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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 the Court’s Order on Petitioner’s Motion to Clarify**

As directed by the Court in its July 22, 2024 Order, Respondent Justin McGee (“Husband”) files this return opposing the Notice of Motion and Motion for Expedited Hearing to Clarify this Court’s Prior Order (the “Motion to Clarify”) filed by Petitioner Lindsay F. McGee (“Wife”). In response to the Court’s inquiry, Husband argues below that:

- I. This Court would be unable to rule on, and Husband would be unable to properly defend, Wife’s request to suppress the entire complaint in the divorce and custody action, or even suppress “[a]ll allegations in the complaint and supporting affidavits related to [Wife’s] parenting,” without viewing the recordings Wife alleges were improperly obtained.
- II. Litigants routinely review discovery, including copies of communications, within the bounds of Rule 26, SCRPC that is not otherwise admissible, so no impediments to standard discovery of the recordings exist in this case.

For these reasons, the Court should dismiss Wife’s Amended Motion to Suppress should she refuse to present the evidence necessary to carry 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 of June 15, 2023. Because of this proceeding, that hearing has never been held, and the children's issues have not been addressed in any way. The parties' three young children remain in legal limbo with no ability for redress for nearly a year, even in the face of an affidavit filed with this Court by the Guardian *ad Litem* on July 2, 2024, imploring the Court to lift the stay and allow the Family Court to address the children's needs.

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 -14; the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §§ 2510–23 (“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. After Husband moved to dismiss this proceeding, the Court certified the proceeding to the Honorable Spiros Ferderigos, Family Court Judge (“Special Referee”). Following roughly five months of discovery, the Special Referee

issued his Report and Proposed findings dated May 3, 2024 (the “Report”). In part, that 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).) Wife has filed no exceptions to the Report.

After this Court again certified the case to the Special Referee, the Special Referee held a status conference. Following arguments from the parties’ counsel, the Court issued its Order from Fifth Status Conference. That Order 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.<sup>1</sup> The week following the hearing, Wife filed her Motion to Clarify.

After Husband filed his return in opposition, this Court issued its order requiring the parties to brief the issues set forth above. Husband now files his return in compliance with that order, which builds on the arguments Husband has already raised in opposition to Wife’s improperly filed Motion to Clarify.<sup>2</sup>

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<sup>1</sup> 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 no way to dispute Wife’s claims about the number and length of the videos.

<sup>2</sup> 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.

## Argument

Under the Homeland Security Act, Wife must establish that Husband unlawfully intercepted her *audio* communications and that she is entitled to suppression.<sup>3</sup> Inherent in that burden is establishing *what* Wife seeks to suppress. Here, Wife has asked for suppression of extensive evidence in the parties' divorce and custody proceedings. Ignoring for the time being that Wife has admitted her adultery in affidavits and that her drug use has been documented by family-court-ordered drug tests, Wife cannot establish the suppression of any "evidence derived therefrom" without actually resorting to the contents of the recordings. She is resisting turning over those recordings at every turn, despite bearing the burden of proof and there being no prohibition in the applicable statutes for its production of the recordings in the scope of civil discovery. This position is puzzling, which is likely why Wife only files a two-page return to the Court's Order.

For the reasons set forth below, therefore, Husband asks that the Court dismiss Wife's Amended Motion to Suppress.

### **I. Wife cannot carry her burden to the drastic relief she seeks without a review of the recordings she claims were illegally recorded.**

The Court's July 22, 2024 order asks, "how this court can rule on Petitioner's motion to suppress when the contents of the allegedly intercepted communications are unknown." Husband's response: It cannot, especially not for the drastic relief Wife seeks.

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<sup>3</sup> Wife also must prove willfulness. *See In re Pharmatruk, Inc.*, 329 F.3d 9, 23 (1st Cir. 2003) ("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."). The Special Referee's Report refutes this point, and Wife has failed to except from the Special Referee's Report. (Report at 3, ¶¶ I(k)–(l).)

As the Court correctly points out in its July 22<sup>nd</sup> Order, Wife asks this Court to suppress “the evidenced derived” from the alleged illegally obtained recordings. Before the Special Referee, Wife asked that this Court go much farther, making her suppression request even more drastic. In her discovery ordered by the Special Referee, Wife claimed to seek suppression of:

- a. Plaintiff's Complaint.
- b. All affidavits and exhibits submitted by Plaintiff.
- c. All pleadings, discovery and affidavits submitted in the Keys v. Keys matter.
- d. All affidavits, reports and testimony by John Clayton [Husband's private investigator].
- ...
- a. All allegations in the complaint and supporting affidavits related to adultery.
- b. All allegations in the complaint and supporting affidavits related to drug use.
- c. All allegations in the complaint and supporting affidavits related to Defendant's parenting.
- d. All allegations contained in the affidavits submitted by Plaintiff.
- e. All allegations contained in the affidavits, reports and testimony by John Clayton.

(**Exhibit 1**, Excerpts from Wife's Responses to Husband's First Set of Interrogatories No. 2–3.)<sup>4</sup>

Despite such a broad and drastic remedy, Wife provides no credible evidence supporting a suppression of Husband's entire Complaint in the divorce and custody action or the other

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<sup>4</sup> Husband provides these responses from the Respondent's Appendix filed with the Special Referee on April 5, 2024.

“evidenced derived therefrom” that she seeks to suppress.<sup>5</sup> As a result, Wife cannot establish entitlement to this relief without actually resorting to the contents of the recordings. She has already relied on the contents of those recordings previously—it would be improper for Wife to be able to unilaterally decide which contents may be relevant to this Court’s analysis. Thus, dismissal of the Amended Motion to Suppress is warranted.

Dismissing the Amended Motion to Suppress would not leave Wife without redress. She has separately filed a Complaint seeking damages from Husband. That action has been removed to the United States District Court for the District of South Carolina. In that action, Wife has already served Requests to Admit and Requests for Production and has served subpoenas on four different third parties. The parties have also discussed depositions and wrestled with privilege issues related to many of the devices that were at issue in this proceeding. Wife, therefore, appears to have chosen her horse—she seeks compensatory and statutory damages, attorneys’ fees, costs, and even punitive damages from Husband. Granting her the drastic remedy of suppressing the “entire complaint” or “all evidence of her parenting” in this action based on a partial record and utilizing Wife’s just-trust-me standard of review would be improper.

Thus, the Court should reject Wife’s arguments, dismiss this action, and allow the parties to litigate the merits of their claims—the divorce, custody, and civil claims—in courts that more

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<sup>5</sup> It also makes no sense that Wife would ask for suppression of all evidence of her adultery when she has admitted that adultery in her own affidavit to this Court and others. (Wife’s Aff. ¶ 12, Aug. 29, 2023 (“I committed adultery with Dan Fowler (D.F.) on September 4, 2022, and was almost immediately confronted by Justin.”).) Wife filed this affidavit with this Court in support of her original Motion to Suppress on August 30, 2023. In a similar vein, the record has several examples of Wife’s drug use, including her asking her paramour whether Molly (ecstasy) would appear on a drug test and responding “too late” when he failed to timely answer. (See **Exhibit 2**, Wife’s Text Message to Paramour, May 6, 2023.) Wife later directed her paramour to delete this evidence.

routinely handle these claims and can afford the parties the discovery and motions practice that are afforded to all other litigants.

## **II. Wife presents no valid basis for why the communications cannot be reviewed.**

The Court’s July 22, 2024 order asks about “the feasibility of the parties reviewing copies of the communications themselves and informing the family court what, if any, of the recordings contain information which could be considered intercepted communication pursuant to the [Homeland Security Act].” Husband’s response: Nothing in the statutes relied on by Wife preclude the parties from engaging in traditional discovery related to the recordings—parties routinely review records that are not otherwise admissible in civil proceedings as a part of the broad discovery permitted by Rule 26, SCRPC.

Wife has argued elsewhere that her disclosure of the contents of the recordings is itself a violation of the Homeland Security Act and the Federal Act. Wife appears to have abandoned this argument by attaching “a Fifth Supplemental Affidavit by Mr. Abrams [Wife’s purported expert] summarizing some of the contents of the intercepted communications based upon his review of these communications.” (Wife’s Return at 2, August 9, 2024.)<sup>6</sup> Wife even attaches an informal transcript of the allegedly illegally recorded conversation. If the recording was illegally obtained—and it was not—then this is not just Wife abandoning an argument, but her express waiver of the claim that she cannot provide the contents of the recordings during discovery.

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<sup>6</sup> In her most recent filing with this Court, Wife files another 27 pages of exhibits, some of which contain even more new material not previously disclosed. Husband objects to Wife continuing to supplement the record with new affidavits and materials in a proceeding that is now more than a year old. Of her entire filing, she presents less than two pages of argument from her counsel as compared to 13 pages of argument from her purported expert, Steven Abrams. Mr. Abrams is a member of the South Carolina Bar. It is hard to tell from this filing, however, whether Mr. Abrams is testifying as an expert or advocating as an attorney given the length of his filing as compared to that of Wife’s counsel and the language used throughout the affidavit.

As explained in Husband’s prior return, Wife’s argument is without merit anyways. (*See* Husband’s Return at 6, July 12, 2024.) Given that at least one third-party has already seen—and summarized—the contents of the recordings, there is no feasibility concern with the production of these recordings for review through discovery as would be afforded to any other litigant under Rule 26, SCRCF. What is not feasible is to follow Wife’s suggestion of suppressing everything and somehow shift the burden to Husband to prove a negative—that he had independent knowledge from the contents of recordings that he has never seen and would never see if the Court grants Wife’s drastic suppression remedy. (Wife’s Return at 2.) Wife should not be allowed to benefit from her purported experts’ review of the recordings to later hold Husband hostage by the contents of those recordings. In a similar vein, Wife should not be allowed to make allegations about the contents of those recordings to further her claims without allowing the opposing party the right to confront that evidence. This is basic due process, and also implicates a host of evidentiary concerns. *See, e.g.*, Rule 106, SCRE (Rule of Completeness); Rule 802, SCRE (Hearsay); Rule 1002, SCRE (Best Evidence Rule). These evidentiary rules apply in these proceedings. *See* S.C. Code Ann. § 17-30-110 (“Unless otherwise provided by federal law or Rules of Court, all South Carolina Rules of Evidence apply.”).

### **Conclusion**

For the reasons set forth above, the Court should dismiss Wife’s Amended Motion to Suppress so the parties can get through their divorce and custody action, and so the Federal Court can address issues related to Wife’s allegations of illegal wiretapping.

**[Signature on following page.]**

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