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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 Justin McGee's Petition for Rehearing and Rehearing *En Banc*

Respondent Justin McGee ("Husband") petitions, under Rules 221(a) and 240, SCACR, for rehearing and rehearing *en banc* of this Court's August 20, 2025 unpublished Order (the "Suppression Order"). The Court overlooked or misapprehended several important points:

- Jurisdictional: Section 17-30-110 on which this Court bases its Suppression Order applies only in criminal actions, so the Court lacks subject matter jurisdiction, and nothing gives this Court original jurisdiction to entertain such proceedings. The Court also lacks personal jurisdiction, having issued no process in this proceeding. [1]
- Factual and Legal: The Court misapprehended the law and record, and its factual findings and legal conclusions are not supported by the admissible evidence presented by Petitioner Lindsay F. McGee ("Wife"). The Court overlooked Husband's arguments as to the lack of intent, lack of contemporaneous recordings, and his defenses to the

[1] As it has continuously done to date, Husband files this Petition 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.

suppression. It has also misapprehended the record by stating that Wife "provided" communications to the Court from the Camduck Device—she has refused to disclose or file those alleged recordings and provides no admissible evidence of their contents.

- Procedural: The Court, including the Honorable Spiros Ferderigos, Family Court Judge ("Special Referee"), prohibited depositions, an evidentiary hearing, and specific discovery sought, leaving Husband without the ability to contest the evidence submitted against him. Indeed, the chief evidence on which the Court's Suppression Order is based—the "hundreds of hours' worth of recordings"—has not been produced to Husband or this Court for review. This summary procedure deprived Husband of due process, prevented the Court from having a complete record on which to grant the broad and drastic remedy of suppression, prevented Husband from seeking a jury trial, and left Husband without a meaningful ability to oppose Wife's Amended Motion to Suppress. The Court has also overlooked the import of Wife's failure to file exceptions and objections to the Special Referee's Report, and has not addressed Husband's exceptions and objections.

Additionally, because the Court has simultaneously applied the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure in these proceedings, Husband alternatively moves, under Rule 59, SCRCP, to alter and amend its Order and for reconsideration. The Court has "misunderstood, failed to fully consider, or perhaps failed to rule on," the same arguments or issues set forth above. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

As a result, the Court should grant rehearing, rehearing *en banc*, or reconsideration. It should vacate its Suppression Order, lift its two-year stay of the divorce and custody action, and dismiss these proceedings. Husband alternatively moves that the Court to stay its Order pending further appeal and/or certiorari. *See* Rule 241(c)–(d), SCACR.

Standard

A. Petition for Rehearing or Rehearing En Banc

A petition for rehearing "aid[s] the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Where, as here, the Court overlooks the record or applicable law or misapprehends arguments, a petition for rehearing is appropriate. *See, e.g.*, *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492 n.4, 763 S.E.2d 19, 21 n.4 (2014); *Kennedy v. S.C. Ret. Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); Rule 221(a), SCACR.

B. Motion to Reconsider

A motion under Rule 59(e) has long been viewed as a "motion for reconsideration." *Elam v. S.C. Dep't of Tran*sp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A party may file such a motion "when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id*. at, 24, 602 S.E.2d at 780. A party can ask the Court to reconsider its ruling, "even if it means rehashing all or part of an argument previously presented." *Id*. (citing *Arnold v. State*, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) ("The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits.")). After all, "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Elam*, 361 S.C. at 22, 602 S.E.2d at 779.

C. Motion to Stay

In other contexts, this Court may "stay proceedings in the [circuit] court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) (quoting 4A C.J.S. *Appeal & Error* § 662 at 494–95 (1957)) (alteration in original). This Court may "supersede an order of a circuit judge" when it is "made to appear to be necessary to prevent irreparable injury or a miscarriage of justice." *Andrews v. Sumter Com. & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E. 604, 606 (1910). In ruling on a motion for supersedeas, the "court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Issuance of a stay is often necessary when our courts confront novel issues. In *State v. Register*, the Supreme Court issued a writ of supersedeas because the trial court's order dealt with a novel issue. 308 S.C. 534, 536, 419 S.E.2d 771, 772 (1992). This standard was also used in *In the Matter of Decker* to determine whether to grant a stay of a civil contempt order. 322 S.C. 212, 214, 471 S.E.2d 459, 461 (1995).

No statutory or other procedure sets the standard or process for seeking a stay of an order from the "reviewing authority," so Husband applies this similar standard in seeking a stay of the Suppression Order as an alternative remedy pending further appellate proceedings.

Argument

Under S.C. Code Ann. §§ 17-30-10 *through* -145 ("the Homeland Security Act"), Wife must establish that Husband unlawfully intercepted her *audio* communications and that she is entitled to suppression.[2] The Family Court or Circuit Court, not this Court, should have entertained Wife's claims through plenary proceedings, not through the summary procedure employed by this Court in some sort of quasi-original proceeding in which it lacks jurisdiction. Because of the lack of jurisdiction and the improper summary proceedings employed here, the Court has misapprehended or overlooked arguments Husband made and the lack of evidence presented by Wife. Thus, the Court should grant Husband's Petition.

I. The Court has misapprehended its subject matter and personal jurisdiction and overlooked Husband's jurisdictional arguments.

A. The Court lacks subject matter jurisdiction.

The Court misapprehended Section 17-30-110 by concluding it has original jurisdiction to entertain these proceedings. (Suppression Order at 1 n.1.) Found in Title 17, "Criminal Procedures," Section 17-30-110 is not intended to apply to anything but criminal actions and is not a grant of jurisdiction to this Court to entertain civil actions as original proceedings.

South Carolina courts must assure themselves of jurisdiction before entertaining the merits of any action. *See Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) ("The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental."); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (holding a "court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits."). Under the South Carolina Constitution, this Court "shall have such

[2] Wife made several other claims under 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. She has abandoned those claims, including the very claims that initiated these proceedings. Moreover, as the Court correctly concluded before, it has no jurisdiction or authority to entertain claims under anything but the Homeland Security Act in response to a Motion to Suppress. *See Cronin v. Cronin*, Appellate Case No. 2023-000959, Order at 2 n.1 (Sept. 6, 2023).

jurisdiction as the General Assembly shall prescribe by general law." S.C. Const. art. V, § 9. No mention is made in this section about this Court's jurisdiction to entertain original proceedings or issue original writs, which stands in contrast to the constitutional provision establishing our Supreme Court. *Compare id.*, *with* S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."). General state law provides that the Court "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission." S.C. Code Ann. § 14-8-200(a). These authorities make no provision for the Court to entertain this action in its original jurisdiction.

Section 17-30-110 is not an independent grant of jurisdiction to this Court. That Section only allows this Court to review a motion to suppress wiretap evidence in the criminal context as evidenced by several key conditions of the statute:

- "Upon receiving the motion, the reviewing authority must notify the issuing judge who must transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization." S.C. Code Ann. § 17-30-110(A).
- "After reviewing the materials, the reviewing authority must first determine whether all materials otherwise discoverable under South Carolina law were made available to the aggrieved person." *Id.*
- If a majority of the reviewing authority "determine[s] that all necessary materials were made available, the reviewing authority must decide whether the

> order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter." *Id.*

Put another way, the Court may only entertain a Motion to Suppress after a judge of competent jurisdiction (1) receives an application from a qualified individual for an order authorizing or approving the interception of certain communications, and (2) issues an order authorizing or approving the interception of such communications. *See* S.C. Code Ann. §§ 17-30-70(A), -80(A)(1), -80(D). That cannot happen in the civil context. There is no "issuing judge" who has issued an "order of authorization." S.C. Code Ann. § 17-30-110(A). This is perhaps why the Homeland Security Act references civil liability elsewhere in the Act, but that Section 17-30-110 contains no such references. Even in its references to appellate review, Section 17-30-110 only guarantees *the State* a right to appeal orders of authorization or approval and orders granting a motion to suppress. *See* S.C. Code Ann. § 17-30-110(B) ("*The State* has the right to appeal an order granting a motion to suppress made under subsection (A)." (emphasis added)).

Thus, the Court should grant rehearing and dismiss based on its lack of subject matter jurisdiction. Husband incorporates by reference his Motion to dismiss filed September 8, 2023, and his December 20, 2023 Objections Husband filed with the Special Referee and continuously raised throughout the proceedings.

B. The Court lacks personal jurisdiction over Husband and has issued no process to him.

Two years ago, Wife filed her Motion to Suppress directly with this Court. She made no motion to the Family Court or any other trial court before starting this proceeding. Nor did she reference anything within the Homeland Security Act before the trial court in the first instance. Thus, this proceeding is not an appeal, but an original action in which the Court must acquire personal jurisdiction over Husband before proceeding. Wife, however, filed only a Motion with this Court. She presented no Summons and the Court has issued no process to Husband. As a result, the Court has overlooked Husband's challenges to the Court's process and jurisdiction over him. *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005) (holding plaintiff bears the burden of establishing personal jurisdiction).

II. The Court has misapprehended or overlooked several legal and factual issues Husband presented to the Special Referee and this Court.

A. The Court has misapprehended the applicable intent standard.

By concluding that Husband violated the Homeland Security Act through the videos allegedly found on the Camduck Device, the Court has either overlooked Husband's arguments about the intent required to establish a violation of the Homeland Security Act or misapprehended that standard.

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).[3] "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 v. City of Detroit*, No. 19-10853, 2019 WL 3943055, at *3 (E.D. Mich. Aug. 21, 2019) (quoting *DirecTV, Inc. v. Wallace*, 347 F. Supp. 2d 559, 565

[3] The Homeland Security Act parallels the Federal Act such that "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the 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).

(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, nor is an attempt to intercept actionable. *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.

The Court's Suppression Order does not address this crucial element of Wife's claim on which she has the burden of proof. The record reflects three key points that negate this element, which the Court overlooked. *First*, the Camduck device, did not capture or record audio when it was purchased as shown by the purchase records. (*See* Purchase Records, McGee(HSA)_2119–27.)[4] The Special Referee agreed. His Report states that, "[w]hen purchased, the sound function for the CAMDUCK charger was closed due to Amazon's policy." Wife's purported expert agrees: "McDougall, Self, Currence & McLeod have already proved beyond a shadow of a doubt that the vendor intentionally omitted information about the camera having audio to comply with Amazon's policies in the US." (Eighth Supp'l Bumgarner Aff. at 3, ¶ 7 (June 4, 2024).) *Second*, Husband

[4] Even one of the reviews with the purchase records states that "there is no sound" with the Camduck. *See* McGee(HSA)_02126. The same review states that if the device is unplugged and plugged back in, the device cannot be accessed remotely until it is reconfigured. *Id*.

did not place the Camduck Device in Wife's bedroom—she did so. (Wife's Supp'l Reply Aff. ¶ 4, Nov. 17, 2023.) There has been no evidence presented of an actual recording from any location other than the location where Wife admits she placed the device. If such a recording exists, Wife should have been made to produce it. *Third*, Husband has never seen, and does not possess, the subject recordings from the Camduck Device and Wife presents no evidence to show that he did. As a result, Husband could not have willfully intercepted Wife's audio communications through the Camduck Device.

The Court's reliance on Husband's testimony that he downloaded the CIXICM application does not change this result. Husband testified that he did not ever remotely access the Camduck Device. Even still, that Husband *could* have viewed video through that application does not a violation make because the Camduck could not have transmitted audio to that application. Wife presents no admissible evidence to the contrary and the Special Referee expressly declined to address the issue.

Wife concedes that the sound function of the App associated with the Camduck was turned off, which should be the end of the inquiry under the Homeland Security Act. As her purported expert explains, "this device had audio recording capabilities, *which had to be manually enabled by the user controlling the device*." (Bumgarner's Fifth Supp'l Aff. ¶ 39.) Stated another way, the Camduck's "microphone has to be manually enabled by the user configuring the camera for deployment." (Bumgarner Email, Jan. 8, 2024.)[5] And another: "All 3 of the Camduck cameras purchased by [Husband] had built-in internal microphones, *which are disabled when shipped from*

[5] The Camduck is not the only camera that did not have readily accessible audio. As Wife's purported expert John Bumgarner explained to Wife's counsel in January 2024, there "are at least 12 cameras that have the capability to record audio. Some of the purchases show that audio was included. Some of the vendors don't mention audio, because it's not enabled by default. It has to be turned on like the CAMDUCK did." (Bumgarner Email, Jan. 11, 2024.)

Amazon." (Bumgarner Sixth Supp'l Aff. ¶ 22.) This means "that special software is needed to activate audio recording on the Cam Duck." (Abrams Fifth Supp'l Aff. ¶ 7.)[6] Wife's purported experts assert the Camduck Management application allowed users to active the audio through "engineering mode," and that the CIXICM application (an alleged precursor to the Camduck app) "would have been used" to enable audio. (Bumgarner Seventh Supp'l Aff. ¶ 15.) Wife claims the CIXICM application was "rebranded as CAMDUCK management application" but ignores the fact that Husband did not install the rebranded application and that the original application did not have the capability of enabling engineering mode in 2022.[7] (*Id.* ¶ 12.) The Court has overlooked how Wife's purported experts refer to software applications that were updated for years after the relevant time period and have provided no evidence that the purported capabilities of these apps two years later existed during the time that Husband allegedly recorded Wife.

Wife has presented no evidence that Husband knew the Camduck was capable of capturing audio or ever activated the sound functionality on it. The Court overlooked Husband's argument that it should reject Mr. Bumgarner's speculative allegation that "[w]e know that the Respondent was ***most likely*** informed by LUOHE, as was McDougall Self Currence McLeod, about enabling audio on the camera." (Bumgarner Fifth Supp'l Aff. ¶ 28 (emphasis added).) There is no support for Mr. Bumgardner's knowledge about what LUOHE "likely" informed Husband. (*Id.*) This is especially true because Husband has never contacted LUOHE and was never informed that the Camduck even had audio capabilities. (Husband's Aff. ¶ 18, April 5, 2024.)

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[6] Wife improperly filed this affidavit and Bumgarner's Eighth Supplemental Affidavit *after* the Special Referee issued his Report.

[7] The Version History on the Camduck Release History website cited by Bumgarner shows that the Camduck app did not allow Engineering Mode to be enabled until May 26, 2024, demonstrating that neither the Camduck application nor its alleged precursor CIXICM had the ability to enable audio recording in 2022. (Bumgarner Seventh Supp'l Aff. ¶ 7.)

On this point, the Special Referee said it best: (1) "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," and (2) "there is no circumstantial evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK." (Report at 3, ¶¶ I(k)–(*l*).) Yet Wife failed to file exceptions to the Special Referee's Report on this points and the Court's Suppression Order overlooks them.

The Court's Suppression Order also sets a dangerous potential precedent. If anyone could violate the Homeland Security Act by using a device that merely has the ability to record audio, even though the individual does not actually access that audio or intend to intercept any audio, then a whole host of everyday activities could fall under the auspices of this statute and flood this Court with more motions to suppress, especially in the divorce context. For example, consider homeowners trying to sell their home that have a ring doorbell and an in-home security system. If they leave the house for a showing in which the buyer's agent and prospective buyers are walking around the house discussing the price they wish to offer, the homeowners have violated the Homeland Security Act by merely having the capability to log into their home security app to view the conversation, even if they never do so. Or consider any family using a wi-fi camera beside a baby's crib in which one spouse talks to a third party on speakerphone within earshot of the device. In that scenario, the spouse that was not a party to the phone call may have violated the Homeland Security Act even where that spouse does not access that communication or intend to intercept it. This cannot be the standard under the Homeland Security Act. It cannot impose civil and potential criminal penalties on the homeowners merely because of what they *could* have done. *See Carson*, 621 F. Supp. 3d at 618 (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).

The Court has overlooked Husband's consistent arguments in this regard and misapprehended the applicable intent element that Wife has failed to prove.

B. The Court has overlooked the contemporaneousness requirement imposed by the Homeland Security Act and this Court's own precedent.

Wife does not allege Husband acquired the audio contemporaneously with its transmission. *See Cronin v. Cronin*, Appellate Case No. 2023-000959, Order (Sept. 6, 2023);[8] *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."). The Special Referee expressly concluded that "there is no evidence that [Husband] contemporaneously intercepted or attempted to intercept any audio recording made by the Camduck," even if he was alleged to have the ability to do so. This lack of contemporaneousness is fatal to Wife's claims, and the Court overlooked this argument and the Special Referee's Report in this regard.

[8] Husband provided a binder of the orders under the Act to the Special Referee for ease of reference, including this unpublished case not previously available on C-Track but obtained from the Clerk of Court in light of Wife's repeated references to it in hearings before the Special Referee. C-Track only makes available 21 cases under the Homeland Security Act, and its orders are not otherwise published, creating a potential body of law not otherwise available for citation.

C. The Court has overlooked Husband's independent source and inevitable discovery defenses.

Courts have concluded that although illegal recordings cannot be used as evidence in a criminal prosecution, this prohibition does not mean that the underlying facts cannot be presented. *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920). If knowledge of these facts can be gained from an independent source, the facts can be proved through such independent evidence. *Id.* A similar concept exists under the Homeland Security Act. *See* S.C. Code Ann. § 17-30-65; *see also Resha v. United States*, 767 F.2d 285, 287–88 (6th Cir. 1985) (citing 18 U.S.C. § 2515 and discussing limitations of suppression under the Federal Wiretap Act). Likewise, courts have permitted illegally recorded conversations to be used as impeachment. *See Nash v. Byrd*, 298 S.C. 530, 535, 381 S.E.2d 913, 916 (Ct. App. 1989); *Culbertson v. Culbertson*, 143 F.3d 825, 827 (4th Cir. 1998) ("The district court is correct in its conclusion that courts recognize that an illegally taped conversation is admissible for impeachment."). Courts have also routinely applied the unclean hands doctrine in equitable proceedings, but the Court has also overlooked these defenses raised by Husband. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000).

Overlooking these defenses could have dangerous ramifications. For example, Husband has previously alleged that Wife was abusing drugs around the parties' three children. If, on remand, Wife were to provide the Family Court with a video of her doing drugs and claim it was captured by the Camduck, then is the Family Court really to ignore that evidence despite the potential harm to the children?[9] This is especially true where independent evidence in the form of court-ordered drug tests confirms that Wife was using illegal drugs and her own text messages confirm she took ecstasy—evidence she later directed her paramour to delete. (Exceptions and

[9] Husband has not been provided with the Camduck videos, so he has no idea what is on them. He gives these as potential examples in light of the Court's Suppression Order.

Objections, ¶ 23.) Another example: If Wife produces to the Family Court a video of her having sexual relations with her paramour, is the Family Court supposed to ignore that she voluntarily filed an affidavit with this Court stating she "committed adultery with Dan Fowler (D.F.) on September 4, 2022 . . . ."? (Wife's Aff. at 4, ¶ 12, Aug. 29, 2023.)[10] This type of evidence may appear to be suppressed in light of the Court's Order, yet the Court has not addressed Husband's defenses applicable to the extent of the suppression remedy imposed by the Court.

III. These proceedings have suffered from various procedural deficiencies that Husband has raised, but this Court has overlooked.

The summary proceedings employed by the Special Referee and this Court are fundamentally unjust. The inability to conduct complete discovery, take depositions, have any type of evidentiary hearing, and actually examine the evidence to be suppressed has deprived Husband of due process. It has also improperly abrogated his right to a jury trial on these claims and will have far-ranging impacts on the parties' divorce and custody action, and even possibly the civil litigation pending between them in federal court.[11] The Court has overlooked Husband's objections to these procedural shortcomings and should grant rehearing to correct them.

A. Despite Husband's requests and objections, he has not been allowed appropriate discovery or an evidentiary hearing.

Husband requested the ability to depose or examine Wife and her witnesses, and for an evidentiary hearing. (Exceptions and Objections ¶¶ 29–33.) The Special Referee and this Court have overlooked those requests. The Court should grant rehearing to correct that oversight.

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[10] This is especially true because Wife does not dispute that Husband retained a private investigator around June 15, 2022, who witnessed Wife's admitted affair, which continued long after Wife filed these proceedings.

[11] Indeed, Wife has already filed the Court's Suppression Order with the federal court despite these proceedings not having concluded.

Wife's case hinges on the testimony from her two purported experts, who provided 14 affidavits over the two years this case has been pending. At least two of those affidavits were filed even after the Special Referee issued his Report. Yet Wife has refused to provide documents relied on by her experts, and the Court has refused Husband's requests to depose or examine those experts. Neither the Special Referee nor this Court has conducted any type of evidentiary analysis of their qualifications or opinions, which Husband has objected to under Rules 702, 703, and 705, as well as various others.[12] The credibility of these purported experts, as well as the fact witnesses for both parties, must be evaluated to effectively make the factual determinations that remain outstanding in this case, yet the Court has not allowed the necessary discovery for that determination to be made. *See Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (discussing court's view of the witnesses' testimony and assessment of credibility).

The inability to seek discovery from Wife's experts or to secure their testimony is not harmless. Their testimony is central to Wife's claims. So too is their credibility. That credibility, however, has already been undermined in these proceedings. Wife's purported experts have provided conflicting testimony at various points in these proceedings. For example, the original device on which Wife based her claims was an SCS camera found in her garage. Mr. Abrams provided sworn testimony to the Court that this camera recorded audio of Wife's oral communications:

> From the videos it could be seen that this camera had been hidden in the back of Petitioner's garage, aimed towards the garage door. . . . Petitioner frequently goes into her garage when she needs to make phone calls outside the earshot of her children, such as to her attorney, and all of these conversations would easily have been recorded and transmitted by the spy camera hidden in the garage. I

[12] 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.").

> have not reviewed many of the hundreds of video clips stored to the SD Card, but from what I did review **I can confirm that there was video, and audio recorded by the camera**, and that Petitioner was frequently recorded in her garage making or receiving phone calls.

(Abrams Aff. at 6, ¶ 5, Aug. 29, 2023 (emphasis added).) Mr. Bumgarner provided similar testimony: "This location gave the person monitoring this covert surveillance camera unfettered access to Lindsay McGee's physical activities in her garage and also allowed someone to listen to her private conversations when the device was triggered by motion detection." (Bumgarner Aff. at 10 ¶ 38, Aug. 29, 2023.)

The Special Referee concluded the purported experts' assertions were false, noting this camera was "without audio." (Report at 12, ¶ V.c.) Wife conceded this point, providing verified interrogatory responses that the SCS camera found in her garage did not record audio in direct contradiction of her experts' sworn testimony. (Wife's Response to Interrogatory No. 8).) She has elsewhere conceded this fact. To date, however, Mr. Abrams and Mr. Bumgarner have not corrected this sworn testimony or withdrawn it, calling into question their veracity as purported experts in this case on a pivotal issue: whether particular devices are actionable because they recorded audio. Yet this Court still credits the very same witnesses when they offer similar testimony about the Camduck without giving Husband the ability to challenge that testimony through cross-examination to see whether similar inconsistencies on these key issues exist.

Similarly, evidence presented by these purported experts has been called into question by various pieces of independent evidence. For example, the router logs on which the purported experts heavily rely to show that certain cameras were allegedly connected to Wife's home network show two different devices owned by third parties were connected to the home network. Yet those third parties—Daniel Walden and Madison Lamp—provided affidavits confirming that their devices could not have connected to Wife's home network because they were out of the state or otherwise not anywhere near the house. Wife has failed to refute these points and the Court has overlooked the significance of the purported experts' inconsistencies in its Suppression Order, especially in combination with denying Husband an opportunity to examine these purported experts.[13] Husband expects there are other contradictions and oversights, yet he has never been afforded the opportunity to examine these purported experts, whether in a deposition or at an evidentiary hearing. The Court has overlooked this procedural error, which deprives Husband of Due Process.

B. Neither the Court nor Husband has been provided the alleged recordings from the Camduck.

In the Suppression Order, the Court states that, "following discovery, the only intercepted communications provided to this court were those found on the [Camduck] Device; accordingly, this order applies only to those communications." While the Court is correct that Wife has abandoned any communications other than those on the Camduck Device, the Court's statement is incorrect about the communications being "provided" to the Court. Wife has not "provided" this Court with the communications allegedly found on the Camduck Device. At best, Wife's purported experts—ones Husband has not been allowed, despite request, to voir dire or otherwise cross-examine—have provided some information about what they allegedly saw on the videos

[13] Wife's purported experts also appear to have a material, pecuniary interest in the success of Wife's claims, as Husband highlighted to the Special Referee and this Court in his Response to Wife's Proposed Findings of Fact. The Court should consider the biases of these purported experts, yet Husband has been prohibited from evaluating and presenting that bias through discovery. *See State v. McEachern*, 399 S.C. 125, 140–41, 731 S.E.2d 604, 612 (Ct. App. 2012) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." (quotation omitted)).

they claim to have extracted from the Camduck Device.[14] The Court misapprehended the record in this regard and its ruling on suppression without having been presented with the evidence is flawed.

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 review that evidence. She cannot establish the suppression of any "evidence derived therefrom" without actually resorting to the contents of the recordings, or at least producing them to the Court and Husband. This is basic due process, and also implicates a host of evidentiary concerns Husband raised to this Court. *See*, *e.g.*, Rule 106, SCRE (Rule of Completeness); Rule 802, SCRE (Hearsay); Rule 1002, SCRE (Best Evidence Rule). These objections have not been addressed by the Special Referee or this Court. The Court should grant rehearing to correct these issues.

C. Wife's failure to file exceptions to the Report is fatal to her claims and the Court has overlooked Husband's exceptions and objections.

After roughly five months of limited discovery and five hearings, the Special Reference issued his Report. Husband timely filed exceptions to the Report. Wife did not. As a result of the failure to file exceptions, Wife has conceded two key findings from the Special Referee's Report:

- "That 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."

[14] The Court may have misapprehended a "Stipulation Regarding Camduck Recordings" unilaterally filed by Wife with this Court on June 19, 2024. That Stipulation asserts that Wife's counsel has "approximately 833 hours of undeleted video with audio contained on the Camduck," which Wife calculates as 5,000 videos of 10 minutes each. Husband did *not* join that stipulation, and it is unsigned.

- "That there is no <u>circumstantial</u> evidence that [Husband] intentionally intercepted audio recordings from the CAMDUCK."

(Report at 3, ¶¶ I(k)–(*l*).)

By failing to file exceptions, Wife has waived 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). These adverse findings are fatal to Wife's claim as set forth above, yet the Court has overlooked this procedural error in its Suppression Order.

D. Rehearing and dismissal of these proceedings is the appropriate remedy.

The Court's Order suppresses the "oral communications intercepted through the" Camduck, but also then delegates the duty to determine "what portion of Husband's allegations were derived from the intercepted communications" by presenting videos to the Family Court, which "should consider the content of any such information suppressed." (Suppression Order at 3 n.4.) The Court also concludes that any "further motions concerning these cases should be addressed to the family court." (*Id.* at 3.) Respectfully, the Court has misapprehended its role and the Family Court's role by delegating unfettered authority over the issues in this proceeding to the Family Court.

In light of the Court's ruling that it entertains matters under the Homeland Security Act in its original jurisdiction, (*id*. at 1 n.1.), the Court has erred by abdicating that role and delegating it to the Family Court. While Husband maintains that the Family Court or the Court of Common

Pleas should have entertained Wife's claims in the first instance, this Court's ruling is that it has original jurisdiction and that all other proceedings—including the parties' divorce and custody proceedings—were stayed. This is based in part on the Homeland Security Act's directive that, unless the "reviewing authority" unanimously concludes that "that the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter," then "the contents of the intercepted wire or oral communication or evidence derived therefrom must be treated as having been obtained in violation of this chapter." S.C. Code Ann. § 17-30-110(A). The Court has now only performed half of that function, leaving the Family Court to decipher what "information" must be suppressed from the videos that this Court and Husband have not even seen. This is inconsistent with the Court's ruling that it has original jurisdiction.

Instead, the Court should grant rehearing and dismiss these proceedings.[15]

Conclusion

For the reasons set forth above, the Court should grant rehearing, rehearing *en banc*, or reconsideration. It should vacate its Suppression Order, lift its two-year stay of the divorce and custody action, and dismiss these proceedings. Alternatively, it should stay its Suppression Order pending further appellate proceedings.

[Signature on following page.]

[15] Doing so 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.

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Columbia, South Carolina
September 2, 2025

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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 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 Petition for Rehearing and Rehearing En Banc**
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