Court where issues of fact shall arise." S.C. Code Ann. § 14-8-280. This authority does not include any authority to apportion costs as would be permitted in traditional family court litigation.

Even if it did, an allocation of suit money is unwarranted here. "S.C. Code Ann. § 20–3–120 (1985) makes it clear that in order for a spouse to be entitled to suit money, the claim must be "well founded." The burden of proving that a claim is well founded is on the party seeking suit money." *Anderson v. Tolbert*, 322 S.C. 543, 547, 473 S.E.2d 456, 458 (Ct. App. 1996). The allowance of alimony and suit money must be made according to the principles controlling such allowance and actions for divorce. *See* S.C. Code § 20-3-140. "The court, from time to time after considering the financial resources *and marital fault* of both parties, may order one party to pay a reasonable amount to the other for attorney fees, expert fees, investigation fees, costs, and suit money incurred in maintaining an action for divorce from the bonds of matrimony. . ." S.C. Code § 20-3-130(H) (emphasis added). Notably though "[n]o alimony may be awarded to a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written

property or marital settlement agreement or (2) entry of a permanent order of separate maintenance pay alimony and child support or of a permanent order approving a property division or marital settlement agreement between the parties." S.C. Code Ann. Section 20-3-130(A). An award of suit money is a form of spousal support in that legal services are as necessary an element of support as food and lodging. *See* Homer H. Clark, Jr., *The Law of Domestic Relations In The United States* § 17.2 (2d ed.1987) (cited in *Anderson v. Tolbert*, 322 S.C. 543, 548, 473 S.E.2d 456 (Ct. App. 1996)). As such, an award of suit money is not permissible where the recipient spouse is statutorily barred from receiving spousal support. Further, the *Anderson* Court held that an adversary spouse should not be rewarded for being uncooperative, prolonging and hampering a final resolution of the issues in the case, or any other unreasonable, and contumacious conduct. *Anderson v. Tolbert*, 322 S.C. 543, 549, 473 S.E.2d 456, 459 (Ct. App. 1996).

Here, Wife has admitted to committing adultery before filing in affidavits to this Court and in filings with the Special Referee. In fact, the adultery is ongoing. As such, Wife is barred from receiving any form of alimony or any other financial support from Husband including (without limitation) suit money. Moreover, this action has unnecessarily and unreasonably prolonged and protracted the collateral divorce action and has effectively barred Husband from seeking redress as to several other financial and child related issues as contemplated by the Temporary Order filed. Therefore, any award of suit money or order requiring cost-sharing as set forth above would be unreasonable and inappropriate.

Conclusion

For these reasons, the Court should deny Wife's motion and reject any attempts to require Husband to pay the fees and costs necessary for Wife to carry her burden of proof.

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July 12, 2024

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

Justin M. McGee,

Plaintiff,

vs.

Lindsay F. McGee,

Defendant.

Civil Action No. 2022-DR-10-3072
Appellate Case No. 2023-001376

Husband's Memorandum in Opposition to Appointment of a Special Referee and Cost-Sharing

(Regarding Wife's Motion to Suppress)

In its Order from Fifth Status Conference, the Court invited Respondent Justin McGee ("Husband") to raise objections about the appointment of a special referee to review the videos from the Camduck and the Court's suggestion that it was contemplating requiring cost sharing of that discovery.[1] For the reasons set forth below, although Husband agrees with the Court that a production and review of the Camduck videos is required by the Court of Appeals' June 10, 2024 Order (the "Second Certification Order"), Husband does not believe the Court has the authority to appoint a special referee. If it does, it lacks the authority to require Husband to pay the cost of that discovery to Husband, whether presently or later through allocation in the divorce proceedings. For these reasons, Husband asks the Court to reconsider these provisions of its Order from Fifth Status Conference.

Argument

1. Petitioner Lindsay F. McGee ("Wife") brings this action under the Homeland Security Act, S.C. Code Ann. 17-30-10 to -145 (the "Act").

[1] Husband files this Memorandum subject to his jurisdictional and related objections detailed below and as set forth in his December 20, 2023 filing, which are incorporated by reference.

2. The Court of Appeals first certified discovery and reporting on certain issues to this Court back in December. Six months later, the Court of Appeals issued its Second Certification Order. The Court's Order from Fifth Status Conference properly interprets that order to require review of the Camduck videos. Husband disputes, however, the method the Court may use to conduct that discovery and who must pay for that discovery.

A. The Court has no authority to refer this discovery matter to a special referee.

3. As with the first certification order, the Second Certification Order includes a narrow jurisdictional grant to this Court. It anticipates proceeding under the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure—both of which were referenced in different orders from the Court of Appeals in this litigation. The Second Certification Order is not itself an independent grant of authority exceeding that authority under state law or the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure.

4. The South Carolina Appellate Court Rules have no provisions related to discovery or appointment of special referees. By contrast, the South Carolina Rules of Civil Procedure provide for discovery under Rule 26, SCRCP, and for the appointment of special referees under Rule 53, SCRCP.

5. Our Supreme Court has expressly enjoined the use of special referees for discovery matters, however. *See Administrative Order*, No. 2021-06-03-02 (S.C. Sup. Ct. June 3, 2021), *available at* https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2021-06-03-02. This is because Rule 53, SCRCP, unlike Fed. R. Civ. P. 53, has no provision for the appointment of special referees who may address discreet issues and report back to the

appointing judge. Instead, Rule 53, SCRCP allows only the reference of "causes of action," and later the entry of judgment. *Id*. Thus, the Court lacks the authority to appoint a special referee.[2]

B. The Court cannot, and should not, require cost sharing.

6. Just as the federal and state rules of civil procedure diverge on the ability to appoint a special referee for discovery purposes, the federal and state rules of civil procedure have different provisions related to cost sharing in discovery. In 2015, federal Rule 26 was amended to specifically allow courts to "specifying terms, including time and place *or the allocation of expenses*, for the disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(B) (emphasis added). The Committee Notes on the 2015 Amendment was quick to explain that the 2015 amendment "does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding." Fed. R. Civ. P. 26, 2015 Comm. Not.

7. South Carolina's rules were not amended in 2015, however. Rule 26(c), SCRCP has no corollary provision allowing the Court to issue a protective order requiring Husband to share in the costs.

8. Nor should it, even if it had the authority. The discovery ordered by the Court of Appeals is of videos that are exclusively in Wife's possession. Husband has never seen them. He has never tried to use them as evidence. As is customary, the party who holds the records

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[2] If the cumulative time of the Camduck videos provided by Petitioner Lindsay McGee ("Wife") are accurate—and Husband disputes this just based on the logic of what even a 128 GB SD card would hold—it is certainly understandable why the Court would want to outsource the review. The Court, like Husband, cannot just take Wife's word for what is on the videos, especially in this contentious of litigation. Unfortunately, however, this nebulous original jurisdiction of the Court of Appeals for litigation under the Act provides little guidance for procedural issues. The lead authority relied on by the Court of Appeals for these proceedings is the Rules of Civil Procedure. And those rules do not permit reference to a special master.

subject to discovery is responsible for the cost of that discovery. This is especially true where, as here, those records are necessary for Wife to carry her burden of proof on her own claim.

9. It would be inequitable to require Husband to pay for his own defense and then also finance Wife's claims. As set forth in his affidavit attached as **Exhibit 1**, Husband has no present ability to pay for Wife's litigation costs, especially in light of all the other costs he is unilaterally covering.

10. That the collateral proceedings involve divorce is irrelevant. The present action is one under the Act. The proceeding is purportedly within the original jurisdiction of the Court of Appeals—not the family court. The proceeding is its own action, and not within the purview of the family court. Although the Court originally sits as a family court judge, the statute under which the Court of Appeals has certified this case provides only for the Court to act as a special referee vested with the authority provided by the appointing court. It may only exercise the power held by the appointing court which has been provided by the Second Certification Order. that authority is limited by the certification statute, which only allows "for the appointment of referees to take testimony and report thereon, under such instructions as may be prescribed by the court, in any cases arising in the Court where issues of fact shall arise." S.C. Code Ann. § 14-8-280. This authority does not include any authority to apportion costs as would be permitted in traditional family court litigation.

C. Circumventing the lack of authority to apportion discovery costs under Rule 26 with the Family Court's statutory authority to allocate suit money is impermissible considering Wife's adultery and the financial circumstances of the parties.

11. An analysis of South Carolina's treatment of *pendente lite* fee and costs claims is set forth in *Anderson v. Tolbert*, 322 S.C. 543, 548, 473 S.E.2d 456 (Ct. App. 1996):

> The appellate courts of this state have not been careful to separate the question of entitlement to attorney fees from the question of

> determining the appropriateness of the amount of the award. However, S.C. Code Ann. § 20-3-120 (1985) makes it clear that in order for a spouse to be entitled to suit money, the claim must be "well founded." The burden of proving that a claim is well founded is on the party seeking suit money. [citations omitted] Although no case sets forth a clear test for when a claim for attorney fees should be deemed well founded, several cases are demonstrative of how the appellate courts of this state have dealt with that determination. In *Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977), our Supreme Court determined the wife's claim for attorney fees was well founded when requiring her to pay her attorney would have decreased her standard of living and the husband had greater means than she to pay the fees. Likewise, in *Lowe v. Lowe*, 256 S.C. 243, 247, 182 S.E.2d 75, 77 (1971), the Court found the wife's claim well founded, particularly in light of the disparity between the parties' financial circumstances. The Court stated "it was inferable [the wife] could pay her attorney only at the expense of decreasing her standard of living at least temporarily." Id.

Anderson v. Tolbert, 322 S.C. 543, 547, 473 S.E.2d 456, 458 (Ct. App. 1996).

12. An award of suit money is a form of spousal support in that legal services are as necessary an element of support as food and lodging. *See* Homer H. Clark, Jr., The Law of Domestic Relations In The United States § 17.2 (2d ed.1987) (cited in *Anderson v. Tolbert*, 322 S.C. 543, 548, 473 S.E.2d 456 (Ct. App. 1996)).

13. "The court, from time to time after considering the financial resources ***and marital fault*** of both parties, may order one party to pay a reasonable amount to the other for attorney fees, expert fees, investigation fees, costs, and suit money incurred in maintaining an action for divorce from the bonds of matrimony, as well as in actions for separate maintenance and support, including sums for services rendered and costs incurred before the commencement of the proceeding and after entry of judgment, *pendente lite* and permanently." S.C. Code § 20-3-130(H) (emphasis added).

14. An award of suit money is not permissible where the recipient spouse is statutorily barred from receiving spousal support. "No alimony may be awarded a spouse who

commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance pay alimony and child support or of a permanent order approving a property division or marital settlement agreement between the parties." S.C. Code Ann. Section 20-3-130(A).

15. Here, Wife has admitted to committing adultery prior to the date of filing, in affidavits to the Court of Appeals, and in filings with this Court, and in an ongoing nature ever since. Therefore, Wife is barred from receiving temporary support or alimony, including (without limitation) suit money, which is a form of spousal support.

16. Also, the financial circumstances of the parties are not so disparate that an award would be appropriate. The parties have virtually the same earning abilities and Wife, unlike Husband, had no impediment to earning income during the pendency of this action.

17. The Court's proposal is merely an advance of the marital estate disguised as discovery cost-sharing—Wife is not entitled to an advance.

18. Because discovery cost-sharing is not permitted and Wife is barred from receiving suit money, the only remaining possible option for requiring Husband to pay a portion of the cost for the special referee would be by giving Wife an advance on equitable division, but Wife is not entitled to an advance.

Conclusion

For the reasons set forth above, the Court should reconsider the portions of its Order from Fifth Status Conference appointing a special referee and requiring Husband to share the costs of that special referee.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *<u>/s/ Matthew A. Abee</u>*

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Columbia, South Carolina
June 26, 2024

Exhibit 1

Justin McGee Affidavit in Opposition to Discovery Cost Sharing

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE FAMILY COURT FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2022-DR-10-3072
JUSTIN MCGEE, Plaintiff, v. LINDSAY FOREBACK MCGEE, Defendant.	**Affidavit of Justin McGee in Opposition to Discovery Cost Sharing**

PERSONALLY appeared before me, Justin McGee, who, being first duly sworn, deposes and states as follows:

1. I am the Plaintiff in this action, over 18 years old, and reside in Charleston County, South Carolina.

2. This affidavit is provided to oppose the possibility of sharing costs related to discovery of evidence in Lindsay's possession and needed to support Lindsay's claims. Not only would it be inequitable for me to have to share these costs, but I do not have the present ability to pay those costs, especially if they are in addition to the other expenses I am covering for Lindsay.

3. Lindsay and I have similar earning potential. We graduated law school together and had relatively the same grades. We passed the bar at the same time and have both been working primarily in family law.

4. Despite Lindsay's ability to earn, she has not employed her law degree to her benefit. I believe, unfortunately, Lindsay lacks a certain drive for work that is required to earn an income as an Attorney. For example, she was fired from her first job as a lawyer. She started working for McGee Law Firm (the "Firm") after that, but the highest gross income she billed for the Firm in the last 10 years was $30,760 (in 2020). She appeared in 23 cases, total, in Charleston County during the thirteen-year period from 2009 to the date of filing in 2022, and several of those were cases that I was lead counsel and several more were pro bono cases. After being employed for merely seven months, Lindsay quit her job with NCGS, Inc. in July 2022 a month after we

purchased 664 McCutchen Street. . She did not work for the following 22 months (until May 2024 according to her affidavit signed June 25, 2024).

5. Lindsay can earn a substantial income. She bills at a $350.00 hourly rate. If she bills merely 30 hours per week for 48 weeks per year, her gross receivables would be $504,000.00. Rather than realizing her potential and earning the income she is capable of making, she has, instead, lived off of and relied upon funds taken from the marital estate.

6. Without my consent, Lindsay withdrew the cash value of her marital New York Life Insurance policy in December 2022, after the date of filing. She had previously proposed doing so in November 2022 and I objected. She then withdrew the funds without my knowledge, in the approximate amount of **$47,000.00**. I did not find this out until months later.

7. Lindsay also took the following liquid cash sums, totaling approximately **$34,439.88**, from the marital estate:

a. April 5, 2023: 2022 tax refund from SCDOR of $3,417.00;

b. April 5, 2023: 2022 tax refund from I.R.S. of $6,451.98;

c. March 3, 2023: 2021 tax refund from I.R.S. of $3,008.00;

d. April 12, 2023: 2022 tax refund from SCDOR in our oldest son's name of $769.00;

e. April 12, 2023: 2022 tax refund from I.R.S. in our oldest son's name of $1,561.00;

f. November 7, 2022: payment to AMEX from the Firm operating account of $618.00;

g. December 6, 2022: payment to AMEX from the Firm operating account of $4,973.06;

h. January 4, 2023: payment to AMEX from the Firm operating account of $641.84;

i. October 18, 2022: bank transfer of $1,500.00;

j. October 26, 2022: bank transfer of $1,500.00; and

k. She had approximately $10,000.00 in cash in her possession as of the date of filing.

8. I paid the following sums, totaling approximately **$43,930.00**, for Lindsay's benefit after the date of filing (and her adultery) with nonmarital funds:

a. monthly payments totaling approximately $8,277.00 on her whole life insurance policy (the same policy she withdrew the cash value of in December 2022);
b. the health insurance policy covering Lindsay was paid from the law firm operating account in the approximate amount of $27,471.00;[1]
c. monthly payments of $780.00 for her Lexus of in the approximate total amount of $3,120.00;
d. the car insurance covering her Lexus in the approximate amount of $3,862.00; and
e. $1,200.00 in direct uncovered medical expenses.

9. Lindsay also used $5,000.00 of marital funds to pay legal fees for this case.

10. The sums above indicate that Lindsay has taken and/or received the benefit of approximately **$130,369.88** from the marital estate after the date of filing.

11. I have also paid the following expenses (totaling more than **$51,000.00**) for the benefit of our children during the twenty-one months this case has been pending without contribution from Lindsay:

a. no less than $3,850.00 on extracurricular fees, equipment, and educational opportunities for the children;
b. approximately $7,716.00 for childcare at St. James Episcopal Church;
c. no less than $5,000.00 on children's clothing;
d. no less than $22,500.00 to O'Quinn for childcare;
e. no less than $5,241.00 on Kaleidoscope afterschool childcare;
f. no less than $2,340.00 for groceries, toys, books, bunkbeds, and a trampoline for the kids at her house;
g. no less than $3,470.00 in therapy expenses for the children;
h. no less than $1,200.00 in uncovered medical expenses for the children;

[1] This policy covered the entire family.

i. in addition to all of the other costs incident to having the children an equal amount of the time.

12. Lindsay has refused to reimburse me for a portion of the child-related expenses above as required by the Temporary Order, including (without limitation) therapy costs, medical expenses, field trips, and O'Quinn. She currently owes me more than $12,000.00 in unpaid expense reimbursements; however, I have been unable to enforce the Temporary Order due to the stay.

13. I also paid approximately $1,878.00 in payments and costs related to our marital camper after the date of filing with nonmarital funds. Lindsay did not make the $207.00 monthly payments on the camper while my law license was suspended and I was unable to earn an income. As a result, the camper was repossessed, subsequently sold at auction, and we now owe $4,428.24 in a deficiency balance.

14. Lindsay also spent no less than $4,000.00 of marital funds forming two new LLCs, renting an office, marketing, and obtaining business cards for a new law firm. Upon information and belief, she is no longer working at that firm. Instead, she is bartending at a local college bar on King Street.

15. I, however, was forced to utilize nonmarital funds to maintain and pay for the expenses and overhead of the Firm (in excess of $30,000.00) during my suspension and after until the Firm was closed. These expenses are and were both a marital debt and Lindsay's responsibly as a member of the Firm and capital contribution. Lindsay has not contributed anything to these expenses, and they are ongoing as I continue to pay monthly storage fees and Microsoft SharePoint and Exchange fees. (I am required to continue paying these joint expenses based on the orders issued in this case at Lindsay's request.)

16. Moreover, I have incurred an exorbitant amount of fees and costs associated with my defense against Lindsay's everchanging claims, allegations, and relief sought. As an estimate and rough total, I have incurred hundreds of thousands of dollars defending against her allegations of drug and substance abuse, allegations in her original Motion to Suppress that were either disproven outright or subsequently abandoned by Lindsay, and other unsubstantiated claims of malfeasance

and misconduct on my part. That amount includes, among other expenses, the fees and costs associated with my attorneys, private investigators, the Guardian *ad Litem*, and experts.

17. Notably, I incurred the costs of and have submitted to numerous drug and alcohol tests, for over 18 months, and have not failed a single test. I also participated in two substance abuse evaluations and paid those costs. Based upon the foregoing, I am seeking an award of fees and costs and respectfully request and urge the Court not to require me to pay additional costs and expenses.

18. I believe the costs associated with these discovery issues should be the sole responsibility of Lindsay as the movant. As I have detailed before, I have not been able to afford to pay for my own experts to refute the incorrect claims made by Lindsay's purported experts. I also owe fees and costs to my attorneys and the expert I previously hired. Any obligation to share in fees and/or costs associated with Lindsay's claims would further frustrate and limit my attempts to be able to pay for my own defense of this action and the related civil action currently pending in Federal Court. Furthermore, I have been restrained by the family court from encumbering assets, so I have no ability to obtain a secured line of credit to afford these amounts.

19. Although we are both licensed attorneys, it appears that I am the only one capable of providing ongoing financial support to our children. Lindsay has paid no child support during the pendency of this action and I have a claim to retroactive support back to the date of filing and that amount is also significant. Lindsay has not shown she is capable of financially supporting herself, much less our children. Despite having no impediment to working or earning an income as an attorney, Lindsay's home is on the brink of foreclosure and in massive disrepair, her car was repossessed, and she has not contributed fairly to the expenses of our children. Our children need me to pay for their ongoing expenses, including our middle son's uncovered medical expenses. HMM is facing some serious medical issues and the cost of treatment and medication is expected to be high. I am paying those costs to provide whatever HMM needs, but cannot do that if I am required to pay approximately $125,000.00 as ordered by the Honorable Spiros Ferderigos.

20. Although identified as cost sharing, the potential for splitting the costs of discovering records in Lindsay's possession presumably is an advance on the martial estate. Lindsay is not entitled to such an advance. My house was valued at $1,650,000.00 on May 9, 2022 (within days of our separation). The house needed approximately $30,000.00 to conform to the appraisal and the mortgage indebtedness was approximately $553,000.00, leaving $1,067,000.00 in equity. I contributed $492,000.00 of nonmarital funds when we purchased this property and have a special equity interest equal to that amount, leaving $575,000.00 for the value of the marital interest (without factoring deferred maintenance costs or any proportionate increase in value due to my nonmarital contribution). Lindsay's home has no less than $200,000.00 in equity. If the balance of equity in the real properties is equalized, the remaining marital interest to be divided is $375,000.00.

21. I have a significant amount of marital debt in my name or for which I am responsible, including a $156,000.00 EIDL SBA loan. Lindsay does not have such debts but rather has significantly more value in assets such as life insurance, jewelry, and her Lexus vehicle. Lindsay also received advances in the estimated total of $130,369.88 as set forth herein. Moreover, I paid off all of Lindsay's student loans (an amount I believe exceeds $200,000.00) during the marriage.

22. Simply put, when the equitable distribution of assets and debts is evaluated comprehensively, Lindsay is not and should not be entitled to any further advance from the marital estate under almost any scenario. Awarding her with an advance would be inequitable because I would have no means of recovering the sum advanced after trial because she does not have the assets or ability to repay it.

23. Lastly, because of this case and Lindsay's action, I have been forced to borrow money and take independent loans from family to ensure that our children, Lindsay, and myself are cared for during the pendency of this action. That debt totals more than $200,000.00[3] and those funds were used, in large part, to support the family and pay marital expenses.

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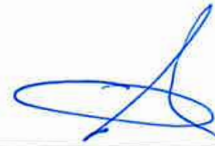
[3] $175,000.00 of that is accumulating interest in excess of $1,000.00 on the principal every month.

24. In conclusion, I cannot continue to regularly incur more expenses than I earn. If I am ordered to do so, I may have to investigate bankruptcy, which could complicate and delay this matter to an even greater degree. I cannot afford to pay $125,000.00 to assist Lindsay in developing evidence for her case. As I've explained, I do not believe Lindsay is entitled to anything further from the marital estate.

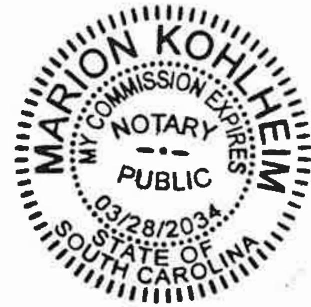
FURTHER AFFIANT SAYETH NAUGHT!



JUSTIN McGEE

SWORN TO before me this
26th day of June 2023

NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 03/28/2034



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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 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 counsel in this action with a copy of the document(s) set forth below by email under *In re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules*, Appellate Case No. 2020-000447 (April 24, 2024):

Document(s): **Respondent's Return to Petitioner's Notice of Motion and Motion for Expedited Hearing to Clarify this Court's Prior Order Exhibit 1, Memorandum in Opposition**

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